



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Fru-Con Construction Corp.
File: B-227971
Date: October 2, 1987

DIGEST

1. Where the agency led the protester to believe that its proposal was not yet definitely excluded from the competitive range, despite a letter stating that it was being eliminated, a protest filed with the agency within 10 working days of the agency's definite exclusion of the protester from award is timely. The protester's filing of a protest with the General Accounting Office within 10 working days of adverse agency action on that protest therefore also is timely.

2. Agency's decision to exclude an offeror from the competitive range on the basis that the firm's experience did not meet the mandatory criteria of the solicitation is proper where the record shows that the agency's evaluation of the offeror's experience was reasonable and consistent with the solicitation's evaluation scheme.

DECISION

Fru-Con Construction Corp. protests the exclusion of its proposal from the competitive range and the award of a contract to M.K. Ferguson Co. under request for proposals (RFP) No. DACA45-87-R-0017 issued by the Army Corps of Engineers, Omaha District, for the alteration of and addition to a heat plant at K.I. Sawyer Air Force Base, Michigan. Fru-Con argues that the Corps did not properly evaluate its proposal under the evaluation criteria for related design experience on similar plants.

We deny the protest.

The solicitation, issued on February 3, 1987, provided that experience counted for 30 percent of the total point-scoring

formula, with technical considerations counting for 30 percent, and price, the remaining 40 percent. Offerors were required to meet certain specified experience criteria, the first being "have related HTHW [high temperature hot water] design experience on plants of similar size (over 50 million Btu/hr)." The solicitation specifically noted that the experience evaluation carried significant weight and that deficiencies in this area could exclude a proposal from the competitive range.

The RFP further required the submission of brief resumes of key personnel expected to participate on the project. It stated that "Design personnel anticipated for this project shall have previous high temperature hot water system design experience on units of similar size." The solicitation also asked for a list of projects that demonstrated the firm's competency to perform work similar to that required for this project, stating "The more recent such projects, the better. Prime consideration will be given to projects which illustrate respondent's capability for performing work similar to that being sought."

Five offerors submitted proposals. An evaluation committee reviewed the proposals and eliminated three offerors from the competitive range. The Corps then conducted discussions with the two remaining offerors--Fru-Con and M.K. Ferguson--and requested clarifications and best and final offers on or before May 19.

After receipt of best and finals, the Corps requested further information from Fru-Con regarding the experience of the member of the design team with high temperature hot water (HTHW) design experience and his role in the project, as well as Fru-Con's experience with wood and coal handling projects. After Fru-Con responded, the Corps rescored the two proposals in the competitive range and eliminated Fru-Con. By letter of June 3, the Corps notified Fru-Con that there was a critical deficiency in the firm's proposal regarding HTHW design experience and that it would not be considered for award.

In response to Fru-Con's protest, the Corps first asserts that the protest, filed in our Office on July 22, should be dismissed as untimely, since the firm was notified that its proposal was eliminated from the competitive range by letter of June 3 but did not protest to the Corps until July 1. To be timely, a protest either to the contracting agency or to our Office must be filed within 10 working days after the basis for protest is or should have been known. 4 C.F.R. § 21.2(a)(2) (1987). If a protest is filed initially with the agency, the subsequent protest filed here, to be considered timely, must meet two tests: it must be filed

within 10 working days of the protester's learning of adverse action on the protest filed with the agency, and the initial protest itself must have been timely filed. 4 C.F.R. § 21.2(a)(3).

The protest is timely. Although the Corps first notified Fru-Con that its proposal was eliminated from the competitive range on June 3, in a June 8 telephone conversation with Fru-Con the agency agreed to a June 10 meeting with the firm. According to a Corps memorandum of the telephone conversation, the Corps stated that it told Fru-Con that it would "look into their clarifications" and listen to "anything else in their proposal that we need to look at and that they can show us." The Corps held the meeting and did not clearly reject Fru-Con's proposal until June 17, when it called Fru-Con and stated that the contents of its June 3 letter would not be changed and that the firm would not be considered for award.

Fru-Con's July 1 protest to the Corps was filed within 10 working days of the June 17 notification of the basis for protest and therefore was timely. The Corps acted on Fru-Con's protest on July 8, informing the firm of its negative decision, and Fru-Con protested to our Office within 10 working days of such adverse agency action. We therefore will consider the protest on the merits.

Fru-Con, the low offeror, contends that "hands on" design services were not required by the solicitation and states that it has contracted with an engineer who will be legally responsible for the HTHW design under a Professional Services Agreement. Fru-Con also complains that its experience rating was downgraded as a result of how long ago the engineer's HTHW experience was, noting that HTHW experience represented less than 15 percent of the 30 percentage points allocated to this evaluation factor.

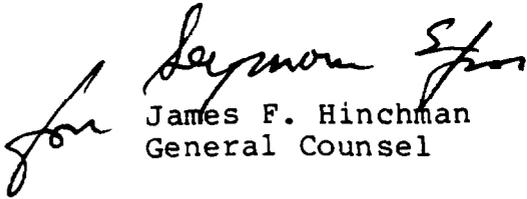
The evaluation of proposals and resulting determination as to whether an offeror is in the competitive range are matters within the discretion of the contracting agency, as it is responsible for defining its needs and the best methods of accommodating them. Harbert International, Inc., B-222472, July 15, 1986, 86-2 C.P.D. ¶ 67. Our review of an agency's evaluation is limited to considering whether that evaluation was fair and reasonable and consistent with the evaluation criteria set forth in the RFP. Ametek, Straza Division, B-220384, Feb. 11, 1986, 86-1 C.P.D. ¶ 149. Further, our Office will not disturb a determination to exclude a proposal from the competitive range unless the determination is shown to be unreasonable or in violation of procurement law or regulation. Metric Systems Corp., B-218275, June 13, 1985, 85-1 C.P.D. ¶ 682.

Fru-Con's proposal included the resume of an engineer proposed as a consultant in HTHW generation and distribution. That engineer's resume listed six projects similar to the Sawyer project, including one as project engineer on the design team of the original Sawyer heat plant built in 1959 and now being altered. The consultant's other projects included an assignment as engineer on the design team of a project for the Air Force Base in Fairbanks, Alaska, in 1959; two smaller generator conversions project in 1972; a smaller generator and distribution project in 1977; and a smaller distribution system project in 1977. In response to the Corps' request for clarification regarding the individual on the design team with HTHW experience and his specific task on this project, Fru-Con responded that the individual with HTHW experience was the engineer identified as a consultant in its proposal. Fru-Con identified his tasks as follows: "to review, verify, and assure HTHW design meets our system requirements." Fru-Con also stated that several engineers on the design team had experience in high and low pressure condensate systems similar to HTHW systems. In support of its position, Fru-Con submitted its Professional Services Agreement with the consultant, which stated that the consultant's services would include, in part, critique of HTHW design and calculations, and critique of vendor HTHW submittals.

The determination of an agency's minimum personnel needs, and the experience required of those personnel, is primarily the responsibility of the procuring agency. See Pacific Computer Corp., B-224518.2, Mar. 17, 1987, 87-1 C.P.D. ¶ 292. Thus, the fact that Fru-Con believes its proposed personnel were adequate to meet the Corps' requirements does not make the evaluation improper. Here, the solicitation made certain specific experience a mandatory requirement for inclusion in the competitive range. That experience was defined as previous HTHW design experience on heat plants of more than 50 million BTU/hr., and more recent experience was stated to be preferable. The consultant proposed by Fru-Con did not have any specific HTHW design experience on heat plants of over 50 million BTU/hr.; his most recent HTHW experience, on plants of 3-50 million BTU/hr., was 28 years ago. In addition, Fru-Con's own submissions show that no member of its design team had any HTHW experience and that the proposed consultant only had review and critique responsibility over the high temperature water design. The basis for the Corps' scoring of Fru-Con's proposal and its

exclusion from the competitive range was that the engineers and consultant proposed by Fru-Con did not have the mandatory HTHW experience on heat plants of over 50 million BTU/hr. required by the solicitation, and we do not find any basis in the record to conclude that this determination was unreasonable.

The protest is denied.

The signature is written in cursive and appears to read 'JFH' followed by 'James F. Hinchman'.

James F. Hinchman
General Counsel