DOCUMENT RESUME

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[Protest against Procurement Restrictions Excluding Educational Institutions]. B-187737. April 27, 1977. 9 pp.

Decision re: Southern Methodist Univ.; Archaeological Research Program; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: General Government: Other General Government (806).
Organization Concerned: Soil Conservation Service; Munley Multimedia Productions.
Authority: 4 C.F.R. 20.2(a), 20.2(b)(1). 4 C.F.R. 20.4. F.P.R. 1-2.407.8(b)(3). F.P.R. 1-3.101(c)(d). F.P.R. 1-3.805-1. 53 Comp. Gen. 519. 54 Comp. Gen. 29. 55 Comp. Gen. 972. 55 Comp. Gen. 1362. 55 Comp. Gen. 374. 55 Comp. Gen. 1281. 46 Comp. Gen. 606. 46 Comp. Gen. 610. 55 Comp. Gen. 787. 55 Comp. Gen. 494. B-187053(1) (1976). B-181082 (1974). B-182337 (1976).

Objections were submitted concerning restrictions by the contracting agency against proposals by educational institutions. The protest, found to be timely, was sustained, but suspension of contract performance while protest was pending was not required. GAC does not review determinations of contractor responsibility. (HTW)

02082

DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

P.L. I
Gallagher

FILE: B-187737 DATE: April 27, 1977

MATTER OF: Southern Methodist University

DIGEST:

1. Where protest alleging improprieties in request for proposals is filed with contracting agency at 8 a.m. on closing date for receipt of initial proposals and proposals are due by 2 p.m., protest is timely. Although GAO Bid Protest Procedures provide that such protests must be filed "prior to the closing date" (4 C.F.R. § 20.2(b)(1)(1976)), reasonable interpretation of provision is that protest filed on closing date but prior to closing time for submission of proposals is timely.

2. While letter to agency did not use word "protest," agency should have recognized that it constituted protest, and should not have proceeded with award during pendency of protest without making appropriate determination under FPR § 1-2.407.8(b)(4). However, once award has been made there is no requirement in regulations that agency suspend contract performance while protest is pending.

3. GAO is in agreement with Soil Conservation Service's revised position--taken as result of protest by educational institution--that competition in procurements of archaeological survey work should not be limited to private firms and individuals. No basis is seen which would authorize restriction against competition by educational institutions, and prequalification of certain offerors is regarded as undue restriction on competition except in certain limited circumstances. Restriction imposed in present procurement is serious matter since it tended to undermine basic objective of assuring maximum practical competition in Government procurement.

4. Determining minimum needs and drafting appropriate specifications are functions of contracting agency, and agency's actions are not subject to objection unless clearly shown to have no reasonable basis. GAO does not believe protester has made such showing regarding agency's inclusion of requirements for two separate surveys in one solicitation. Allegation

that unspecified environmental legislation precludes Soil Conservation Service from drafting terms of RFP or assessing qualifications of offerors is without merit.

5. Mere statement in request for proposals that "price and other factors" will be considered in making award determination is insufficient to satisfy requirement that offerors be informed of relative importance of price vis-a-vis technical considerations.

6. Allegation that contractor lacks curatorial capabilities to perform contract for archaeological surveys is not for consideration, since GAO no longer reviews affirmative determinations of responsibility unless there is showing of fraud, or solicitation contains definitive responsibility criteria which allegedly were not properly applied.

The Archaeological Research Program of Southern Methodist University (SMU) has protested against request for proposals (RFP) No. SCS-67-TX-76, issued at Temple, Texas, by the Soil Conservation Service (SCS), Department of Agriculture. The RFP contemplated the award of either one or two contracts; the successful offeror(s) would be required to furnish qualified archaeologists, supervision, equipment and material to conduct surveys and provide resulting reports which would inventory and evaluate archaeological or historical resources of cultural value in certain geographic areas.

SMU's protest objected to the restriction established by SCS that only offerors other than educational institutions could submit proposals under the RFP. Also, SMU questioned the advisability of the RFP's calling for surveys in two widely separated and disparate geographical areas. Subsequently, SMU challenged SCS's action in awarding a $9,059.50 contract to Nunley Multimedia Productions (NMP) while the protest was pending, and questioned NMP's capabilities to perform the contract, particularly insofar as curatorial capabilities are concerned.

Timeliness of Protest

NMP has questioned the timeliness of the protest. In this regard, our Office's Bid Protest Procedures provide that where a protest has been filed initially with the contracting agency, any subsequent protest to our Office must be filed within 10 working days after initial adverse agency action. 4 C.F.R. § 20.2(a)(1976).

Also, alleged improprieties in an RFP which are apparent prior to the closing date for receipt of initial proposals must be protested "prior to the closing date for receipt of initial proposals." 4 C.F.R. § 20.2(b)(1)(1976).

Initial proposals were due on October 15, 1976, by 2 p.m. SMU sent a letter to SCS dated October 13, 1976, concerning the RFP. SCS received the letter at about 8 a.m. on October 15. In the letter SMU contended that the RFP's restriction against competition by educational institutions was inappropriate and possibly illegal. Though the letter did not use the word "protest," we think it constituted a protest to the contracting agency. See, in this regard, Johnson Associates, Inc. 53 Comp. Gen. 518 (1974), 74-1 CPD 43.

NMP's argument is that the October 13, 1976, letter was not received by the agency prior to the closing date for receipt of initial proposals. As noted above, the letter was received by SCS on the closing date for receipt of proposals and prior to the closing time (2 p.m.)

We note, in this regard, that the timeliness rule which applies in formally advertised procurements is that protests against apparent improprieties in an invitation for bids be filed prior to "bid opening." 4 C.F.R. § 20.2(b)(1), supra. Thus, a protest filed on the bid opening date, but prior to the bid opening time, is timely. See Plattsburgh Laundry and Dry Cleaning Corporation et al., 54 Comp. Gen. 29 (1974), 74-2 CPD 27.

In this light, we believe the reasonable interpretation of the requirement that a protest against apparent solicitation improprieties be filed "prior to the closing date" for receipt of proposals in a negotiated procurement is that a protest may be filed up to the closing time for receipt of proposals on that date.

Since SMU protested to the agency in a timely manner and it is undisputed that SMU protested to our Office within 10 working days after initial adverse agency action, SMU's protest to our Office is timely.

Awarding of Contract While Protest was Pending

SMU believes that SCS violated the Federal Procurement Regulations and GAO's Bid Protest Procedures in making an award notwithstanding

the filing of a protest, and also objects to the failure of SCS to suspend contract performance while the protest was pending.

SCS states that it did not recognize an October 11, 1976, telephone call by SMU to an SCS archaeologist, identified in the solicitation as the person to contact on technical questions, as constituting a protest. Further, the protester's October 13, 1976, letter to SCS objecting to the solicitation was not sent directly to the contracting officer, but to a different SCS official. There may also have been confusion as to whether this letter constituted a protest, because it did not use the word "protest." Finally, the contracting officer states that when he awarded the contract on October 18, 1976, he did not have personal knowledge of SMU's October 13, 1976, letter.

Where a protest has been filed before award, a contracting officer may nevertheless proceed to make an award based upon a determination of urgency, that delivery or performance will be unduly delayed by failure to make award, or that a prompt award will otherwise be advantageous to the Government. See FPR § 1-2.407.8(b)(4). Our Office's Bid Protest Procedures provide that award during the pendency of a protest will be made as provided for in the applicable procurement regulations. 4 C.F.R. § 20.4 (1976). In the absence of evidence which clearly shows that a determination to make a prompt award was erroneous, our Office will not object to the agency's action. What-Mac Contractors, Inc., et al., B-187053(1), November 19, 1976, 76-2 CPD 438.

We believe there is merit in SMU's objection. As discussed above, SMU's October 13, 1976, letter did constitute a protest. Since strict time limits are imposed on protesters as to the filing of protests, we believe it is equally incumbent on Government agencies to be alert in recognizing that a before award protest has been filed. SCS should have recognized that a protest was made, and should not have proceeded with an award without making an appropriate determination under FPR § 1-2.407.8(b)(4). However, we note that once an award has been made, there is no requirement in the regulations that contract performance be suspended until the protest has been resolved; rather, the question of whether to suspend contract performance until resolution of a pending protest is essentially a discretionary matter for the contracting agency. See Corbetta Construction Company of Illinois, Inc., 55 Comp. Gen. 972 (1976), 76-1 CPD 240.

Restriction on Competition

After SMU's protest against the refusal to allow educational institutions to submit proposals, SCS reconsidered its position and decided that it will not similarly restrict future procurements. Notwithstanding this change of position, some discussion of this issue is appropriate.

The principal reason for the restriction against educational institutions was SCS's belief that its procurement of archaeological surveys in Texas had become unbalanced in favor of educational institutions. It is reported that educational institutions performed (under small purchase procedures or co-operative agreements) 72 of 90 such jobs since 1973. Thus, SCS initially thought it would be appropriate to procure from private firms or individuals until a reasonable balance was achieved.

We are not aware of any basis in the procurement statutes or regulations which would authorize this type of restriction on competition. See, in this regard, Martin & Turner Supply Company, B-181082, November 18, 1974, 74-2 CPD 267. There, a provision had been included in a solicitation which operated against the interests of a particular bidder; the contracting officer believed that the bidder had a monopoly and was acting in restraint of competition. We found that the particular provision was inappropriate under the circumstances of the case and upheld the bidder's protest. While the decision is factually dissimilar in several respects from the present case, it does indicate that an otherwise unauthorized restriction on competition cannot be instituted by the contracting agency in the hope of achieving, over a period of time, a desired competitive balance within a particular industry. Rather, the agency should direct its efforts at maximizing competition in each individual procurement.

We further note that to prequalify a certain group of offerors is a restriction on competition. Except in limited circumstances, such as those described in Department of Agriculture's Use of Master Agreements, B-182337, November 9, 1976, 76-2 CPD 390, such prequalifications have been held to be unduly restrictive of competition.

While we therefore agree with SCS's revised position, we think it is important to point out that the restriction imposed in the present procurement is a serious matter, since it tended to undermine one of the basic objectives of the procurement statutes and regulations, i.e., the obtaining of maximum practical competition. See FPR § 1-3.101(c), (d).

Minimum Needs of SCS

SMU objects to the fact that the RFP solicited proposals for survey work in one geographic area near Dallas and also in a different geographic area in the Texas panhandle, and suggests that educational institutions located in the particular areas involved may be best qualified to do the work. SCS reported in this regard that it does not believe that location should be a significant factor in selecting a contractor. In response to this, SMU points out that SCS limited its solicitation of proposals to prospective offerors in Texas,

Oklahoma and New Mexico. SCS responds that this limitation was for administrative reasons, asserts that adequate competition was obtained (11 prospective offerors solicited, 6 proposals received) and maintains, in short, that a single qualified contractor can accomplish the necessary surveys in the two separate areas.

More generally, SCS expresses concern over pressure from educational institutions or other groups as to whether a particular contractor should do survey work in a particular geographic area. The protester, on the other hand, believes that the intent of environmental legislation is that surveys of this kind be carried out by unbiased, objective and competent experts. SMU maintains that it is an obvious conflict of interest for a Federal agency to determine professional qualifications of offerors, curative arrangements for the data recovered from surveys, and the like. SMU believes that such decisions must rest with the archaeological profession itself.

Determining minimum needs and drafting specifications which properly reflect those needs are functions of the contracting agency. In carrying out these functions, responsible agency officials are accorded a reasonable range of judgment and discretion. Our Office will not object to such determinations unless they are clearly shown to have no reasonable basis. See Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181; Julie Research Laboratories, Inc., 55 Comp. Gen. 374 (1975), 75-2 CPD 232, and decisions cited therein. Such determinations can encompass decisions whether to procure several items of work under one solicitation, or whether to "break out" certain items of work in separate solicitations. See, for example, Joe R. Stafford, B-184822, November 18, 1975, 75-2 CPD 324, where we denied a protest against an agency's decision to contract for certain audit services on a nationwide basis, as opposed to making awards on a state-by-state or regional basis.

While there is obvious disagreement in the present case between SMU and SCS as to the wisdom of the RFP's soliciting surveys in the two separate areas, after reviewing the record we do not believe that the protester has clearly shown that SCS's position has no reasonable basis to support it. Also, the protester's objection apparently does not relate so much to the fact that the RFP solicited proposals for the two surveys, but to the fact that a contract was awarded to NMP for both surveys. In this regard, the issue of NMP's responsibility is addressed infra.

Further, we see no merit in the protester's contention that unspecified "environmental legislation" precludes SCS or other Federal agencies from making determinations of their minimum needs, drafting the specifications, terms and conditions of solicitations, or evaluating the qualifications of offerors. For instance, that such tasks are the function of the U.S. Environmental Protection Agency in conducting its procurements of scientific studies or surveys has been implicitly recognized in several decisions of our Office. See Enventions, Inc., B-183216, June 16, 1975, 75-1 CPD 368; University of New Orleans, B-184194, January 14, 1976, 76-1 CPD 22; Environmental Protection Agency-Request for Modification of GAO Recommendation, 55 Comp. Gen. 1281 (1976), 76-2 CPD 50.

Evaluation Factors

The submissions to our Office by the protester and the agency also raise the question of the proper evaluation bases to be used in procurements of this type. SCS states that SMU has objected to the awarding of negotiated contracts for these services on a competitive basis. SMU responds that it does not object to "multiple proposal evaluation," but does object to what it terms "competitive bidding"--i.e., the awarding of contracts to the lowest-priced offerors. The protester apparently believes awards should be made on the basis of which proposal offers the highest technical quality.

We see no need to become involved in a general discussion of how best to procure these types of services. However, several deficiencies in the present RFP are apparent. First, the RFP contains no specific statement of evaluation factors. That is, there is no statement informing offerors of the principal criteria which provide the basis for evaluating proposals and making an award determination as to which proposal is most advantageous to the Government.

In this regard, the RFP contains only the "boilerplate" language in paragraph 10, Standard Form 33A (March 1969 ed.), that "The contract will be awarded to that responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered." The "price and other factors" language merely establishes that when making an award in a negotiated procurement, price cannot be totally disregarded (See 50 Comp. Gen 110 (1970); FPR § 1-3.805-1) and that price alone is not controlling, since the reference to "other factors" includes consideration of the technical acceptability of proposals (Cf. 46 Comp. Gen. 606, 610 (1967); FPR § 1-3.805-1).

A further difficulty is that the reference to "price and other factors," without more, does not inform prospective offerors of the relative importance of price in relation to the other factors. See, in this regard, Iroquois Research Institute, 55 Comp. Gen. 787 (1976), 76-1 CPD 123 where we stated at pages 790-791:

> "[W]e have stated in numerous decisions that in order to achieve effective competition the contracting agency should advise offerors of the relative importance of cost to the technical factors. [citing decisions] Thus, offerors are entitled to know whether a procurement is intended to achieve a minimum standard at the lowest cost or whether cost is secondary to quality. * * * The mere statement that 'cost and other factors' will be considered in the award determination does not in our opinion fully satisfy the requirement."

Responsibility of NMr

In regard to the questions raised by the protester concerning NMP's capability to perform the contract, our Office as a general rule no longer reviews determinations by contracting agencies that particular prospective contractors are responsible. Affirmative determinations of responsibility are largely a matter of subjective judgment within the sound discretion of the contracting agency officials, who must bear the brunt of any difficulties experienced by reason of a contractor's inability to perform. We will review such determinations only under certain limited circumstances--if there is a showing of fraud on the part of the contracting agency officials, or it is alleged that definitive responsibility criteria set forth in the solicitation were misapplied by the agency. See, generally, ENSEC Service Corporation, 55 Comp. Gen. 494 (1975), 75-2 CPD 341, and decisions cited therein. However, neither of these circumstances is present here.

Conclusion

In view of the foregoing, the protest is sustained.

Since the contract work is scheduled for completion in April 1977, it is not practical to make any recommendation for corrective action with respect to the award. However, by letter of today, we are calling to the attention of the Secretary of Agriculture our conclusions (1) that SCS erred in not recognizing that SMU had filed a before award protest, (2) that the restriction in this procurement against competition by educational institutions was improper, and (3) that the

RFP failed to contain an adequate statement of evaluation factors. We are further suggesting to the Secretary that this information be brought to the attention of the SCS personnel involved with a view towards attempting to preclude similar difficulties in future procurements.

R. F. Keller

Deputy Comptroller General
of the United States