

C. Melody



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: D. J. Findley, Inc.

File: B-226804

Date: July 31, 1987

DIGEST

1. General Accounting Office will not treat in detail allegations of a protester who fails to respond to contracting agency's rebuttal of numerous issues raised in initial protest regarding alleged solicitation defects. Record shows that protester's contentions are without merit where contracting agency's unrebutted responses reasonably establish that solicitation is not defective as protester contends.

2. General Accounting Office will not review challenge on constitutional grounds to provision in solicitation for search and tests of contractor's employees to detect alcohol or drugs since issues involving alleged constitutional violations are for resolution by the courts.

DECISION

D. J. Findley, Inc., protests any award for security guard services under request for proposals (RFP) No. R-87-0026, issued by Bechtel Petroleum Operations, Inc. (BPOI), a prime contractor operating and managing the Naval Petroleum Reserves in California for the Department of Energy (DOE). We deny the protest in part and dismiss it in part.

The RFP calls for a comprehensive range of security guard services, including operation of a security gate, patrols, and emergency response and preparedness services. Findley, the incumbent contractor, initially challenged the RFP as defective on numerous grounds, arguing, for example, that various provisions were ambiguous and misleading; the procurement should have been conducted using sealed bids instead of negotiated procedures; the bonding requirements were improper; and the evaluation factors and their relative weight were not disclosed. Findley also objected to the provision in the RFP for searches and bodily fluid tests of the subcontractor's employees to detect alcohol or drugs.

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Findley contended that the search and testing provisions violated on unspecified grounds the California state constitution and statutes, and the U.S. Constitution.

In its report on the protest, DOE rebutted each of Findley's objections to the RFP. In its response to the DOE report, Findley limited its comments to the alcohol and drug detection issue; it did not respond to DOE's position on or otherwise acknowledge any other issues raised in the initial protest. After the protester's comments were filed, DOE submitted a letter enclosing two documents which had been omitted from its report on the protest. After receiving DOE's letter, we advised Findley that the record had been closed after its comments were filed, and that DOE's subsequent letter would be disregarded to the extent that it attempted to supplement its argument. Findley nevertheless submitted additional comments of its own. In response to a statement in DOE's letter that Findley appeared to be pursuing only the alcohol and drug detection issue, Findley stated that it had not intended to abandon its other grounds of protest; however, Findley did not elaborate on its contentions or make any attempt to rebut DOE's position.

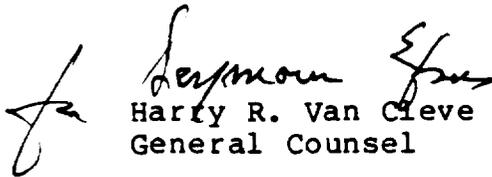
In view of Findley's failure to rebut DOE's responses to the numerous defects in the RFP alleged by Findley we see no need to treat in detail each of the alleged defects. After reviewing DOE's responses to Findley's allegations, we find that DOE has successfully rebutted each contention relating to alleged defects in the RFP. For example, the provisions which Findley, without further explanation, claims are ambiguous and misleading in fact are clear on their face, and in many cases are identical to provisions in Findley's current contract. In addition, while Findley complains that certain standard Federal Acquisition Regulation (FAR) clauses were not included in the RFP, there is no requirement that a government prime contractor like BPOI include the FAR clauses in the solicitations it issues. DOE also has shown that the bonding requirements are reasonable based on the need to protect the government's interest in the facilities at the Naval Petroleum Reserves. In addition, with regard to the evaluation criteria, the RFP clearly sets out BPOI's technical requirements and the basis for award.

With regard to Findley's challenge to the alcohol and drug detection provisions, the RFP requires the subcontractor to comply with BPOI's "Drug and Alcohol Policy Applicable to Subcontractors and Visitors," which is incorporated into the RFP. In relevant part, BPOI's policy permits a "reasonable search with or without notice" for purposes of enforcing the policy as a condition of entry to the Naval Petroleum

Reserves. The policy also allows the chemical testing of bodily fluids of the subcontractor's employees under certain circumstances. Findley contends that the search and testing provisions violate the constitutional rights of its employees and subject Findley to liability for damages if it terminates an employee for refusing to submit to the procedures. We will not consider this issue on the merits.

Under the Competition in Contracting Act of 1984, 31 U.S.C. § 3552 (Supp. III 1985), our Office is authorized to decide protests concerning alleged violations of a procurement statute or regulation. Findley's argument regarding the impact of the alcohol and drug detection provisions in the RFP on its employees' rights involves an alleged constitutional violation, not a violation of a procurement statute or regulation. As in cases where a protester challenges a statute as unconstitutional, e.g., Onshore SOG, Inc.-- Request for Reconsideration, B-210406.3, Feb. 15, 1984, 84-1 CPD ¶ 203, we decline to consider Findley's challenge to the RFP on constitutional grounds; the issue is a matter for the courts, not our Office, to decide.

The protest is denied in part and dismissed in part.


Harry R. Van Cleave
General Counsel