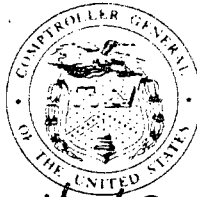


DECISION



17227
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

[Protest of HHS Contract Award] March 5, 1981

FILE: B-200386

DATE:

MATTER OF: Policy Research Incorporated

DIGEST:

1. Although record is not clear as to precisely when protester learned of basis for protest, protest is untimely when clearly filed more than 10 days after protester knew or should have known of basis for protest.
2. Showing of bias is not made by mere speculation that technical reviewers' possible past bias against protester's consultant for instant procurement probably tainted review of protester's proposal.
3. To invoke GAO review of procuring officials' affirmative determination of firm's responsibility, protester must submit evidence establishing prima facie case of fraud. Mere allegation of fraud based in part on fact that procurement officials found awardee responsible despite alleged unsatisfactory past performance does not satisfy proof standard.
4. Agency's failure to promptly notify protester of award is procedural irregularity which does not affect the validity of award.

Policy Research Incorporated (PRI) protests the award of a contract by the Department of Health and Human Services (HHS) to Lawrence Johnson & Associates, Inc. (LJA) under request for proposals (RFP) No. HSA 240-BCHS-26(O). The RFP solicited proposals to study laws and death investigation systems and practices and their impact on those affected by Sudden Infant Death Syndrome (SIDS).

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PRI argues that the award to LJA is without a rational basis because LJA's proposal did not demonstrate the firm's ability to secure the necessary cooperation of families of children who died from SIDS and of the organization which represents them, the National Sudden Infant Death Syndrome Foundation (NSIDSF). The protester also alleges bias on the part of proposal evaluators and in connection with the agency's affirmative determination of LJA's responsibility. PRI also complains that although the contract was awarded to LJA effective June 30, 1980, unsuccessful offerors were not notified of the award until late July.

The protest is denied in part and dismissed in part.

HHS states that PRI's protest should not be considered because it was filed by a law firm which only was a potential subcontractor to PRI. However, PRI's September 10 protest to our Office was filed in the name of PRI as well as the law firm, and the record also shows that PRI authorized the law firm to file a protest on its behalf before it actually filed its protest. Therefore, HHS' contention is without merit.

HHS maintains that PRI's protest is untimely because it was not filed until mid-September, well after PRI received the notice of award to LJA. PRI maintains, however, that it "could not have known of its basis for protest merely from receipt of this document." PRI explains that it was not aware of the complained of deficiency in the LJA proposal until it had completed its own investigation of the award to LJA, which it allegedly commenced immediately upon receipt of the HHS notice. PRI states that it checked with NSIDSF, its proposed consultant for this project, and was advised that NSIDSF previously had protested another contract award to LJA. PRI states that this information led it to investigate further and that "subsequent inquiries" revealed a GAO audit in process which formed the basis for its allegation of bias by HHS officials. The protester argues that its protest on both grounds is timely because it filed its September protest within 10 working days of this latter discovery.

We find the protest on the first issue to be untimely. Although it is not clear from the record precisely when PRI learned that LJA's proposal did not demonstrate that it had secured the cooperation of families of children who died from SIDS and particularly of the Foundation, PRI states that it has not received LJA's proposal and that "LJA did not even attempt to contact NSIDSF before submitting its proposal." It thus seems apparent that PRI's allegation is based on information it received from the Foundation.

Our Bid Protest Procedures require that protests be filed with our Office within 10 working days after the basis for protest is known or should have been known, whichever is earlier. 4 C.F.R. § 20.2(b)(2) (1980). Moreover, while it is true that the mere notice of award to a competitor often does not itself provide the basis for protest, it is incumbent upon a potential protester to diligently seek whatever relevant additional information is needed to determine whether a basis for protest exists. National Council of Senior Citizens, Inc., B-196723, February 1, 1980, 80-1 CPD 87. Often this information will be sought through a debriefing. See, e.g., Lambda Corporation, 54 Comp. Gen. 468 (1974), 74-2 CPD 312. Other times it may be through investigatory efforts such as were made here. In no case, however, may a potential protester sit idly by and decide later to seek information that could have been obtained earlier and then expect to file a protest based on that information. See Tymshare, Inc., B-193703, September 4, 1979, 79-2 CPD 172.

Here, we agree with PRI that the notice of award did not itself provide a basis for protest with respect to the issues raised. However, we find no explanation in the record as to why information bearing on the first issue should not have been obtainable shortly after PRI received the notice, particularly since PRI had a working relationship with the Foundation from which PRI appears to have obtained the information which forms the basis for the first protest allegation. Thus, we can only conclude that PRI learned or should have learned of the basis for protest on the first issue shortly after it initiated its "investigation," in which event, if it did so learn, the allegation is clearly untimely since it was not filed within the required 10 days. If it did not, then,

in the absence of any plausible explanation from the protester, we can only conclude that PRI did not diligently pursue the matter when it could have and is not entitled to have the issue considered. See Graphics, Communications Systems, Inc., B-186715, July 23, 1976, 76-2 CPD 75.

PRI argues that because of the GAO audit this protest falls within the "good cause" exception to our timeliness requirements found at 4 C.F.R. § 20.2(c), and should be considered for that reason. We do not agree. "Good cause" generally refers to some compelling reason beyond the protester's control which prevents the filing of a timely protest. Comtech Laboratories, B-196755, April 10, 1980, 80-1 CPD 267. Clearly, this is not the situation here.

PRI's allegation of bias is based on a GAO audit of the SIDS program. The protester states that this audit effort concerns whether the manner of selecting technical proposal reviewers "resulted in a bias against [NSIDSF] in a previous contract award to [LJA]." Since NSIDSF was a major consultant to PRI for this procurement, PRI speculates "any bias which exists against [NSIDSF] on the part of in-house reviewers would probably also exist against the PRI proposal."

Whenever agency wrongdoing is alleged, a protester has the burden of affirmatively proving its case. B&W Stat Laboratory, Inc., B-195391, March 10, 1980, 80-1 CPD 184. Particularly when bias is alleged, there must be a meaningful showing of that possibility; " * * * unfair or prejudicial motives will not be attributed to individuals on the basis of inference or supposition." A.R.F. Products, Inc., 56 Comp. Gen. 201, 208 (1976), 76-2 CPD 541.

PRI has not made that showing. It merely alleges bias here because of the possibility of bias, in a prior procurement, against an organization it proposed for its subcontractor. Moreover, our audit investigation found no evidence of bias against NSIDSF in the prior procurement or that proposals for that procurement were not evaluated objectively and equitably. In addition, our review of the record does not reveal any bias in the evaluation of proposals in this case. Thus, we find no merit to this allegation.

With respect to the awardee's responsibility, PRI recognizes that we normally will not review a contracting officer's affirmative determination of a firm's responsibility, but urges that this case is an exception because it is alleging that the affirmative determination "was biased, conducted in bad faith, and tantamount to fraud." PRI also alleges that LJA's performance on a prior HHS contract was unsatisfactory and that the responsibility determination here, therefore, must be tainted by fraud.

We frequently have stated the standard under which we will review affirmative determinations of responsibility. In some cases, for example, New Haven Ambulance Service, Inc., 57 Comp. Gen. 361, 365 (1978), 78-1 CPD 225, we stated that we would not review affirmative determinations of responsibility "except where the protester alleges actions by procuring officials which are tantamount to fraud * * *." (Emphasis added.) However, in more recent cases we have refined the standard to require a protester to show possible fraud on the part of procuring officials, not merely allege it. Brodart, Inc., B-195208, March 5, 1980, 80-1 CPD 173; Industrial Acoustics Company, Inc., et al., B-194517, February 19, 1980, 80-1 CPD 139. Thus a protester alleging fraud in connection with an affirmative determination of responsibility must submit evidence establishing a prima facie case of fraud or of such willful disregard of the facts or such misconduct as to be tantamount to fraud on the part of contracting officials. Courier-Citizen Company, B-192899, May 9, 1979, 79-1 CPD 323. Here, the protester has submitted no evidence which remotely suggests the possibility of fraud. There has been no showing of bias, and the specific points the protester raises do not suggest an improper responsibility determination much less a fraudulent one. For example, PRI's contention that LJA performed unsatisfactorily on a prior procurement does not therefore mean that the responsibility determination for this procurement was fraudulent since prior poor performance does not require a subsequent negative determination of responsibility. See Mars Signal Light Company, B-193942, March 7, 1979, 79-1 CPD 164. Consequently, we find no basis for our reviewing the responsibility determination.

With respect to the agency's failure to provide prompt notice of the award, we need only point out that a deficiency

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of this type is a procedural irregularity which does not affect the validity of an award. Leon Whitney, Certified Public Accountant, B-190792, December 19, 1978, 78-2 CPD 420.

The protest is dismissed in part and denied in part.

A handwritten signature in cursive script that reads "Milton J. Aroslan".

Acting Comptroller General
of the United States