



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Republic Environmental Systems, Inc.

File: B-249898

Date: December 15, 1992

Marc Lamer, Esq., Kostos & Lamer, P.C., for the protester.
Lou Ann Keenan-Killane, Esq., for the agency.
James M. Cunningham, Esq., and Paul Lieberman, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

1. Protest that agency improperly made award to offeror submitting higher priced proposal is denied where protester was found nonresponsible because of lack of demonstrated financial capability. Contracting agency's decision to conduct discussions with the protester prior to his finding of nonresponsibility concerning its technical proposal did not constitute an affirmative determination of responsibility.
2. Agency is not required to conduct discussions regarding responsibility matter such as offeror's financial capability.
3. New grounds of protest must independently satisfy the timeliness requirements of the General Accounting Office's Bid Protest Regulations. Where new grounds of protest were first raised in comments on contracting agency's bid protest report, protest is untimely when filed more than 10 working days after protester received the bid protest report which contained the bases for the new protest grounds.

DECISION

Republic Environmental Systems, Inc., protests an award to Capital Environmental Services Company under request for proposals (RFP) No. DLA200-92-R-0005, issued on March 11, 1992, by the Defense Reutilization and Marketing Service,

Defense Logistics Agency (DLA), for an annual requirements contract for the removal and disposal of hazardous waste generated at and around Letterkenny Army Depot, Chambersburg, Pennsylvania.

Republic argues that it should have received the award because it is a responsible offeror which submitted a technically acceptable proposal that constituted the best value to the government.

We deny the protest in part and dismiss it in part.

The RFP required offerors to submit technical proposals which were to be evaluated in the areas of treatment, storage and disposal facility plan, transportation of wastes, and management plan, all of which were of equal evaluation importance. Offerors were also allowed to provide any information regarding "level of performance, in terms of delivery and quality achieved under either government or commercial awards for same or similar services within the last 2 years." Apart from the evaluation of proposals, offerors were informed that DLA might conduct a pre-award survey (PAS) on one or more offerors in order to determine the offeror's "ability to satisfactorily perform the work" to include "financial capability." Finally, the RFP provided that DLA would award the contract to the responsible offeror whose offer was technically acceptable, conformed to the RFP and demonstrated the best value to DLA in terms of price and past performance.

Five proposals were received by the closing date of April 10, 1992. Four of the proposals, including Republic's and Capital's, were subsequently determined to be technically acceptable.¹

¹DLA ordered that a PAS be conducted on Republic in April 1992. Ultimately, the PAS team recommended that no award be made to Republic given Republic's inability to provide a bank (or other financial institution) commitment "indicating the availability of a working capital loan sufficient to finance the proposed contract." The contracting officer received this recommendation on July 6, 1992.

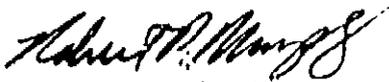
After discussions, the four offerors submitted best and final offers (BAFOs) by July 31, 1992. While Capital's final price was slightly higher than Republic's, DLA determined that Capital's proposal constituted the best value and warranted payment of the small cost premium. In addition, the contracting officer, in a determination dated August 5, 1992, found that Republic was nonresponsible based on the PAS recommendation of no award because Republic lacked financial capability to perform the contract, given that Republic had not obtained a requested bank commitment. Award was then made to Capital.

Republic argues that DLA had effectively found it to be a responsible offeror, and therefore was precluded from later finding Republic to be nonresponsible. Republic's position is that since DLA conducted discussions with the company, and discussions are only to be held with "all responsible offerors whose proposals are in the competitive range," Republic had been found responsible. However, the use of the term responsible offeror in the quoted provision of section 15.610(a) of the Federal Acquisition Regulation does not mean that by conducting discussions with an offeror an agency has determined that the offeror is responsible for purposes of award; rather, it means only that the offeror has submitted a proposal that has a reasonable chance of being selected for award. Holmes & Narver, Inc., B-239469.2; B-239469.3, Sept. 14, 1990, 90-2 CPD ¶ 210. The contracting officer must still make a subsequent affirmative determination of responsibility before making an award and retains the right to reject the offeror as nonresponsible. See Avdin Vector Div., B-244838, Nov. 13, 1991, 91-2 CPD ¶ 455. As noted above, the contracting officer determined prior to award that Republic was nonresponsible. We therefore deny this basis of protest.

Next, Republic argues that DLA should have informed Republic during discussions that DLA continued to perceive that Republic lacked financial capability. Republic argues that, had there been discussions, it could have supplied financial information which would have changed DLA's conclusion. However, a contracting agency is not required to conduct discussions concerning a prospective contractor's

responsibility. Oertzen & Co. GmbH, B-228537, Feb. 17, 1988, 88-1 CPD ¶ 158. Therefore, DLA's decision not to conduct discussions with Republic concerning its financial capability does not provide any basis to sustain its protest.²

We deny the protest in part and dismiss it in part.


for James F. Hinchman
General Counsel

²Republic also questions the validity of the financial data in the PAS which was relied on by DLA to find Republic nonresponsible, and asserts that DLA failed to give it prompt notice that it had been found to be nonresponsible. Republic did not file these bases of protest until October 8, more than 10 working days after Republic was first made aware of them on September 21, 1992, when Republic received DLA's bid protest report which contained the information in question. New grounds of protest must independently satisfy the timeliness requirements of our Bid Protest Regulations. Onyx Computers, Inc., B-247663, May 11, 1992, 92-1 CPD ¶ 437. Under our Regulations, a protest must be filed within 10 working days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1992). Consequently, these new grounds of protest are untimely and will not be considered.