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10/20/89



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Management Engineers, Inc.; KLD Associates, Inc.

File: B-233085, B-233085.2

Date: February 15, 1989

DIGEST

1. Protest alleging that the Service Contract Act (SCA) is applicable to a procurement is untimely where the request for proposals did not contain SCA provisions and the issue was not raised prior to the closing date for receipt of initial proposals.
2. Allegation that awardee's proposals did not comply with solicitation requirements is without merit where the record shows that the agency reasonably determined that the proposals in fact complied with those requirements.
3. General Accounting Office does not review a protest of an agency's affirmative determination of responsibility absent a showing of possible fraud, bad faith, or failure to apply definitive evaluation criteria contained in the solicitation.

DECISION

Management Engineers, Inc. (MEI) and KLD Associates, Inc. protest the award or proposed award of 10 cost-plus-fixed-fee contracts to Kimely-Horn Research Institute (KHRI) under request for proposals (RFP) No. DTNH22-87-R-07266, issued by the National Highway Traffic Safety Administration for the operation of primary sampling units (PSUs) in support of the agency's National Accident Sampling System. The PSUs generate reports concerning the crashworthiness of vehicles based on accidents in the sampling area. MEI and KLD argue that the award of contracts to KHRI would violate the Service Contract Act of 1965, 41 U.S.C. § 351 et seq. (1982), that KHRI's proposals did not comply with solicitation requirements and were improperly evaluated, that KHRI is not responsible, and that KHRI improperly offered a multiple-site discount to the agency in return for multiple

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awards. We deny the protests in part and dismiss them in part.

The RFP, issued September 25, 1987, covered sampling units at 19 separate sites. It required offerors to submit separate proposals for each site they were interested in operating. The agency received various number of proposals from several firms by December 1, the closing date for receipt of proposals. KHRI submitted proposals for 12 of the 19 sites.

The agency conducted technical and cost discussions with the offerors in the competitive range and requested revised proposals. After evaluating the revised proposals, the agency determined that only KHRI had a reasonable chance for an award with respect to 10 of the sites and therefore eliminated the other offerors. KHRI had either the highest or second highest rated technical proposal for each of the 10 sites, and in all cases had the lowest evaluated cost, mostly by wide margins. The agency reports that the technical differences among the proposals were not significant, and that cost therefore became the deciding factor. The agency asked KHRI for best and final offers, and on September 29, 1988, informed the firm that it was the successful offeror for the 10 sites, all of which are involved in either or both of the protests of MEI and KLD.^{1/}

The protesters contend that because KHRI does not have an employee pension plan, any award to that firm would violate the Service Contract Act. The agency responds by pointing out that the solicitation did not contain any requirement for compliance with that Act and contends, therefore, that if the protesters believed the Act was applicable, they should have raised the issue prior to the closing date for receipt of initial proposals. In any event, the agency maintains, the contracts are not covered by the Act since

^{1/} MEI has protested with respect to 8 of the 10 sites. KLD's protest involves 6 of those 8 sites plus the 2 sites not involved in MEI's protest. The agency requested that we dismiss MEI's and KLD's protests concerning certain of the sites because the protesters would not be next in line for award with respect to those sites and therefore are not interested parties under our Bid Protest Regulations, 4 C.F.R. § 21.1(a) (1988). We cannot conclude that either protester lacks the requisite interest to protest the awards for any of the sites because the record before us does not allow us to say what any offeror's chance for award would be if these protests were to be sustained.

the principal purpose of each contract is to acquire case summary reports concerning the crashworthiness of vehicles, not to acquire any services. The agency also advises that in prior years both protesters received awards for this work under solicitations that similarly did not contain SCA provisions.

The protesters' challenge to the agency's determination that the Service Contract Act is not applicable to this procurement is untimely. It was apparent from the face of the RFP that it did not contain any Service Contract Act provisions. Thus, if the protesters believed this constituted a solicitation defect, they should have raised the issue prior to the closing date for receipt of initial proposals. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1988).

MEI requests that we consider this issue, in the event we find it untimely, under the good cause or significant issue exceptions in our regulations. See 4 C.F.R. § 21.2(b). The good cause exception to our timeliness requirements is limited, however, to circumstances where some compelling reason beyond a protester's control prevents the protester from filing a timely protest. Dontas Painting Co., B-226797, May 6, 1987, 87-1 CPD ¶ 484. There is nothing in the record indicating any such reason exists here. The significant issue exception is limited to considering an untimely protest when the issue raised is of widespread interest to the procurement community that has not been considered on the merits in previous decisions. Delaware Eastwind, Inc., B-228533, Nov. 18, 1987, 87-2 CPD ¶ 494. The applicability of the Service Contract Act has been considered by this Office on numerous occasions. See e.g., OAo Corp., B-211803, July 17, 1984, 84-2 CPD ¶ 54; Advance, Inc., B-213002, Feb. 22, 1984, 84-1 CPD ¶ 218.

The protesters contend that for a number of reasons, KHRI's proposals did not comply with solicitation requirements. First, the protesters contend that KHRI failed to comply with the requirement to submit a separate proposal for each site because, they argue, the firm effectively submitted a combined proposal by offering what the protesters call a "multiple-site discount." Second, the protesters allege that KHRI did not provide evidence with its proposals as required showing that its personnel were committed to remaining with the firm for the 3-year duration of the contracts. Third, the RFP provided that key personnel would be required to perform at least 1 year before the contracting officer would consider requests for substitutions; yet, the protesters point out, within 1 week of award KHRI began recruiting substitute personnel. Fourth, the protesters

contend that the awardee proposed inexperienced personnel even though the RFP stated that the agency "strongly recommends" that the contractor recruit experienced personnel currently working in the program. Finally, the protesters assert that the awardee failed to propose a stable workforce, as allegedly required by the RFP, citing the lack of personnel commitments and KHRI's history of workforce instability in its prior operation of PSUs.^{2/}

We find no merit to the protesters' contentions. The record shows that KHRI in fact submitted 12 separate proposals and that the agency evaluated each proposal separately. KHRI quoted a fixed overhead rate in each proposal, but also advised the agency that it could reduce its overhead percentage in the event it were to receive multiple awards. After the agency determined that only KHRI had a reasonable chance for award with respect to 10 PSUs--based on the firm's high technical scores and substantially lower projected costs--the agency requested KHRI to submit a best and final offer specifying what its overhead rate would be in the event of multiple awards. We do not agree with the protesters that this contravened the solicitation's requirement for separate proposals, nor do we understand how either protester could have been prejudiced, since the record shows that the agency allowed KHRI to propose a reduced overhead rate only after determining that no other offeror remained in the competitive range.

As the agency points out, the RFP did not require formal written commitments from an offeror's proposed personnel. Under the evaluation factors for award, however, the RFP provided that commitment to remaining with the program for the contract duration should be evidenced by resumes and other documentation. Although the agency had concerns in this area in the initial evaluations, KHRI ultimately provided sufficient documentation to satisfy the agency that its staff was committed to working for the duration of the contracts. In any event, the substitution of personnel after award is a matter of contract administration not for consideration by our Office. 4 C.F.R. § 21.3(m)(1). Waukesha Alaska Corp., et al., B-229918 et al., Apr. 27, 1988, 88-1 CPD ¶ 412.

^{2/} The protesters also alleged that KHRI proposed only one team manager, which would be inadequate in view of the RFP's requirement concerning the team manager's time allocation for each PSU. The agency responded that KHRI in fact proposed two managers. Neither protester has addressed this matter in its comments and therefore we consider it withdrawn.

With respect to the protesters' argument that KHRI proposed inexperienced personnel, we note that although the RFP stated that the agency "strongly recommends" that experienced incumbent personnel be recruited, it also provided that inexperienced personnel would be acceptable if they had appropriate education and/or experience. The agency determined that the personnel proposed by KHRI had either direct experience in the program or appropriate education or experience. The record indicates that KHRI proposed project managers and team leaders who had previous experience with the accident sampling system. A majority of the researchers it proposed also had prior experience. Those researchers who lacked prior experience with the system generally had both educational and work experience that was related. Accordingly, we find no reason to question the agency's determination that the personnel proposed by KHRI met the RFP's requirement concerning personnel experience.

Finally in this regard, the protesters contend that KHRI's proposals did not meet the RFP's requirement for a stable workforce, citing the awardee's poor performance in this area on past contracts. While the RFP encouraged the offerors to have a stable workforce, however, the only requirement in the RFP was that offerors demonstrate the staff's commitment to remain for the duration of the contract, and KHRI provided that commitment.

The protesters also have raised a number of issues regarding the agency's evaluation of the cost proposals submitted by KHRI. The protesters' basic complaint is that the awardee's costs are understated, that the firm will not be able to comply with the contract requirements at the costs proposed, and that cost overruns therefore will result. Essentially, the protesters are questioning the adequacy of the agency's cost realism analysis.

The evaluation of competing cost proposals requires the exercise of informed judgment by the contracting agency involved since it is in the best position to assess the realism of proposed costs and must suffer the consequences of a defective cost analysis. PTI Environmental Services, B-230070, May 27, 1988, 88-1 CPD ¶ 504. Accordingly, our review of an agency's cost realism analysis is limited to a determination of whether the agency's evaluation was reasonable. Zeidero Enterprises, Inc., B-230261, June 20, 1988, 88-1 CPD ¶ 583.

We reviewed the cost proposals submitted by KHRI and the agency's evaluation of those proposals and find no reason to question the reasonableness of the agency's determination.

While the awardee's overall proposed costs were significantly lower than those of the other offerors, the individual cost elements are not so low as to be unrealistic. For example, the hourly labor rates quoted by KHRI are in line with those of the other offerors, and the travel budgets--which the protesters suggest are likely understated--are comparable to and in some cases higher than those proposed by other offerors. Finally, the overhead rate proposed by KHRI, while lower, was not substantially different from the rates the firm used in prior contracts.

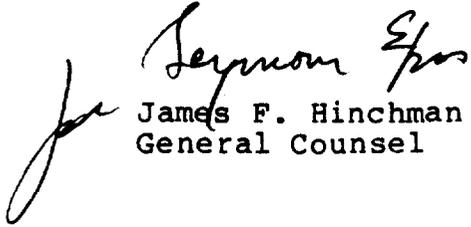
The protesters argue lastly that KHRI is not a responsible contractor. The protesters base this contention primarily on their belief that the costs proposed by KHRI are substantially understated and on their understanding that the firm experienced data falsification problems, cost overruns, and high employee turnover in performing prior PSU contracts. The agency states, however, that in its judgment the costs proposed by KHRI are realistic and that the allegations made by the protesters concerning the performance by KHRI under prior contracts are either unsupported or not significant enough to justify a determination that KHRI is not responsible.

Where, as here, an agency has made an affirmative determination of responsibility, this Office will not review that determination absent a showing that such determination was made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.3(m)(5). The protesters have not alleged fraud or bad faith on the part of the agency. MEI considers as definitive responsibility criteria the provision in the RFP work statement that the team manager is responsible for ensuring strict adherence to sampling and data collection procedures and an evaluation subfactor that said the contractor should have a plan for rewarding acceptable performance and a commitment to replacing unsatisfactory staff.

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 must be met as a precondition to award. Teledyne MEC, B-228469, Oct. 30, 1987, 87-2 CPD ¶ 422. In our view, neither clause cited by MEI is a definitive responsibility criterion. Neither clause contains a standard that can be

applied objectively rather than subjectively. Consequently, we will not review the agency's affirmative responsibility determination.

The protest is denied in part and dismissed in part.

A handwritten signature in cursive script, appearing to read "James F. Hinchman".

James F. Hinchman
General Counsel