



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Staples-Hutchinson and Associates, Inc.

File: B-245007

Date: November 25, 1991

Welles Hutchinson for the protester,
John P. Opitz, Esq., and Kenneth A. Markison, Esq.,
Department of Housing and Urban Development, for the agency,
David Hasfurther, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

1. Protest is dismissed where, despite its contention that the awardee's low bid was nonresponsive, the protester fails to identify anything on the face of the low bid that limited, reduced, or modified the obligation of the awardee to perform in accordance with the terms of the solicitation.

2. Protest against apparent solicitation impropriety (failure to issue solicitation as request for proposals) is untimely, since it was not filed prior to bid opening.

DECISION

Staples-Hutchinson and Associates, Inc. protests the award to Image Advertising under invitation for bids (IFB) No. 91-5, issued by the Department of Housing and Urban Development to obtain the assistance of a contractor in the preparation and placement of certain advertisements and related services.

We dismiss the protest.

The IFB, issued on April 29, 1991, required the submission of bids by May 29. Nine bids were received and opened. Image was the low bidder. On June 3, Staples telephoned the contracting officer to determine the status of the procurement and was told that he was in the process of evaluating the capability of the low bidder to perform the contract. On June 25, the contracting officer determined Image to be a responsible bidder and awarded it the contract with an effective date of July 15. On July 24, a letter was sent by the agency to Staples informing it that an award had been made to Image. Staples filed its protest with our Office on July 31.

Staples argues that the awardee's bid should have been rejected as nonresponsive in view of the contracting officer's decision to delay award of the contract to conduct a preaward survey on the low bidder. Staples asserts that a bid that does not effectively communicate the bidder's responsibility on its face cannot be deemed to be responsive. Staples also raises objections to the contracting officer's failure to issue the solicitation as a request for proposals (RFP), since it believes that only through negotiations could the government be assured of obtaining the best services at the lowest possible price. Staples notes that by letters of August 29, 1990, and February 1, 1991, it advised the contracting agency of its belief that the procurement should be issued as an RFP. Finally, Staples protests the disclosure of its prior contract prices to other bidders.

The terms "responsiveness" and "responsibility" have distinct legal definitions. Whereas bid responsiveness concerns whether the bid itself as of the time of bid opening unequivocally offers to perform in accordance with all material terms and conditions of the solicitation, responsibility refers to a bidder's ability to perform the contract requirements and is determined not at bid opening but at any time prior to award based on information received by the agency up to that time. N.G. Simonowich, B-240156.2, Mar. 19, 1991, 70 Comp. Gen. ____, 91-1 CPD ¶ 299; see Part 9 of the Federal Acquisition Regulation. Staples does not allege that anything on the face of the awardee's bid limited, reduced, or modified the awardee's obligation or that the awardee's bid represented anything other than an unqualified promise to perform in accordance with the IFB specifications. Thus, Staples provides no basis for finding the bid of Image nonresponsive. Laidlaw Env'tl Serv. (FS), Inc., B-246114, Oct. 31, 1991, 91-2 CPD ¶ ____.

To the extent Staples is arguing that Image is not capable of performing in accordance with the specifications, a firm's capability to perform a contract is a responsibility matter. An agency's affirmative determination of responsibility, which was made here and which is a prerequisite for an award, will not be reviewed by our Office absent a showing of possible fraud or bad faith on the part of the procurement officials or of the misapplication of definitive responsibility criteria in the solicitation. 4 C.F.R. § 21.3(m)(5) (1991); King-Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177. Neither showing has been made in this case.

Staples' contention that the procurement should have been negotiated rather than conducted under sealed bidding procedures is untimely and not for consideration. Protests based upon alleged improprieties in a solicitation which are

apparent prior to bid opening must be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991). Staples knew when the IFB was issued on April 29, that the agency did not intend to conduct a negotiated procurement. Staples did not protest the agency's use of sealed bids prior to the May 29 bid opening.

Finally, the agency in its report on the protest states that Staples' prices under its prior contract, which was awarded as a result of Staples being the low bidder on the previous IFB, were available to the public as of the time of the earlier bid opening and that their disclosure was not improper. Staples does not challenge the agency's position in its comments to the agency report. Also, the agency correctly points out that contract prices are generally available under the Freedom of Information Act, 5 U.S.C. § 552 (1988), since the disclosure of prices charged the government is ordinarily a cost of doing business with the government. JL Assocs., Inc., B-239790, Oct. 1, 1990, 90-2 CPD ¶ 261.

The protest is dismissed.



Michael R. Golden
Assistant General Counsel