



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Wildcard Associates

File: B-235000

Date: July 24, 1989

DIGEST

1. Generally, firm that is owned or controlled by federal employees is not eligible for award of contract and is not an interested party to protest since it would not be in line for award even if its protest were sustained. Firm is an interested party, however, where federal employees that own and control firm were eligible to retire and indicated in their proposal their willingness to retire from government employment before award, since date of award is the critical time at which, in order to be eligible for award, an offeror may not be owned or controlled by government employees.

2. Where there is a dispute between the protester and the agency as to the meaning of provisions of a solicitation, GAO will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation.

DECISION

Wildcard Associates protests the exclusion of its proposal from the competitive range under request for proposals (RFP) No. 7FXI-D5-89-S018-N, issued by the General Services Administration (GSA) for a review of GSA's Southwestern Distribution Center to be used in an Office of Management and Budget (OMB) Circular A-76 review.

We deny the protest in part and dismiss it in part.

The solicitation indicated that award was to be made to the responsible offeror whose offer conforms to the solicitation and is most advantageous to the government, price and technical factors considered. On the solicitation cover page and under the evaluation scheme, the RFP indicated that proposals which showed no evidence of prior A-76 project experience would be considered unacceptable and would be rejected. The evaluation scheme, which indicated that

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demonstrated A-76 experience was the most important factor, included five technical evaluation factors. The first factor required that offerors list A-76 projects completed and give sufficient information for evaluation and verification. The second factor indicated that more recent A-76 projects would receive greater consideration and the third factor requested information on A-76 projects completed, such as whether deliverables were provided in accordance with the contract and accepted by the government. The fourth factor indicated that an offeror's project manager, management analyst and cost analyst must have certain specified experience; for example, among other things, the project manager was required to have directed or supervised at least three A-76 reviews. The fifth factor requested information on the offeror's approach to the study.

After evaluating the initial proposals submitted under the RFP, GSA determined that Wildcard's offer was unacceptable since it did not show evidence of organizational experience with prior A-76 projects. Specifically, the evaluation panel noted that the firm has completed no A-76 studies itself and that the only A-76 experience listed in the Wildcard proposal was gained by individual Wildcard employees in their capacity as government employees.

The agency further explains that Wildcard's employees did not meet the individual employee experience requirements of the solicitation since, according to Wildcard's proposal, the experience of the firm's personnel was gained "as managers of functions under A-76 study and in personnel operations associated with those studies." By letter of March 14, the contracting officer notified Wildcard that its proposal was technically unacceptable and would not be considered further.

Wildcard protested to this Office on March 30, contending that its proposal met the requirements of the solicitation, since employees of the firm have extensive experience in conducting A-76 studies as federal government employees. According to the protester, the GSA solicitation simply required experience in A-76 commercial activity studies and did not specify that the experience must have been gained as a private business.

As a preliminary matter, GSA argues that Wildcard is not an interested party for purposes of filing a protest. Under our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1988), a party must be "interested," that is, must have a direct economic interest in the award or failure to award a contract in order to have its protest considered by our

Office. Generally, a party will not be deemed to have the necessary direct economic interest to be considered an interested party where it would not be in line for award even if its protest were sustained, and we will dismiss a protest under these circumstances. Prison Match, Inc., B-233186, Jan. 4, 1989, 89-1 CPD ¶ 8. Since Wildcard is owned and controlled by federal government employees, GSA maintains that under Federal Acquisition Regulation (FAR) § 3.601, the contracting officer could not award a contract to the firm and, under the circumstances, we should not consider its protest.

FAR § 3.601 provides that a contracting officer shall not knowingly award a contract to a government employee or to a firm that is substantially owned or controlled by government employees. Under that provision, which is intended primarily to avoid any actual conflicts of interest and the appearance of possible favoritism or preferential treatment by the government toward its employees, the date of award is the critical time at which, in order to be eligible for award, an offeror may not be a government employee or be owned or controlled by government employees. Big Sky Resource Analysts, et al., B-224888 et al., Jan. 5, 1987, 87-1 CPD ¶ 9.

Here, Wildcard's proposal indicated that two of its partners were still government employees but "[u]pon contract award, each partner will be retired and will work full-time on this contract." The record indicates that those individuals were eligible to retire at any time. Since the date of award is the critical time at which the firm could not be owned or managed by government employees, and Wildcard's partners could retire before the award, a contract award to the firm would not have been prohibited by FAR § 3.601 if, in fact, they resigned their government positions before the award. Big Sky Resource Analysts, et al., B-224888 et al., supra (award of contract to former government employee who resigned government position 1 day before award is not prohibited by FAR § 3.601). Thus, since Wildcard would be eligible for award, the firm is sufficiently interested to file a protest.

On the merits of the protest, GSA says that the RFP required offerors to detail both organizational and individual employee experience with A-76 projects. According to GSA, Wildcard's proposal did not meet the organizational A-76 experience requirements because Wildcard, a start-up firm, listed in its proposal no A-76 projects completed by the firm. As explained above, Wildcard maintains that the solicitation did not require an offeror to have A-76 experience as a firm.

Where, as here, there is a dispute as to the requirements of a solicitation, we read the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. System Development Corp., B-219400, Sept. 30, 1985, 85-2 CPD ¶ 356. Reading the RFP as a whole, we conclude that it was clear that the agency was seeking a firm with A-76 project experience as a firm, not simply a firm that employs individuals with A-76 experience.

First, section L of the RFP stated that an offeror's technical proposal "must fully describe the offeror's . . . previous experience . . ." (emphasis added) and that failure to provide evidence of prior A-76 experience will cause the rejection of the proposal. The evaluation factors also stated that "[o]fferors should list all A-76 projects completed," and should specify whether "deliverables" were provided in accordance with the contract and accepted by the government, in our view, all clear references to prior performance by the firm submitting the proposal, not the firm's employees. In our view, these proposal requirements indicate that the agency's concern was with the offerors' qualifications as firms and not just the experience of individuals employed by the firms.

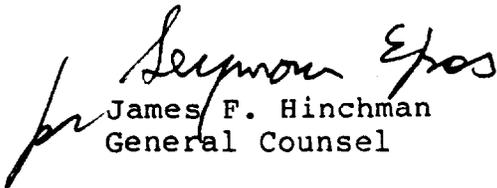
In addition, the fact that the fourth evaluation factor specifically required detailed experience for individual members of the proposed project team is a further indication that the solicitation contemplated both organizational and individual A-76 experience. This provision, which required the listing of individual employees' experience, would have been redundant if the other factors noted above also referred only to employee experience rather than organizational experience.

Thus, we think that it was clear from the solicitation that, to be considered technically acceptable, offerors were required to show evidence of organizational A-76 project experience. See Norfolk Ship Systems, Inc., B-219404, Sept. 19, 1985, 85-2 CPD ¶ 309. As a result, we have no basis to question the agency's decision to reject Wildcard's proposal, since it included no evidence that the firm itself has completed any A-76 studies. In fact, it is clear on the face of the proposal that the firm could not have such experience since the proposal indicates that Wildcard is a recently started firm.

Since we agree with the agency's rejection of Wildcard's proposal because it did not include evidence of the required organizational experience, we need not consider whether the firm's proposal also failed to include evidence that the proposed employees met the individual personnel experience requirements.

Finally, to the extent that Wildcard protests that the solicitation requirement of organizational A-76 experience was restrictive of competition, this issue is untimely. Our Bid Protest Regulations require that protests based upon alleged improprieties in a solicitation must be protested prior to the closing date for the receipt of proposals. 4 C.F.R. § 21.2(a)(1). Here, as explained, it was clear that the solicitation required organizational A-76 project experience; yet Wildcard did not protest until March 30, after the March 3 closing date. Thus, we will not consider this issue.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel