The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Motorola, Inc.

File: B-234773

Date: July 12, 1989

DIGEST

1. When responsibility-type factors such as experience are included as technical evaluation factors in a request for proposals, they do not constitute definitive responsibility criteria. Agency properly evaluated awardee's proposal with respect to these factors where the evaluation was reasonable and consistent with the evaluation criteria.

2. Protest that awardee did not meet definitive responsibility criteria concerning employee training certificates and experience is denied where the awardee submitted sufficient evidence from which the contracting officer reasonably could conclude that the awardee either specifically complied with the requirements, or evidenced a level of achievement equivalent to the criterion.

3. Where contracting officer determined awardee to be responsible, and alleged evidence of bad faith does not establish that agency acted with specific or malicious intent to harm the protester, General Accounting Office will not question the affirmative responsibility determination.

4. Issues which are first raised more than 10 days after the protester was made aware of the bases for protest are untimely and not for consideration on the merits.

DECISION

Motorola, Inc., protests the award of a contract to Automated Data Management, Inc. (ADM), for preventive maintenance and repair of Army and Air Force radio communications equipment at various locations within the Republic of Korea, under request for proposals (RFP) No. DAJB03-88-R-3924, issued by the Department of the Army. Motorola asserts that ADM did not satisfy certain definitive responsibility criteria allegedly contained in the RFP, and

that the Army made a bad faith determination that ADM was responsible. We deny the protest in part and dismiss it in part.

The RFP was issued on August 1, 1988, for a firm, fixed-price proposal for an 8-month base period commencing on February 1, 1989, with two 1-year options. Section M of the RFP provided that award would be made to the responsible, lowest priced offeror whose proposal satisfied all of the terms and conditions of the RFP. Section L-6 of the RFP, entitled information to be furnished by the offeror, included requirements pertaining to the offeror's experience in data encryption standard (DES) communications system maintenance, pricing information, a contract mobilization plan, and other information pertaining to understanding and meeting the RFP requirements. Section L-7 was entitled contractor qualifications, which were stated to be "reliability characteristics," and pertained to required personnel and test equipment. Initial proposals were due by September 15, 1988.

Of 27 firms which received copies of the RFP, only Motorola and ADM submitted proposals. Motorola's initial proposed price for the base and option years was $2,879,689, and ADM's price was $2,457,947. In her evaluation of the proposals, the contracting officer determined that ADM's proposal deficiencies were susceptible of correction and, in the interest of maintaining competition, included both proposals in the competitive range. Prior to the determination of the competitive range, because Motorola was the only company which had performed this work during the past 20 years, the contracting officer requested the Defense Contract Audit Agency (DCAA) to perform an audit and provide a cost and pricing report on Motorola's proposal, pursuant to Federal Acquisition Regulation (FAR) § 15.805-5. DCAA's report focused primarily on the costs of Motorola's subcontractor, International Electronics Corp. (IEC), which was to perform more than two-thirds of the work required under the RFP. This audit report questioned more than 25 percent of IEC's proposed costs, and these questions were later brought to Motorola's attention during the conduct of discussions.

The discussions with ADM focused on its technical deficiencies while Motorola was requested primarily to address the questionable costs which had been raised by the DCAA audit. Best and final offers were requested by January 12, 1989, at which time ADM submitted a proposal with a price of $2,085,293; Motorola submitted a proposal of $2,682,746. Both offers were determined to be technically acceptable and, pursuant to the award criterion, award was made to ADM

on the basis that it was the responsible firm which had submitted the lowest-priced offer which met all of the technical requirements of the RFP. After its agency-level protest was denied, Motorola protested to our Office.

Motorola's primary basis of protest is that ADM did not satisfy the requirements under sections L-6 and L-7 of the RFP. In particular, Motorola contends that ADM did not establish that it met the following requirements: (1) The DES communication system equipment maintenance experience requirement under L-6(b)(1)(a). This clause calls for information pertaining to the offeror's experience in satisfying the same or similar DES equipment maintenance services contemplated under the RFP, and provides that experience within the last 5 years will be given extra consideration. (2) The contract mobilization plan requirement under L-6(b)(1)(b), which calls for the offeror to describe measures to be taken to assume responsibility for maintenance of the DES communication systems by January 1, 1989, including a schedule of the arrival of key personnel and contractor equipment and supplies. (3) The requirement under L-7(a)(1) that the offeror provide documents or certificates to establish that all DES equipment technicians possess training certificates issued by OEM (original equipment manufacturer) factory or factory approved school for maintenance and repair of DES equipment. (4) The requirement under L-7(a)(3)(a), that radio maintenance technicians have 5 years of generalized two-way radio maintenance experience. (5) The requirement under L-7(a)(3)(b) that appropriate personnel have 2 years of specialized maintenance equipment on the same or equivalent types and models of equipment listed under the RFP. (6) The requirement under L-7(b) that the offeror possess adequate equipment to accomplish maintenance in accordance with industry standards and with manufacturer's factory specifications. Motorola argues that all of these requirements constitute definitive responsibility criteria which were not met by ADM, and that therefore the agency could not properly determine that ADM was responsible.

Our Office does not generally review affirmative determinations of responsibility, which are largely subjective, absent a showing of possible bad faith or fraud on the part of contracting officials, or of the misapplication of definitive responsibility criteria, which are specific and objective standards established by an agency to measure an offeror's ability to perform the contract. Calculus, Inc., B-228377.2, Dec. 7, 1987, 87-2 CPD ¶ 558. These criteria put firms on notice that the class of prospective contractors is limited to those who meet qualitative or quantitative criteria stated to be necessary for adequate contract

performance. Antenna Products Corp., B-227116.2, Mar. 23, 1988, 88-1 CPD ¶ 297. However, a general experience requirement which does not call for a particular, objectively measurable level of experience does not constitute a definitive responsibility criterion. John Crowe & Assocs., Inc., B-227846, Aug. 21, 1987, 87-2 CPD ¶ 194.

Here, the broad requirement for information pertaining to the offeror's DES equipment maintenance experience does not constitute a definitive criterion. Similarly, the requirements for a mobilization plan and for adequate test equipment do not constitute the kind of specific qualified minimum standards of acceptable qualifications which establish definitive responsibility criteria. Rather, as is permissible in a negotiated procurement, these responsibility type criteria were included in the RFP as evaluation factors. See Unison Transformer Services, Inc., B-232434, Nov. 10, 1988, 68 Comp. Gen. ____, 88-2 CPD ¶ 471. In a protest of an agency's award decision with respect to such factors, we will examine the record to determine whether the evaluation was fair, reasonable and consistent with the evaluation criteria. EG&G Washington Analytical Services Center, Inc., B-233141, Feb. 21, 1989, 89-1 CPD ¶ 176.

The RFP at issue did not provide for assessing the relative technical merits of the competing offers. Rather, it provided that award would be made to the lowest priced offeror which submitted a technically acceptable offer. No minimum level of experience was specified, however. Thus, while Motorola clearly has substantially more corporate DES experience than did ADM, the agency obviously believed ADM would be able meet its requirements on the basis of the experience of certain Motorola employees who would be displaced, and whom ADM planned to hire if it received this award. This is not inconsistent with the RFP.

With respect to the requirement that the offeror possess adequate equipment, ADM's proposal offered to provide all of the necessary equipment which it either possessed, or was in the process of arranging to purchase. Accordingly, the Army reasonably concluded that ADM could satisfy the solicitation requirements in this regard. As for the mobilization plan, while ADM did not provide a timetable, it did indicate that key personnel would be on location by January 1, 1989. The Army indicates that ADM did timely commence satisfactory performance of this contract as scheduled, and that the Army has not experienced any difficulty with ADM's performance during the 5 months that ADM has been providing the services. Accordingly, since the mobilization plan concerns the contractor's performance obligation and not its ability to perform, we will not question the agency's determination,

particularly in view of ADM's satisfactory performance in this regard. See Telos Field Engineering, B-233285, Mar. 6, 1989, 89-1 CPD ¶ 238.

The other three clauses calling for the possession of training certificates and for specified kinds of experience of a particular length arguably do constitute definitive responsibility criteria. See Topley Realty Co., Inc., 65 Comp. Gen. 510 (1986), 86-1 CPD ¶ 398. In reviewing an allegation that definitive responsibility criteria have not been satisfied, we will review the record to determine whether the offeror has submitted sufficient evidence of compliance from which the contracting officer reasonably could conclude that the criteria have been meet. Unison Transformer Services, Inc., B-232434, Nov. 10, 1988, supra. The relative quality of the evidence is a matter for the judgment of the contracting officer, as is the determination of the extent to which an investigation of such evidence may be required. Id. Further, while definitive responsibility criteria establish a minimum standard which is a prerequisite to an affirmative determination of responsibility, there are situations where an offeror may not meet the specific letter of such criteria, but has exhibited a level of achievement equivalent to or in excess of the specified criteria, and thus properly may be considered to have satisfied the definitive responsibility criteria. Tama Kensetsu Co., Ltd., and Nippon Hodo, B-233118, Feb. 8, 1989, 89-1 CPD ¶ 128.

To satisfy the employee experience requirements under sections L-7(a)(3)(a) and L-7(a)(3)(b), ADM proposed to employ primarily technicians who were current Motorola employees working on this requirement, who would be displaced if ADM received the award. ADM had provided the Army with a number of commitment letters from such employees which were later rescinded, apparently after Motorola learned of them. ADM subsequently reiterated its intention to employ these displaced Motorola employees, and provided assurance that it had informal commitments from many of them. However, as an alternative, ADM submitted resumes from other prospective employees, including former Motorola employees, from which the contracting officer could reasonably conclude that the proposed technicians satisfied the experience criteria. Further, in view of her familiarity with area hiring practices, we believe that the contracting officer had a reasonable basis to determine that ADM would, in fact, be able to hire qualified, displaced Motorola technicians.

With respect to the training certificates, Motorola contends that, as the OEM, it issues its training certificates only

to its own current employees, so that ADM employees could not possess such certificates. That is, Motorola apparently makes employment with its company a requisite for holding such certificates, and essentially revokes the certificates when an employee leaves Motorola. In our view, the Army could reasonably conclude that the proposed Motorola employees who had such certificates which they would lose solely as the result of leaving Motorola and becoming ADM employees could be viewed as meeting this criterion. Clearly the Motorola employees were qualified and certified, as intended by the requirement, and while the RFP is inartfully drafted in this regard, we do not believe it should be interpreted in a manner which would permit the incumbent to make it impossible for any competitor to satisfy the requirement. Accordingly, we find that ADM submitted sufficient evidence of compliance from which the contracting officer reasonably could conclude that the criteria were met.

Motorola also contends that the agency acted in bad faith in determining that ADM was responsible. Since procurement officials are presumed to act in good faith, in order to establish that an affirmative determination of responsibility was made in bad faith, a protester has a heavy burden to show that the officials acted with a specific and malicious intent to harm the protester. Ingram Barge Co., B-230672, June 28, 1988, 88-1 CPD ¶ 614. Motorola provides numerous examples of the contracting activity's actions which it alleges evidence bad faith, but in no instance did the contracting activity violate any procurement laws or regulations or exceed its discretion. For example, the activity performed the DCAA audit on Motorola in order to verify Motorola's cost and pricing, but did not perform an audit on ADM. FAR § 15.804-3 permits the contracting officer to waive verification of cost and pricing data if there is adequate competition. At the time the audit was performed on Motorola, it was not clear ADM's proposal would be found technically acceptable, and Motorola had been the only contractor to perform the requirement for more than 20 years. After it determined that ADM was responsible and satisfied the RFP requirements, the Army concluded that the existence of two competing offerors did provide competition, such that there was no requirement to audit ADM's cost and pricing data. This dissimilar treatment was permissible under the regulations, and resulted from the changed competitive circumstances which arose during the conduct of the procurement.

Motorola also contends that the contracting officer improperly rejected a negative recommendation regarding ADM which had been made by a preaward survey team, and only did

so after providing ADM with a protracted period during which ADM had the opportunity to add a subcontractor--which Motorola contends is not actually performing under the contract. The contracting officer is not required to follow the recommendation of a preaward survey team; she has broad discretion to determine both whether a preaward survey should be conducted and, if conducted, the degree of reliance to be placed on the results. Brussels Steel America, Inc., B-225556 et al., Apr. 16, 1987, 87-1 CPD ¶ 415. Further, an awardee properly may be permitted to establish compliance with the kind of responsibility criteria at issue here up until the time of performance. VA Venture; St. Anthony Medical Center, Inc., B-222622 et al., Sept. 12, 1986, 86-2 CPD ¶ 289. Accordingly, the contracting officer acted within her discretion in this regard, and there is no evidence that she intended to do anything other than foster competition by this action.

Motorola also asserts that the Army accepted ADM's initial proposal even though it was submitted late, based on the fact that Motorola had personnel at the agency on the closing date who did not see the ADM proposal submitted. However, the agency's contract log entry establishes that the proposal was received prior to the deadline and Motorola's speculation that this log entry actually pertains to a different offeror under another procurement is unsupported. We will not deal specifically with the remainder of Motorola's allegations in this regard since, as noted above, in no instance do they evidence any impropriety on the part of Army officials, and they fail to establish that the contracting officer acted in bad faith.

Motorola further contends that ADM is not fulfilling its requirements in performing the contract--including its allegation that the new subcontractor has not yet performed under the contract. First, we note that the subcontractor was added to perform a relatively minor potential requirement pertaining to antenna maintenance, the need for which has apparently not yet arisen under the contract. Further, the Army states that ADM has been performing satisifactorily under the contract. In any event, whether or not ADM is fulfilling its requirements under the contract is a matter of contract administration which is not for consideration by our Office. 4 C.F.R. § 21.3(m)(1) (1988).

Finally, Motorola has added a number of allegations in supplemental submissions, for example, that ADM should not have been included in the competitive range and that the Army engaged in leveling. The bases for these allegations were known by Motorola, at the latest, at the time it received the agency report, but were first raised more than

10 days thereafter. Accordingly, these allegations are untimely and will not be considered. 4 C.F.R. § 21.2(a)(2).

The protest is denied in part and dismissed in part.

for James F. Hinchman
General Counsel