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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: National Health Laboratories, Inc.

File: B-228402

Date: December 10, 1987

DIGEST

1. Protest against solicitation requirement for laboratory certification by the College of American Pathologists is untimely, since protest based on alleged solicitation improprieties must be filed before bid opening.
2. Agency's determination of protester's nonresponsibility will not be questioned where bidder failed to furnish evidence of required College of American Pathologists certification of its laboratory within a reasonable time period after bid opening.
3. Agency's finding of nonresponsibility will not be questioned unless the protester demonstrates bad faith by the agency or a lack of any reasonable basis for the contracting officer's negative responsibility determination.

DECISION

National Health Laboratories, Inc. (NHL), protests the award of a contract to Pathology Associates Medical Laboratories (PAML) under invitation for bids (IFB) No. 773-07-14-87, issued by the Portland Area Indian Health Service (IHS) for the furnishing of professional clinical pathology consultation and laboratory testing services to Indian health centers located in Oregon, Washington, and Idaho. NHL principally contends that IHS improperly determined NHL to be nonresponsible based upon an allegedly improper solicitation requirement for certification of the successful contractor's laboratory by the College of American Pathologists (CAP).

The protest is dismissed in part and denied in part.

The IFB, issued on June 15, 1987, required the successful contractor to perform the services in a laboratory "approved

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by [CAP]."^{1/} At the time of bid opening on July 22, 1987, NHL was found to be the apparent low bidder; however, its laboratory was not certified by CAP. Although, NHL was inspected by CAP personnel on August 26, 1987, the record indicates that a certificate could not be issued until NHL corrected each of the deficiencies found by CAP. The record also shows that on August 27, 1987, CAP officials had anticipated that a report of deficiencies would be issued by its Chicago office within the following 6 to 8 weeks, after which time NHL would have 30 days to respond. It was noted that additional time would be needed to process any new information submitted by NHL to determine whether approval should be granted and, if so, then to issue a certificate.

By letter of September 9, 1987, NHL was notified that its bid was rejected as a result of the contracting officer's determination that NHL could not establish its responsibility within a reasonable time after bid opening. Award was made on September 23, 1987, to PAML, the next low bidder, after its responsibility was verified.

NHL filed its protest with the General Accounting Office on October 5, 1987, claiming that NHL, as the incumbent contractor for these services, should have been given prior notice of the requirement for CAP approval, since such requirement had not been included in its past contracts. NHL also contends that the requirement for CAP certification goes beyond the actual needs of the government.

To the extent NHL argues that the solicitation's requirement for CAP certification is prejudicial or overly restrictive, we will not consider the merits of the issue. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1987), require that protests based upon solicitation improprieties which are apparent prior to bid opening must be filed before bid opening. The CAP certification requirement was clear on the face of the solicitation when it was issued on June 15, 1987. The bid opening date was July 22, 1987, and NHL's protest was not filed in our Office until October 5, 1987. We, therefore, find this issue to be untimely. U.S. Jet Aviation, B-214093, May 25, 1984, 84-1 CPD ¶ 575. In this regard, NHL also argues that it orally complained to the contracting officer prior to bid opening. However, these

^{1/} While not identified in the IFB as a special standard of responsibility, the contractor was required by the IFB to begin performance on the date of award with an approved laboratory. All parties have treated this requirement as a condition that had to be satisfied to be eligible for award; we adopt this view.

alleged oral complaints did not constitute a valid protest since oral protests are not provided for under the Federal Acquisition Regulation (FAR), 48 C.F.R. § 33.101 (1986). Arctic Energies, Ltd., B-224672, Nov. 17, 1986, 86-2 CPD ¶ 571. Accordingly, we dismiss this ground of protest.

NHL next contends that IHS acted without any reasonable basis in determining that it was nonresponsible and questions whether IHS in-house laboratories are in fact CAP approved.

The determination of a prospective contractor's responsibility rests with the contracting officer, and in making that determination, he is vested with a wide degree of discretion and business judgment. Venusa, Ltd., B-217431, B-217432, Apr. 22, 1985, 85-1 CPD ¶ 458. In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer is required to make a determination of nonresponsibility. FAR, 48 C.F.R. § 9.103(b); ICR, Inc., B-223033, Aug. 13, 1986, 86-2 CPD ¶ 184.

Our Office has consistently held that an agency may, in its discretion, allow a prospective awardee a reasonable time period after bid opening to cure a problem related to its responsibility, including the need to obtain any necessary certification, since contract award and not bid opening is the critical time for determining the responsibility of a firm. Right Away Foods Corp., B-216199, Jan. 3, 1985, 85-1 CPD ¶ 15. However, a procuring agency is not required to delay award indefinitely while a bidder attempts to cure the causes for the firm being found nonresponsible. ICR, Inc.-- Request for Reconsideration, B-223033.2, Nov. 4, 1986, 86-2 CPD ¶ 516 at 5.

While NHL states that it has kept the agency apprised of its efforts to obtain CAP approval, and that it knew of no faster method of obtaining such approval, the record indicates that NHL was in fact unable to cure this responsibility problem within a reasonable time after bid opening. The record supports our finding that the contracting officer did not abuse her discretion in awarding the contract 9 weeks after bid opening. The information available to the contracting officer at the time of her decision revealed that a time period of at least two additional months would be needed for NHL to obtain CAP certification and that

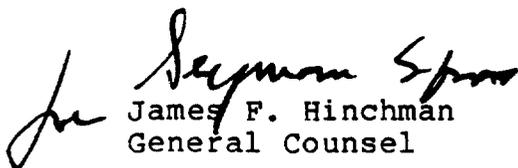
certification was only anticipated and was not necessarily assured.^{2/}

We have held that the contracting officer's responsibility determination must be based on fact and reached in good faith; however, it is only proper that the ultimate determination be left to the administrative discretion of the contracting agency involved as the agency must bear the brunt of difficulties experienced in obtaining the required performance. ICR, Inc., B-223033, supra. Therefore, we generally will not question a negative determination of responsibility unless the protester demonstrates bad faith on the agency's part, or a lack of any reasonable basis for the determination. Omneco, Inc.; Aerojet Production Co., B-218343; B-218343.2, June 10, 1985, 85-1 CPD ¶ 660. NHL has not alleged bad faith by IHS, and upon examination of the record, we find that NHL has not demonstrated that the nonresponsibility determination lacked a reasonable basis. We therefore deny this protest issue.

NHL also argues that the agency erred in affirmatively finding the awardee under this solicitation, PAML, responsible, because PAML has allegedly been unable to meet the start-up requirements under the contract and NHL had to continue providing interim services.

The General Accounting Office will not review an affirmative determination of responsibility, which is largely a business judgment, unless the protester, which bears the burden of proving its case, shows possible fraud or bad faith on the part of procurement officials, or the solicitation contains definitive responsibility criteria that allegedly have not been applied. See 4 C.F.R. § 21.3(f)(5); Security America Services, Inc., B-225469, Jan. 29, 1987, 87-1 CPD ¶ 97. Since NHL does not allege and we do not find that either of these exceptions applies, we will not review the determination of responsibility upon the merits. Security America Services, Inc., B-225469, supra.

The protest is dismissed in part and denied in part.


James F. Hinchman
General Counsel

^{2/} It should be noted that NHL did obtain CAP certification on November 9, 1987, over 15 weeks after bid opening.