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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-220612 **DATE:** January 28, 1986

MATTER OF: Strobe Data, Inc.

DIGEST:

1. Protest against allegedly inadequate specifications is untimely raised when not filed before bid opening.

2. Since IFB did not require bidders to have previously produced required system, awardee's lack of previously produced system does not render its bid nonresponsive. Moreover, there is nothing on face of awardee's bid that otherwise renders it nonresponsive given that protester has not shown that the contracting agency unreasonably evaluated the unsolicited technical data which protester submitted with its bid.

3. Technical transfusion is concept that relates to unfair disclosure in negotiated procurement of another proposer's innovative or ingenious solution to problem. Since agency did not negotiate, but rather contracted under sealed bid method, there could have been no technical transfusion in procurement; moreover, GAO finds that contracting agency's prebid opening efforts to provide information about requirement to ultimate awardee--and any other interested concern--were not unfair, but only efforts made to broaden competition. Further, contracting agency did not act unfairly in considering protester's offer of a price reduction if stated contingency were to be accepted.

4. Protester has not shown by clear and convincing evidence that its proprietary rights have been violated by contracting agency where protester does not state that alleged proprietary material was marked proprietary or confidential or disclosed in confidence. Further, protester states only that data will be disclosed in future by agency, but does not state that any disclosure has already taken place.

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5. Protest against contracting agency's finding that awardee is responsible will not be considered where protester has not shown that finding was fraudulently made and bid documents did not contain definitive responsibility criteria.

6. Statement that award would be made under invitation for bids based on "price and other factors" does not allow a contracting agency to award on the basis of other than low bid where low bidder is otherwise responsible and bid is responsive.

Strobe Data, Inc. (Strobe), protests the award of a Federal Aviation Administration (FAA) contract to Systems Atlanta, Inc. (Systems), the low bidder, for five "Data Display Systems" which are to be used for the display of weather to air traffic controllers in the performance of air traffic control functions. The contract was awarded under invitation for bids (IFB) No. DTFA11-85-B-00170 which was issued on June 18, 1985, as a small business set-aside.

Strobe, the only other bidder, has raised numerous issues about the award of this contract. Specifically, Strobe generally alleges that: (1) the IFB's specifications were defective and, in any event, the FAA allowed Systems to deviate from those specifications in its bid; (2) a "technical transfusion" may have occurred resulting in the transfer of allegedly proprietary Stobe data to Systems; and (3) Systems cannot meet the IFB's specifications and delivery schedule while Strobe's units allegedly exceed the FAA's needs.

Based on our review of the record, we deny the protest in part and dismiss it in part.

SPECIFICATIONS

Strobe alleges that there were problems with the IFB's specifications regarding, for example, maintenance and error detecting aids, as well as an alleged excessive requirement for data pages. Moreover, Strobe insists that the sealed bid method of procurement should not have been used here or that the IFB should have included a price-related evaluation factor relating to "wind-shear" information. But Strobe apparently concedes that it never protested these allegedly defective specifications prior to bid opening although both Strobe and Systems posed questions to the FAA about the specifications prior to that time. As stated by Strobe:

"We elected to be helpful rather than litigious." And in a letter to the FAA's contracting officer transmitted after bid opening, a Strobe representative said that she should have questioned the FAA concerning the "sloppiness of the specs," but that she did not do so because she did not want the FAA engineers to think they were not competent.

Since the record indicates that Strobe did not protest these specifications prior to bid opening, we consider this ground of protest to be untimely filed, and we will not consider it. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1985).

FAA WAIVER OF SPECIFICATIONS

Under this ground of protest, Strobe alleges that the FAA did not use the specifications to evaluate Systems' bid and that if the FAA had done so it would have found Systems' bid nonresponsive. However, Strobe does not take issue with specific statements contained in Systems' bid other than stating that Systems does not have "established" products which conform to the specifications.

FAA's position is that the specifications were applied equally to both bids. Specifically, the FAA's contracting officer states that unsolicited data submitted with Systems' bid established that the bid was responsive.

It is well established that responsiveness is solely to be determined by examination of the bid (including accompanying data) (see, for example, 45 Comp. Gen. 221, 222 (1965)), and that the determination of the merits of technical submissions (in this case Systems' unsolicited bid data) to the contracting agency is the responsibility of that agency which has considerable discretion in making the determination (see, for example, BRD Associates, B-220136, Dec. 24, 1985, 85-2 C.P.D.¶ ___). We find nothing on the face of Systems' bid that contradicts the FAA's finding of responsiveness. Moreover, Strobe has not shown that the FAA unreasonably evaluated the technical data which Systems submitted. Finally, in the absence of a specific IFB clause requiring the bidder to have previously produced the product sought, Systems was not required to have previously produced this system. Thus, we cannot question the FAA's determination that Systems' bid was responsive.

"TECHNICAL TRANSFUSION" OF PROPRIETARY DATA

Under this ground of protest, Strobe suggests that Systems' prebid opening questions to the FAA and the FAA's replies may have resulted in the technical transfusion of

Strobe's proprietary information--derived from an earlier FAA contract with Strobe--to Systems.

Technical transfusion is understood to be the disclosure to other proposers in a negotiated procurement of one proposer's innovative or ingenious solution to a problem. B-173677, March 31, 1972 (summarized in 51 Comp. Gen. 621 (1972)).

This procurement was not negotiated. Consequently, there could not have been technical transfusion in this sealed bid procurement under the above definition of the phrase. Even if what Strobe really means by its allegation of technical transfusion is that the FAA improperly assisted Systems in preparing its bid, we find no evidence to support that allegation.

Although the FAA did respond to Systems' inquiries by issuing amendment No. 3 to the IFB under a cover letter which together made some changes to the specifications, these documents merely informed Systems of its right to "design choices" under some of the IFB specifications and otherwise informed Systems that certain items that it had discussed earlier in its request for clarification were desirable. We do not consider these comments to Systems to be unfair assistance, but rather efforts to broaden competition--efforts that were presumably directed to any interested concern.

Finally, on the issue of unfairness, Strobe also alleges that the FAA conducted improper discussions with Systems after bid opening as to whether the FAA would deduct $75 from the price of certain components of the system if "212A type modems are acceptable" instead of the IFB specified "202's." In reply, the FAA says it conducted no discussions with Systems concerning price adjustments.

It is not uncommon that bids contain stipulated price decreases upon the happening of a fixed contingency. So long as the acceptance of the stipulation is solely within the discretion of the contracting agency--as was the case with Systems' price contingency--the acceptance or rejection of the stipulation does not constitute improper price negotiations.

As to the allegation that Strobe's proprietary data rights may have been violated, a protester must prove a violation by clear and convincing evidence. Andrulis Research Corp., B-190571, Apr. 26, 1978, 78-1 C.P.D. ¶ 321. To meet this burden, the protester must demonstrate that:

(1) the material was marked proprietary or confidential or it was disclosed in confidence; and (2) the data involved significant time and expense in preparation and contained material or concepts that could not be independently obtained from publicly available literature or common knowledge. John Baker Janitorial Services, Inc., B-201287, Apr. 1, 1981, 81-1 C.P.D. ¶ 249.

Strobe states that its proprietary product is the "software and algorithms" furnished under its earlier FAA contract. Strobe does not specifically state that materials were marked proprietary or confidential or that they were disclosed in confidence to the FAA. Further, Strobe does not actually state that the data has been disclosed improperly by the FAA, but speculates only that its data will be disclosed at some time to Systems. Moreover, the FAA's position is that the claimed proprietary data relates to "common knowledge in the telephone industry"--a position which Strobe contests.

There is a lack of evidence concerning whether the data in question was, indeed, disclosed by Strobe in confidence to the FAA. Strobe is also unsure whether the FAA has even now disclosed the data to Systems. Thus, we cannot conclude that the protester has proved by clear and convincing evidence that data has been improperly disclosed even if we were to assume--contrary to the FAA's position--that Strobe's data does not relate to common knowledge in the telephone industry.

SYSTEMS' CAPABILITY

Strobe insists that Systems cannot "produce the promised product." To advance this argument, Strobe, for example, has furnished us with alleged statements from a former Systems' employee in which the employee criticizes Systems' technical and financial capacities. Strobe also contends that its product is superior and exceeds the solicitation requirements.

Strobe, therefore, questions whether the FAA should have found Systems to be a responsible concern. We will not question a contracting agency's finding that a prospective contractor is responsible unless the protester shows either that the determination was made fraudulently or that definitive responsibility criteria in the IFB were not met. 4 C.F.R. § 21.3(f)(5). Strobe does not allege--let alone show--fraud on the FAA's part, and the IFB contained only specifications for the required system. Consequently, we dismiss this ground of protest.

Alternatively, Strobe alleges that Systems' capability could have been assessed under the IFB to determine the acceptability of the low bid given that the IFB stipulated that "price and other factors" would determine award. We have held that the term "other factors" refers to factors--such as responsibility--which are considered in the award of any contract and does not allow a contracting agency to award on the basis of other than the low bid. See 37 Comp. Gen. 550 (1958). Here the FAA decided that Systemswas responsible. Moreover, there is no authority to award a sealed-bid contract to a concern whose product exceeds the government's needs--as Strobe alleges its product does--where a lower-priced bid from a responsible concern has been submitted.

Protest denied in part and dismissed in part.

for Seymour Efros
Harry R. Van Cleve
General Counsel