

posumy



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hettich GmbH and Co. KG

File: B-224267

Date: October 24, 1986

DIGEST

1. Request for proposals provisions that high pressure steam boiler services be performed by certified employees that are merely a part of the general specifications concerning how and by whom the work is to be accomplished do not establish a precondition to award and therefore are contract performance requirements and not definitive responsibility criteria.

2. Where protest on its face is without legal merit, no useful purpose would be served by holding a bid protest conference.

DECISION

Hettich GmbH and Co. KG (Hettich) protests the award of a contract to PAE GmbH (PAE) under request for proposals (RFP) No. DAJA37-86-R-0675, issued by the U.S. Army Contracting Agency, Europe, for nonpersonal services consisting of the operation, maintenance and repair of high pressure steam boilers and similar systems at locations in West Germany.

We dismiss the protest.

The RFP, in Section L-8a, provided that award would be made to the responsible offeror whose offer conforming to the solicitation is the most advantageous to the government, cost or price, and other factors specified in the solicitation, considered.^{1/} However, while the RFP contained detailed specifications for performing the work, it did not contemplate the submission of technical proposals and did not specify any other evaluation factors. Thus, the basis for award was essentially price alone among firms found to be responsible.

^{1/} For reasons that are not apparent, the RFP, in Section M-2, entitled "Award," also contained a second, duplicative clause with essentially similar evaluation factors for award.

037210

Section H-9 of the RFP, entitled "Required Employee Qualifications," provided that "first-line boiler plant supervisors," responsible for the operation of high pressure systems, must be trained and certified by "Technische Ueberwachungsverein," a German quasi-governmental licensing organization. That clause also required that the successful contractor furnish evidence of compliance with this requirement to the contracting officer within 30 days after commencement of performance of the services. Further, Section C-6 of the RFP's Statement of Work, entitled "Applicable Regulations, Manuals, Specifications and Forms," incorporated into the solicitation several German specifications, forms, and publications, with which the successful contractor was required to abide by. One such specification is "TRD 601," which, in English, is entitled "General Instruction for the User of High Pressure Steam Heating Boilers." According to the protester, TRD 601 sets forth the training and testing requirements that must be satisfied for an individual employee to be certified as qualified to operate high pressure boilers. The protester further states that under TRD 601, certification and training is provided to personnel in the name of their employer and that without properly certified personnel, German authorities will not permit the operation of high pressure boilers. The protester is the incumbent contractor and has such certified employees on its staff.

Initial proposals were received by the Army on August 18, 1986 and award was made on September 24, 1986 with performance scheduled to begin on October 1, 1986. According to the protester, at a preperformance conference held on September 29, 1986, PAE informed the contracting officer's representative that while PAE knew that the solicitation required that certified personnel operate high pressure boilers as an essential element of contract performance, PAE had failed to obtain the necessary qualified personnel and would not be able to perform the contract unless PAE obtained the qualified personnel currently employed by the protester. In a telex dated September 29, the protester advised the contracting officer that its certified employees were employed under legally enforceable contracts and that the protester would not permit these employees to join PAE. The protester also states that on October 1, 1986, the first scheduled date of contract performance, PAE did not have qualified personnel on site and that therefore properly certified U.S. Army personnel were required to be present. Hettich contends that Sections H-9 and C-6 of the RFP established definitive criteria of responsibility and that by not having certified personnel available as of October 1, 1986, the performance commencement date, PAE "failed to

satisfy such responsibility criteria and should not be permitted to retain the contract." Hettich argues that definitive criteria are here involved because the training and certification requirements for employees do not involve subjective judgments but are "objective, concrete, and verifiable criteria." Hettich concludes that PAE is nonresponsible and that therefore the contract awarded to PAE should be terminated and instead awarded to the protester as the low, responsible offeror.

Since Hettich is questioning PAE's responsibility, the issue is whether or not the provisions of solicitation Sections H-9 and C-6 constitute definitive criteria of responsibility. It has been our policy not to review affirmative determinations of responsibility absent a showing of possible fraud or bad faith on the part of contracting officials, Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD ¶ 64, or where definitive criteria in the solicitation have not been met. Yardney Electric Corp., 54 Comp. Gen. 509 (1974), 74-2 CPD ¶ 376; Satellite Services, Inc., B-219679, Aug. 23, 1985, 85-2 CPD ¶ 224.

Definitive responsibility criteria are specific and objective standards, established by an agency for a particular procurement, for use in measuring an offeror's ability to perform the contract; these special standards establish a precondition to award. Military Services, Inc. of Georgia, B-221384, April 30, 1986, 86-1 CPD ¶ 423; Caelter Industries, Inc., B-203418, March 22, 1982, 82-1 CPD ¶ 265. Definitive responsibility criteria limit the class of offerors to those meeting specified qualitative and quantitative qualifications that the agency determines are necessary for adequate contract performance. Vulcan Engineering Co., B-214595, Oct. 12, 1984, 84-2 CPD ¶ 403. Thus, definitive responsibility criteria involve a bidder's eligibility for award and not its performance obligations under the contract. J.A. Jones Construction Co., B-219632, Dec. 9, 1985, 85-2 CPD ¶ 637; Jack Roach Cadillac--Request for Reconsideration, B-200847.3, Aug. 28, 1981, 81-2 CPD ¶ 183.

In a strikingly similar case, Johnson Controls, Inc., B-200466, Feb. 20, 1981, 81-1 CPD ¶ 120, the solicitation required that service personnel employed by the successful contractor for the repair and maintenance of a highly complex energy management and control system "be certified by the manufacturer's representative to be qualified to maintain the completely installed . . . system." We found that this provision did not constitute a definitive responsibility criterion. We stated that such provisions, which state how

and by whom the work is to be accomplished, are performance requirements and are to be distinguished from requirements which are preconditions of award.

Here, the protester has not referred us to any RFP provision, and we have found none, which requires offerors to establish their specific qualifications in the area of boiler operations prior to award and as a prerequisite to award. Indeed, the protester's principal basis for protest rests upon post-award statements by the awardee that, without access to trained Hettich employees, it would be unable to secure the necessary certified personnel with which to perform the work in accordance with the terms of the contract. In our view, the cited RFP provisions are merely part of the general specifications concerning performance (how and by whom the work is to be accomplished) and do not establish a precondition to award. See Power Testing, Inc., B-197190, July 28, 1980, 80-2 CPD ¶ 72.

In a supplemental submission filed by the protester, Hettich alleges that during a preproposal conference the contracting officer's representative orally informed offerors that no award would be made to any firm unable to comply with this "licensing requirement," and that this affected its bid pricing. Although the meaning of this statement is not altogether clear, we think the only reasonable interpretation of it is that the ability of the proposed awardee to obtain the necessary qualified employees with which to perform the contract would be considered before an affirmative responsibility determination would be made. Thus, the statement should have been taken as no more than an indication that the specifications would be enforced.

By submitting a proposal that took no exception to the terms of the RFP, PAE obligated itself to provide qualified boiler operators who meet the solicitation's requirements. Whether PAE could be expected to meet those obligations was for the contracting officer to determine in his overall determination as to PAE's responsibility. Moreover, whether PAE actually does perform under its contract with employees possessing the credentials and training required by the RFP is a matter of contract administration which we do not review. 4 C.F.R. § 21.3(f)(1) (1986).

Accordingly, we find that Hettich has not stated a valid basis of protest, and we dismiss the protest pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.3(f), without requesting a report from the agency. In view of this

dismissal, we also find that the conference Hettich has requested would serve no useful purpose. Cushman Electronics, Inc., B-207972, Aug. 5, 1982, 82-2 CPD ¶ 110. Finally, since Hettich's protest is without legal merit, its request for reimbursement of the costs and fees of filing and pursuing its protest is disallowed. R.S. Data Systems, 65 Comp. Gen. 74 (1985), 85-2 CPD ¶ 588.

The protest is dismissed.

Ronald Berger

Ronald Berger
Deputy Associate
General Counsel