Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Southeast Medical Alliance

File: B-242034

Date: December 17, 1990

Barbara Louviere for the protester.
Paul Shnitzer, Esq., Crowell & Moring, for Foundation Health Corporation, an interested party.
Joseph F. Page for Partners Military Health Programs, Inc., an interested party.
Andrew E. Squire, Esq., Department of the Army, for the agency.
John Formica, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is dismissed where its grounds, which include contentions of solicitation improprieties, insufficient notice of elimination from the competitive range, and the nonresponsibility of offerors, are speculative, legally insufficient, untimely, or premature.

DECISION

Southeast Medical Alliance (SMA) protests any award of a contract under request for proposals (RFP) No. MDA903-90-R-0027, issued by the Defense Supply Service, Department of the Army, for health care and associated support services for beneficiaries of the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS).

We summarily dismiss the protest without obtaining a full agency report. Based on the information provided by the agency and the response of the protester, it is clear that the protest grounds raised are either untimely or not legally sufficient. See Bid Protest Regulations, 4 C.F.R. § 21.3(m) (1990).

The solicitation was issued on May 4, 1990, and informed offerors that award would be made to the firm whose offer was determined to be most advantageous to the government considering both technical merit and cost. It also stated that in the evaluation process technical merit would be considered more important than cost.

Three proposals, including one from SMA, were received by the July 9 closing date. After the evaluation of the initial proposals and of additional information requested by the agency, it was determined that SMA did not have a reasonable chance of award, and the firm was eliminated from the competitive range. According to SMA, it received notice of this on October 29. SMA filed its protest with our Office on November 9. No award has been made.

SMA complains that the evaluation process was biased because: (1) the Army's letter informing the protester that it was eliminated from the competitive range did not specify the reasons for proposal rejection; (2) cost proposals were not all evaluated by the same individual thus sacrificing uniformity; (3) neither of the two firms remaining in the competitive range should be considered for award because one is financially unstable and the other's performance on another CHAMPUS contract has raised the concern of Congress and it is "conceivable" that the firm has access to inside information concerning the CHAMPUS program; (4) the RFP's specifications were too broad, as they failed to specify a method to evaluate different approaches properly, and permitted offerors to accept varying degrees of technical risk; and (5) award should not be permitted at "rates" which are higher than those charged by SMA.

The first argument as raised in the initial protest letter solely concerns the lack of information in the agency's notice to the protester that it had been eliminated from the competitive range. This argument involves a matter of procedure which does not impact on the validity of the award nor provides a basis upon which to sustain a protest. Norden Serv. Co., Inc., B-235526, Aug. 22, 1989, 89-2 CPD ¶ 167. It is therefore dismissed.1/

1/ In its response to the agency's request for summary dismissal of the protest filed December 5, SMA for the first time raised concerns about the agency's failure to schedule a debriefing and the propriety of the agency's determination to exclude it from the competitive range. Our Bid Protest Regulations require that protests based on other than an apparent solicitation impropriety be filed within 10 working days after the basis for the protest is known or should have been known. 4 C.F.R. § 21.2(a)(2). Since SMA received the notice that it had been excluded from the competitive range on October 29, and its debriefing was denied by letter dated October 31, these protest arguments raised for the first time nearly 1 month after SMA filed its original protest could and should have been raised earlier in the protest process.

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Similarly, SMA's argument that cost proposals were evaluated by various individuals does not by itself raise an issue which impacts upon the legal sufficiency of the evaluation. The composition of an evaluation board is a matter which is within the contracting agency's discretion, which we will not review absent a showing of possible fraud, bad faith, conflict of interest, or actual bias. See Delta Ventures, B-238655, June 25, 1990, 90-1 CPD ¶ 588. SMA has made no such showing and we will not consider the matter.

The protester's concern that the firms remaining in the competitive range may be unsuitable for award involves whether these firms can be affirmatively determined to be responsible pursuant to the standards in Federal Acquisition Regulation Subpart 9.1. Since the record shows that there has been no determination of responsibility by the contracting officer, SMA's protest on this ground is premature and will not be considered at this time. Everpure, Inc., B-231732, Sept. 13, 1988, 88-2 CPD ¶ 235. In any event, we generally do not review affirmative determinations of responsibility. 4 C.F.R. § 21.3(m)(5).

In connection with this general argument regarding the two firms capability, SMA also states that "it is conceivable" that one of these two firms may have been able to obtain information about the CHAMPUS program which was not made available to the other offerors because this firm is currently providing CHAMPUS services to the agency in another area. The protester's allegation here is speculation, and as such does not provide a basis of protest. Delta Ventures, B-238655, supra. Further, to the extent the protester is referring to an advantage this firm may have by virtue of its prior experience, that advantage need not be discounted or equalized by the agency so long as it is not the result of preferential treatment or other unfair action by the government. Hummer Assocs., B-236702, Jan. 4, 1990, 90-1 CPD ¶ 12. The protest contains no such contention.

The next argument concerns the RFP specifications, while the final argument--that award should not be made at rates higher than those offered by SMA--seems to be aimed at the RFP's evaluation scheme. Under our Regulations, protests based on alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of proposals must be

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Norden Serv. Co., Inc., B-235526, supra. They will therefore not be considered.

filed prior to that date to be timely. 4 C.F.R. § 21.2(a)(1); Sonicor Instrument Corp., B-238131, Jan. 29, 1990, 90-1 CPD ¶ 128. Thus, SMA's challenge to the specifications made long after the July 9 closing date for receipt of proposals is clearly untimely. Since the RFP specifies that award will be made on the basis of technical and cost factors, with technical most important, it is clear that award may be made to other than the low offeror. See Amtech Reliable Elevator Co., B-237670, Mar. 8, 1990, 90-1 CPD ¶ 260. Thus, SMA's argument which questions the agency's authority to make an award based on factors other than cost concerns the terms of the solicitation and should also have been raised prior to the closing date. Id. These arguments will therefore not be considered.

The protest is dismissed.

John G. Brosnan
Assistant General Counsel