



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Electronic Systems USA, Inc.

File: B-233104

Date: December 28, 1988

DIGEST

1. Protest that awardee will be unable to perform computer maintenance contract, because it allegedly cannot acquire protester's proprietary hardware and software and does not have qualified employees as required by the solicitation, concerns matters of responsibility. The General Accounting Office will not review affirmative determinations of responsibility except in certain limited circumstances not applicable here.

2. Where firm would not be in line for award were its protest sustained, protest is dismissed since firm does not have the required direct interest in the contract award to be considered an interested party under General Accounting Office's Bid Protest Regulations.

DECISION

Electronic Systems USA, Inc. (ESUSA), protests the award of a contract to Honeywell, Incorporated under invitation for bids (IFB) No. DABT31-88-B-0055, issued by the Directorate of Contracting, Fort Leonard Wood, Missouri, for maintenance and repair of the central control and monitoring system (CCMS) of a heating and cooling system. ESUSA alleges that Honeywell will be unable to perform the contract.

We asked the Army to provide us with a report on this protest because we could not conclusively determine from the initial protest whether it was appropriate for our consideration on the merits. In its report, the Army argued for dismissal. The protester was given an opportunity to comment on the Army's report. After considering the positions of both parties, we conclude, for the reasons stated below that the protest is for dismissal.

The IFB was issued for maintenance and repair of the CCMS for the heating and cooling system at the General Leonard

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Wood Army Community Hospital. The purpose of the CCMS is to gather temperature data and input it into the data processor (front end) where it can be reviewed by hospital maintenance personnel for making appropriate adjustments to regulate the system. The original CCMS was installed by Honeywell approximately 15 years ago and, in the following years, Honeywell and Johnson Engineering and Maintenance Company performed maintenance contracts on the system. In 1985, ESUSA won a contract which included replacement of the front-end and computer programming necessary to duplicate the existing functions of the Honeywell equipment and provide certain additional features.

Three of the four bids received were found responsive by the contracting officer: Honeywell, \$57,464; Johnson, \$68,400; and ESUSA, \$110,400. The contracting officer determined that Honeywell was a responsible bidder and therefore made award to that firm. ESUSA then filed its protest with our Office alleging that Honeywell will be unable to maintain the CCMS because it lacks access to ESUSA's proprietary parts and software and lacks employees with the requisite experience to maintain or repair the front-end.

Honeywell's bid took no exceptions to the requirements of the IFB and thus Honeywell has obligated itself to perform in accordance with the terms of the IFB. Whether Honeywell will be able to perform as required is a matter of its responsibility. Our Office does not review affirmative determinations of responsibility unless there is a showing of fraud or bad faith on the agency's part or that definitive responsibility criteria in the solicitation were not met. See Repco Incorporated, B-225496.3, Sept. 18, 1987, 87-2 CPD ¶ 272. Neither of these exceptions is applicable here.

In addition, ESUSA is not an interested party. Under our Bid Protest Regulations, we will only consider a protest by an interested party, i.e., an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a) (1988). A party is not an interested party to protest where it would not be in line for award were its protest sustained. See Motorola, Inc., B-232843, Nov. 16, 1988, 88-2 CPD ¶ _____. ESUSA is the third low bidder and failed to allege in its original protest that Johnson was ineligible for award. Thus, the protester would not be in line for award even if we were to sustain its protest of the award to Honeywell.

In its comments to the agency report--in which the Army had argued the "interested party" issue--ESUSA claims for the

first time that Johnson's bid is not responsive and that it is not responsible. We first note that ESUSA's claims are untimely. Under our Bid Protest Regulations, protests must be filed within 10 working days after the basis of the protest is known or should have been known. 4 C.F.R. § 21.2(a)(2). Later raised allegations must independently satisfy the timeliness requirements. See Little Susitna Co., 65 Comp. Gen. 651 (1986), 86-1 CPD ¶ 560. It would appear that ESUSA could have presented its allegations regarding Johnson at the time of its original protest.

Even assuming, for the purposes of argument, that the protester's new allegations are timely, they are without merit. ESUSA first alleges that Johnson's bid was non-responsive because it failed to acknowledge receipt of two of the four amendments to the IFB. However, we have reviewed these amendments and find them to be immaterial; they would not affect the responsiveness of Johnson's bid. Thus, failure to acknowledge these amendments may be waived by the agency and Johnson would remain next in line for award. See Motorola, Inc., B-232843, supra.

ESUSA's second allegation concerns the responsibility of Johnson. As noted above, where there is no showing of fraud or bad faith, or that there are definitive responsibility criteria in the solicitation which Johnson cannot meet, we will not review this issue. See Repco Incorporated, B-225496.3, supra. Since Johnson would be next in line for award, assuming Johnson is found responsible, ESUSA is not an interested party.

The protest is dismissed.



Robert M. Strong
Associate General Counsel