



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Armament Engineering Co.
File: B-228445, B-228582
Date: February 8, 1988

DIGEST

1. The award of a contract to generate technical data packages for the Army Nuclear Munitions Program to a firm having both engineering and production capabilities does not violate the Federal Acquisition Regulation subpart 9.5 governing organizational conflicts of interest, where the record fails to show that the awardee's development type work under this contract will create a potential conflict of interest. The record indicates the work will not lead to future competitive production of items, but that production will be handled in-house.
2. The ability to perform a contract at a particular offered price concerns the offeror's responsibility, the affirmative determination of which will not be reviewed unless there is a showing of possible fraud or bad faith or failure by the contracting officer to apply definitive responsibility criteria.
3. A protest of an agency's allegedly improper evaluation of proposals is without merit where review of the evaluation provides no basis to question the reasonableness of the determination that the awardee submitted a superior technical and management proposal which offered the lowest probable cost.
4. A protest concerning allegations of solicitation improprieties is untimely where it is not filed prior to the closing date for receipt of proposals.
5. A firm is not an interested party to protest award of a contract for engineering services where, if protest were sustained, another offeror and not the protester would be in line for that award.

041275

DECISION

Armament Engineering Co. (AEC) protests the award of a contract to Ferrulmatic, Inc. under request for proposals (RFP) No. DAAA21-87-R-0092. The RFP was issued by the Army Armament, Munitions and Chemical Command at Picatinny Arsenal, New Jersey, for an indefinite quantity of engineering services on a fixed-rate time and materials basis for the Nuclear Munitions Program. AEC raises numerous grounds of protest. In addition, AEC protests the award of a contract to Electronics Corporation under RFP No. DAAA21-87-R-0185 issued by the same agency for engineering services for the reliability, availability, maintainability and quality of armament systems, components and equipment.

We deny in part and dismiss in part the protest of the award under RFP-0092. We dismiss the protest of the award under RFP-0185.

The Army issued RFP-0092 as a 100 percent small business set-aside on June 2, 1987 with a closing date of July 2, 1987. Essentially, the Army sought a contractor to generate technical data packages (TDPs) for rammable/ extractable training projectiles. The requirement for such "trainers" was the result of an operational and safety review by the Army of certain artillery projectiles. During the review, the Army found that several artillery units had fabricated rammable/extractable trainers or adapters for their own use. The intent of the operational and safety recommendation which followed the review was to ensure that such trainers did not pose a safety hazard. Consequently, the Army decided that a standard TDP should be generated and tested so that units could have safe and reliable trainers.

The RFP provided that evaluation would be based on technical, management and price considerations and that technical would be significantly less important than management. Also, the RFP stated that a merit rating combining technical and management would be considered more important than probable price. The RFP advised that award would be based on an integrated assessment of these factors and that an award would be made consistent with the government's best interest. After an extension of the closing date to July 31 and a pre-proposal conference, proposals were received from AEC and Ferrulmatic. Based on its lower cost, higher merit rated offer, award was made to Ferrulmatic on September 14 without discussions. AEC requested and received a debriefing on October 8 and this protest followed on October 19.

AEC alleges that the award violates the Federal Acquisition Regulation (FAR) and other regulations and laws concerning

organizational conflicts of interest. Specifically, AEC believes the award was made to a contractor whose primary business is the production of the same items and systems without any restriction on the contractor's later engaging in production pursuant to its own specifications. It is AEC's contention that without such a "hardware exclusion" the awardee will have an unfair advantage in designing a system on which it can then later bid.

The FAR requires contracting officials to avoid potential organizational conflicts of interest such as where the nature of the work to be performed under a proposed government contract may, without some restriction on future activities, result in unfair competitive advantage or will impair a contractor's objectivity. FAR §§ 9.501, 9.504, and 9.505. These provisions are intended to avoid the possibility of bias or unfair advantage where a contractor would be in a position to favor its own capabilities. Coopers & Lybrand, B-224213, Jan. 30, 1987, 66 Comp. Gen. _____, 87-1 CPD ¶ 100. Here, it is clear that the only production by Ferrulmatic will be of a prototype that will be used only for testing purposes to ensure that the standard design developed will work. AEC is apparently under the impression that the TDPs will be used by the Army to solicit production firms. However, the record indicates that the contract is for developing TDPs for training projectiles which will be fabricated in-house later by the local artillery units' machine shops. Since the Army will not be seeking offers for a production quantity there is nothing in the record to substantiate AEC's allegation of an organizational conflict of interest, and, therefore, we deny this basis of the protest.

AEC next questions Ferrulmatic's ability to perform at its price. Specifically, AEC questions the reliability of the hourly rates for technical and professional personnel as quoted by Ferrulmatic, contending that they are not realistic for the required skills as defined in the solicitation. AEC offered an average hourly rate of \$45.07 while Ferrulmatic offered an average hourly rate of \$33.17. The allegation of Ferrulmatic's inability to perform at its fixed price concerns an issue of responsibility that is not normally reviewed by our Office absent a showing of possible fraud or bad faith or a failure by the contracting officer to apply definitive responsibility criteria. In fact, the same protester recently raised the identical issue in Armament Engineering Co., B-228239, Oct. 9, 1987, 87-2 CPD ¶ 349, in which we specifically held the awardee's ability to provide the labor required to perform the contract at the

fixed labor rates proposed to be a matter of responsibility. See also Bohemia Inc.--Request for Reconsideration, B-226659.2, Apr. 28, 1987, 87-1 CPD ¶ 447. AEC has not alleged and no facts support a showing of possible fraud, bad faith or failure to apply definitive responsibility criteria. The contracting officer determined that Ferrulmatic was responsible, that its rates were reasonable in light of the independent government cost estimate, and that the hourly rates proposed do not impair the contractor's ability to attract and retain competent professional employees. Accordingly, we dismiss this basis of the protest.

AEC also protests the evaluation of its proposal, particularly the agency's apparent disregard of its team management approach and the availability of a substantial on-call consulting staff. The record shows that the Army did not disregard those aspects of AEC's proposal. The major distinction between the AEC and Ferrulmatic proposals was the offer of in-house personnel and facilities by Ferrulmatic. AEC's limited in-house capability and use of "associate" firms and available on-call part-time or full-time consultants was considered but was determined to be less desirable for purposes of fast response and management of tasks than the use of in-house capabilities and firm subcontract commitments to perform tasks as proposed by Ferrulmatic.

The evaluation and scoring of technical proposals is the function of the contracting agency and our review of allegedly improper evaluations is limited to a determination of whether the evaluation was fair and reasonable and consistent with the stated evaluation criteria. Lembke Construction Co., Inc., B-228139, Nov. 23, 1987, 87-2 CPD ¶ 507; Delany, Siegel, Zorn & Assocs., B-224578.2, Feb. 10, 1987, 87-1 CPD ¶ 144. Given the evaluation emphasis on management, we cannot conclude that AEC's proposal emphasizing "associate" firms and on-call consultants was unreasonably downgraded on this basis. Indeed, we previously have found acceptable an agency's evaluation of the risk posed by the offeror's method of operation. See Consolidated Group, B-220050, Jan. 9, 1986, 86-1 CPD ¶ 21.

AEC also complains that the solicitation calls for production of prototypes and, as such, does not involve a service contract effort as characterized in the solicitation. AEC states that the solicitation allows an "uncontrolled by-passing of production item acquisition procurement processes through a services contract." We note again that the solicitation for TDPS was not intended to result in future production by outside firms. Under the RFP, any production by Ferrulmatic is limited to a test sample. Should the test

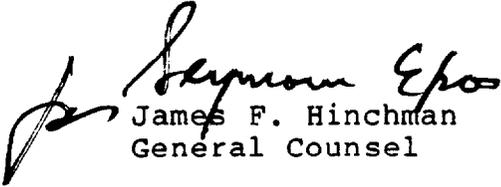
sample be satisfactory, the agency reports, the local artillery units' machine shops will produce the trainers for the field. We think that the generation of TDPs is an engineering/design/analysis task that is properly characterized as a services contract effort. In any event, if AEC had concerns about the propriety of the solicitation as characterized it should have filed a protest prior to the closing date for receipt of proposals since our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1987), require that improprieties apparent from the face of the solicitation be protested before the closing date for submission of proposals.

AEC also protests the award under RFP-0185 to Electronics Corporation on September 29, 1987. Under the same selection criteria as contained in RFP-0092, award was made to Electronics, the higher merit rated, low cost offeror. The RFP was for engineering services on a fixed-rate time and materials basis for reliability, availability, maintainability (RAM) and quality of armament systems, components and equipment at the Picatinny Arsenal. AEC alleges that the Army failed to apply definitive responsibility criteria to the awardee, that the award was made in violation of the FAR concerning organizational conflicts of interest, that the awardee cannot perform the required services at its proposed labor rates, and that the award "allows uncontrolled bypassing of material acquisition processes through a services contract."

AEC's challenge to the award to Electronics is dismissed. Under the Competition in Contracting Act of 1984, 31 U.S.C. § 3551 (Supp. III 1985), and our Bid Protest Regulations, 4 C.F.R. §§ 21.0(a), 21.1(a), a party must be interested in order to have its protest considered by our Office. A party is interested if its direct economic interest would be affected by the award or the failure to award a contract, which generally means that the party is next in line for award if the challenged offeror is eliminated from the competition. See Gallegos Research Group, B-227037.2, July 17, 1987, 87-2 CPD ¶ 57. The agency report indicates that a third offeror has a higher technical score and a lower price than AEC. Since AEC has not challenged its evaluation in this protest and is not next in line for award if we were to sustain its protest against award to Electronics, we find AEC is not an interested party. In any event, we note that AEC does not show that the solicitation contains definitive responsibility criteria and that with regard to the awardee's alleged conflict of interest and unreasonably low labor rates, our prior discussion concerning these issues under RFP-0092 would apply equally to this procurement.

Finally, as indicated previously, any impropriety concerning the RFP requirements or format is untimely filed. 4 C.F.R. § 21.2(a)(2).

The protest concerning RFP-0092 is denied in part and dismissed in part; the protest concerning RFP-0185 is dismissed.


James F. Hinchman
General Counsel