



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Secure Engineering Services, Inc.

File: B-252270.2; B-252271.2

Date: June 11, 1993

John W. Griggs, Esq., and Debra B. Adler, Esq., Griggs & Adler, for the protester.
Lisa Zabriskie, for Security Applications, Inc., an interested party.
Mike Horrom, Esq., Department of Defense, for the agency.
Paul E. Jordan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency failed to provide sufficient time to respond to solicitation is untimely when filed after closing date for receipt of proposals, by firm which had timely submitted a proposal.
2. Alleged improper use of proprietary material by protester's former employees concerns dispute between private parties which, absent evidence of collusion between offerors or an indication that a firm was prevented from submitting a proposal, does not violate Certificate of Independent Price Determination.
3. Allegations that awardee lacks necessary facility security clearance and workman's compensation insurance coverage concern matters of responsibility the affirmative determination of which is not for review by our Office absent evidence of fraud, bad faith or failure to meet definitive responsibility criteria.

DECISION

Secure Engineering Services, Inc. (SESI) protests the award of contracts to Security Applications, Inc. (SAI) under request for proposals (RFP) Nos. MDA904-93-R-K007 (K007) and MDA904-93-R-K006 (K006), issued by the Department of Defense (DOD) for maintenance of electronic security systems at two installations in Germany. SESI contends that SAI should have been found ineligible for award, and that the agency failed to provide SESI with timely notice of the RFP and of the award.

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We dismiss the protests.

SESI had a long history of receiving sole-source contracts with DOD for electronic security services in Germany. Its most recent contracts were due to expire in September 1992, and in July 1992, it submitted proposals to the contracting activity to perform maintenance services at two DOD installations on a sole-source basis. The contracting officer conducted negotiations with SESI until mid-November without reaching agreement on the contracts. On November 16, SAI submitted an unsolicited proposal to perform one of the contracts.¹ Based upon the appearance of SAI as a possible source, the contracting officer decided to conduct the procurement on a competitive basis. Accordingly, on December 4, the contracting officer notified SESI by telefacsimile that she had canceled the sole-source RFPs and would issue new solicitations on or about December 8.

On December 9, the contracting officer mailed copies of the RFPs to SESI and SAI. On December 10, in addition to sending SESI's copy to its Columbia, Maryland office from Germany by United States Postal Service Express Mail, she sent the protester, by telefacsimile, copies of RFP Sections A, B, K, statements of work (SOWs), security forms, and logistical support forms. SESI received the entire RFP on December 21 and submitted proposals for both procurements by the December 30 closing date. SAI also submitted proposals by December 30. Neither offeror had complained of having insufficient time to complete its proposals or requested an extension of time. The contracting officer evaluated SAI as the low, responsible, technically acceptable offeror for both procurements. On December 31, 1992, she awarded SAI the K006 contract and, on January 4, 1993, she awarded SAI the K007 contract. She mailed letters notifying SESI of the awards on the same dates.

On January 5, SESI protested the awards to the contracting officer on the following grounds: SAI's employment of two former SESI employees who allegedly used information gained during their SESI employment; and SAI's lack of facility security clearance and worker's compensation insurance. The contracting officer denied both protests by letter of January 25. By letter of January 29, SESI challenged the

¹The president of SAI had resigned from SESI on October 31, 1992, but remained on its payroll on vacation status until November 20.

agency's response and for the first time claimed not to have been "officially notified" of the competitive procurements.² On February 8, SESI filed its protests with our Office.

SESI first argues that its late receipt of the RFP packages, after SAI received them, prevented it from having a fair and equal opportunity to compete. Specifically, SESI contends that it did not have sufficient time to effectively prepare its proposals. This challenge concerns an alleged solicitation impropriety that must be raised prior to the initial closing date for submission of proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1993). Since SESI did not raise it until after contract award, its protest on this ground is untimely. See MGM Land Co.; Tony Western, B-241169; B-241169.2, Jan. 17, 1991, 91-1 CPD ¶ 50.³

SESI next argues that the contracting officer failed to promptly provide SESI with the postaward notification required by Federal Acquisition Regulation (FAR) § 15.1001(c). Although SESI filed a protest with the agency on January 5, the same day it received the award notices, it did not raise this issue in that protest. Rather, the protester first raised this issue in its February 8 protest to our Office, more than 10 working days after it knew of this protest ground. Accordingly, this challenge also is untimely. 4 C.F.R. § 21.2(a)(2). In any event, the alleged failure to comply with the requirements of FAR § 15.1001(c) concern a procedural defect which does not provide a basis to sustain a protest.

²SESI also for the first time challenged the contracting officer's determination that SAI was the low priced offeror. SESI also raised this issue in its protest to our Office, but subsequently withdrew it after reviewing the agency report.

³Notwithstanding its argument to the contrary, the record indicates that SESI had sufficient time to prepare and submit its proposals. The work covered by the RFPs was virtually the same as that which SESI had performed under its previous sole-source contracts and SESI was furnished the SOWs 1 day after the RFPs were issued. Its submission, without complaint or request for extension, evidences that it was not hampered by the time it had to prepare its proposals.

In its comments on the agency report, SESI essentially acknowledges that these issues were untimely filed, but argues that they should be considered because "good cause" (alleged contracting officer bias) exists for considering these issues. See 4 C.F.R. § 21.2(c). We disagree.

The good cause exception is limited to circumstances where some compelling reason beyond the protester's control prevents it from filing a timely protest. Central Tex. College, B-245233.5, Feb. 6, 1992, 92-1 CPD ¶ 151. Here, the protester argues that it first discovered evidence of bias in the agency report. In this regard, SESI identifies several statements by the contracting officer which indicate that she had been furnished inaccurate, detrimental information concerning SESI, which the protester infers was furnished by its former employees, now employed at SAI.⁴ According to SESI, this information caused the contracting officer to structure the competitive procedure such that SESI could not win. Thus, SESI hypothesizes that it was to this end that the contracting officer was late in providing the RFPs and the notice of award. SESI claims that it would have raised these issues if it had known of the bias at the time it filed its initial protests. Since SESI was admittedly aware of these protest grounds well before its receipt of the agency report, we do not agree that the alleged newly discovered "evidence" of bias constitutes a compelling reason beyond SESI's control which prevented it from timely raising these grounds. See Ensign Aircraft Co., B-207898.3, Apr. 1, 1983, 83-1 CPD ¶ 340.

Moreover, the record provides no evidence of bias or bad faith. While the protester now complains of insufficient time to prepare and submit its proposals, it nonetheless submitted both without complaint prior to the closing date. Further, the protester does not argue, and there is no indication in the record, that the allegedly incorrect information had any effect on the evaluation or award determination. There must be very strong proof that an agency has a specific intent to injure a protester before we may find bias. Hill's Capitol Sec., Inc., B-250983, Mar. 2, 1993, 93-1 CPD ¶ 190. The protester must produce credible evidence showing that any bias translated into agency action which unfairly affected the protester's competitive position. Id. Here, the record contains no such showing.

⁴These statements include the contracting officer's understanding of why SESI determined to administer its Germany contracts from its headquarters in Maryland; circumstances surrounding the ownership of SESI; and issues concerning the failed negotiations of the canceled sole-source contracts.

SESI next contends that SAI falsely certified that its prices were independently determined, since SAI allegedly used pricing information its employees learned while employed by SESI. The purpose of the Certificate of Independent Price Determination is to prevent collusive bidding. It sets forth a statement that the offeror has arrived at its price independently, has not disclosed its price to other competitors before the closing date, and has not attempted to induce another concern either to submit or not to submit an offer for the purpose of restricting competition. See FAR § 52.203-2.

The transfer of an employee from one offeror to another will not constitute a violation of the certification absent collusion between offerors or an indication that a firm was prevented from submitting an offer. Arlington Pub. Schools, B-228518, Jan. 11, 1988, 88-1 CPD ¶ 16; Genasys Corp., B-213830, Jan. 23, 1984, 84-1 CPD ¶ 102. Here, there is no evidence of this type of collusion between offerors.⁵ SESI's complaint that its former employee used proprietary information and thereby violated an employment obligation concerns a dispute between private parties which we do not consider.⁶ Bildon, Inc., B-241375, Oct. 25, 1990, 90-2 CPD ¶ 332. Further, if there is evidence of collusion, the matter is properly to be referred to the Attorney General. Arlington Pub. Schools, supra.

To the extent that SAI's eligibility for award is affected by the alleged improper conduct of its employees, it involves the firm's responsibility. See FAR § 9.104-1. The decision as to whether a firm is responsible is largely within the discretion of the contracting officer, and our Office will not review an affirmative determination of responsibility absent a showing of possible fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation may have been misapplied. 4 C.F.R. § 21.3(m)(5); King-Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177. None of these circumstances are present here.

⁵SAI's president denies using proprietary pricing information to prepare the SAI proposal. According to the president, SAI's lower prices are based on its salaries and overhead requirements for operation and growth of the firm.

⁶SAI's president had signed a confidentiality and security agreement which included covenants not to use proprietary information and not to solicit any account of SESI or to compete with it for a period of 2 years after termination of employment.

We reach the same conclusion with regard to SESI's other challenges to SAI's responsibility. SESI contends that SAI lacked proper security clearances and that SESI was unable to verify that SAI has worker's compensation insurance coverage. The contracts awarded to SAI require it to possess certain security clearances in order to perform the work and to comply with local labor laws including worker's compensation requirements. Proof of security clearances and insurance coverage was not required prior to award. SAI submitted the appropriate documentation to obtain the clearances and the contracting officer determined that SAI would be able to obtain the necessary clearances prior to commencing work. Further, SAI states that it has the required insurance. As both of these requirements concern SAI's ability to perform, they constitute matters of responsibility. See Ktech Corp.; Physical Research, Inc., B-241808; B-241808.2, Mar. 1, 1991, 91-1 CPD ¶ 237 (ability to obtain necessary security clearances) and Scherr Constr. Co., Inc., B-234778, May 25, 1989, 89-1 CPD ¶ 509 (insurance coverage). There is no evidence of fraud or bad faith on the part of the contracting officer, and the requirements for security clearances and insurance coverage contained in the RFPs did not constitute definitive responsibility criteria since they were not required prior to award. Id.; Telos Field Eng'g, B-233285, Mar. 6, 1989, 89-1 CPD ¶ 238. Accordingly, we have no basis to challenge the contracting officer's affirmative determination of responsibility.

The protests are dismissed.



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Assistant General Counsel