

DECISION



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

28172

FILE: B-214034

DATE: May 2, 1984

MATTER OF: Medi Coach Inc.

DIGEST:

1. Protest against cancellation and resolicitation, filed more than 10 working days after protester knew or should have known basis for protest, is untimely, and GAO will not consider it.
2. GAO does not review affirmative determinations of responsibility unless there is a showing of possible fraud on the part of the contracting officials or an allegation that definitive responsibility criteria have been misapplied.
3. GAO does not consider protests relating to the size status of a small business because under the Small Business Act, 15 U.S.C. § 637(b)(6), the Small Business Administration has conclusive authority to determine size status.
4. Allegation that awardees are not meeting contract requirements relates to contract administration and is not for consideration under GAO Bid Protest Procedures.
5. GAO will deny protest based on contracting officer's failure to consider responsibility of firm that was not low bidder, since award must be made to the lowest responsive, responsible bidder.
6. Protester alleging bias has the burden of proof, and where the record fails to demonstrate bias, GAO regards protester's allegations as mere speculation. Even if bias is proven, GAO will deny protest if there is no indication that it adversely affected the protester's competitive standing.

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7. Allegations concerning purchase of one bidder by another and subcontracting arrangements do not constitute evidence of collusive bidding in violation of the Certification of Independent Price Determination. If protester has additional, specific information, it should be presented to contracting officer for possible forwarding to the Department of Justice.

Medi Coach Inc. protests the award of two contracts for invalid transportation services at the Veterans Administration (VA) Medical Center, Kansas City, Missouri, under invitation for bids 589-11-84, a small business set-aside. The awardees are Gallant Enterprises, Inc., doing business as Medicab, and Trans-Handi.

We dismiss the protest in part and deny the remainder.

Medi Coach first protests the September 12, 1983 cancellation of an earlier solicitation for the same services and the resolicitation on October 11, 1983. We will not consider this aspect of Medi Coach's protest since it was not filed until December 30, 1983, more than 10 working days after Medi Coach knew or should have known the basis for the protest. Under our Bid protest Procedures, 4 C.F.R. § 21.2(b)(2) (1983), such a protest is untimely.

A number of Medi Coach's other allegations also involve matters that our Office will not consider. For example, Medi Coach alleges that the contracting officer did not consider the fact that one of the awardees has failed to perform adequately in the past. Whether a bidder is capable of performing is a matter of responsibility; before award, a contracting officer must make an affirmative determination of the proposed awardee's responsibility. Our Office does not review protests concerning such determinations unless there is a showing of possible fraud on the part of the contracting officials or an allegation that definitive responsibility criteria have been misapplied. This is because responsibility determinations are essentially business judgments, not readily susceptible to reasoned review. See Harnischfeger Corporation, B-211303, July 8, 1983, 83-2 CPD 68.

Medi Coach also alleges that one of the awardees is not a small business. Under the Small Business Act, 15 U.S.C. § 637(b)(6) (1982), the Small Business Administration has conclusive authority to determine small business size status. For that reason, we do not consider protests on this basis. Mid-South Ambulance Corporation, B-214078, January 30, 1984, 84-1 CPD 133.

Medi Coach further alleges that the awardees are not meeting contract requirements with regard to number of vans and training of personnel in physical therapy and oxygen dispensing. Here Medi Coach is raising an issue of contract administration that we will not consider, since our Bid Protest Procedures are reserved for determining whether an award or proposed award complies with procurement statutes and regulations. Tate Engineering, Inc., B-213854, March 26, 1984, 84-1 CPD _____. Contract administration, including enforcement of contract provisions, is the responsibility of the contracting agency.

We dismiss the protest on all of the above grounds.

Medi Coach additionally alleges that the contracting officer refused to consider its experience, qualifications, past service record, and the opinions of patients who used the service. Since award must be made to the low, responsible, responsive bidder, and Medi Coach was not the low bidder, the VA was not required to consider these additional matters, which relate to its responsibility. We therefore deny the protest on this basis.

Medi Coach also alleges that the personal involvement of a business associate of the president of one of the awardees with an unnamed VA employee may have influenced the award decision. In addition, Medi Coach claims that it was denied the award because of "past prejudice and slander." In alleging bias either toward an awardee or against itself, a protester has the burden of proof, and unfair or prejudicial conduct will not be attributed to contracting officials on the basis of inference or supposition. Crystal Industries, Inc., B-205710, B-205928, July 27, 1982, 82-2 CPD 82. Where, as here, the written record fails to demonstrate bias, we regard the protester's allegations as mere speculation. Id. Even if bias is proven, we will deny a protest unless there is some indication that it adversely affected the protester's competitive standing. See Ted L. Biddy and Associates, Inc., B-209297, 209297.2, April 22, 1983, 83-1 CPD 441. There is no such indication here.

Finally, Medi Coach alleges that actions of one of the awardees violated the solicitation's Certification of Independent Price Determination. The purpose of this certification is to assure that bidders do not collude to set prices or restrict competition by inducing others not to bid, which would constitute a criminal offense. The facts alleged with regard to the purchase of one of the original bidders by another, subcontracting agreements, and the like, do not, in our opinion, constitute evidence of price fixing or restraint of competition. If Medi Coach has additional, specific evidence of criminal conduct, it should be presented to the contracting officer for possible forwarding to the Department of Justice in accord with Defense Acquisition Regulation §§ 1-111 and 1-115(f) (1976 ed.). See Southern Maryland General Contractors, Inc., 57 Comp. Gen. 277 (1978), 78-1 CPD 121.

The protest is dismissed in part and denied in part.

Milton J. Jordan

Acting Comptroller General
of the United States