



Comptroller General
of the United States
Washington, D.C. 20548

Cooper
143369

Decision

Matter of: Vertrans Design Associates
File: B-242080
Date: March 8, 1991

Edward V. Gregorowicz, Jr., Esq., and Bruce I. Selfon, Esq., Cotten, Day & Selfon, for the protester.
Robert C. Mackichan, Jr., Esq., and Adam C. Striegel, Esq., General Services Administration, for the agency.
Sabina K. Cooper, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency decision to terminate negotiations with the protester for architect-engineer services was not arbitrary or unreasonable where the agency discovered inaccuracies in the information regarding the number of in-house professional employees listed in the protester's Standard Forms 254 and 255 and the requirement in the Commerce Business Daily that the project would be limited to firms with at least 75 percent of services performed in-house.

DECISION

Vertrans Design Associates protests the award of a contract to Syska & Hennessy Engineers under request for proposals (RFP) No. GS-03P-89-DXD-0079, issued by the General Services Administration (GSA) for professional engineering services involving elevator and escalator design. Vertrans argues that GSA improperly terminated negotiations with the firm after erroneously concluding that Vertrans was a collection of independent contractors and consultants, rather than a primary firm capable of performing services in-house, in compliance with the RFP.

We deny the protest.

Generally, under the selection procedures set forth in the Brooks Act, as amended, 40 U.S.C.A. §§ 541 et seq. (West Supp. 1989), and its implementing regulations, Federal Acquisition Regulation (FAR) part 36.6, a contracting agency must publicly announce requirements for architect-engineer (A-E) services. An A-E evaluation board established by the agency evaluates the A-E performance data and statements of qualifications already on file, as well as those submitted in response to the announcement of the particular project, and selects at least

three firms for discussions. The board recommends to the selection official, in order of preference, no less than three firms deemed most highly qualified. The selection official then lists, in order of preference, the firm most qualified to perform the required work. Negotiations are held with the firm ranked first. If the agency is unable to agree with the firm as to a fair and reasonable fee, negotiations are terminated and the second ranked firm is invited to submit its proposed fee. Asbestos Mgmt., Inc., B-237841, Mar. 23, 1990, 90-1 CPD ¶ 325.

GSA announced the procurement in the Commerce Business Daily (CBD) on July 18, 1989. The CBD notice stated that the project would be limited to "primary firms capable of performing a minimum of 75 percent of services in-house in an existing active design construction management office in the designated geographic areas"; required respondents to demonstrate capability and a planned approach to perform at least 75 percent of the services with "in-house resources from existing offices located in the geographic area"; and noted that offerors with "in-house technicians and mechanics" would be given preference. The announcement established a deadline of September 7 for receipt of Standard Form (SF) 254, Architect-Engineer and Related Services Questionnaire, and SF 255, Architect-Engineer and Related Services for Specific Project.

The SF 254 is the statement of qualifications submitted annually by firms wishing to be considered for A-E contracts. Among other items, it requires each firm to indicate the names of not more than two principals, and its total personnel. The firm must also list the personnel by discipline. SF 255, a supplement to SF 254, which requests a list of a firm's additional qualifications with respect to the specific project, requires the firm to list personnel by discipline and indicate the total personnel. The instructions to SF 254 indicate that all information submitted should be current and accurate as of the date of the submission, and requires offerors to show the "total number of employees" by discipline as well as the total personnel in all offices. SF 255 also includes the requirement for the submission of current and factual information and indicates that the "number of personnel by discipline presently employed" is to be inserted. The forms further ask for a list of "outside key Consultants/Associates" anticipated for the project.

GSA received five responses to its CBD announcement. Vertrans' SF 254 and SF 255 indicated that Vertrans employed 21 persons as of September 6, 1989, and listed them by discipline. GSA selected three firms, including Vertrans and Syska, for discussions following a preliminary evaluation. Following these interviews, the evaluation board unanimously

recommended that Vertrans be selected for award. On November 9, the source selection official recommended that negotiations begin with Vertrans.

On February 28, 1990, the GSA Regional Office of Inspector General (IG) conducted an audit of Vertrans. The IG found that the information contained in Vertrans' SF 254 and SF 255 did not accurately reflect the firm's office staffing. While the forms Vertrans filed indicated that Vertrans employed 21 people as of September 1989, the IG found that the firm employed only one permanent employee, the sole proprietor, and that all other services were provided on a consultant/subcontractor basis. Consequently, by letter of September 19, 1990, the contracting officer informed Vertrans that its proposal was nonresponsive to the technical requirements of the solicitation in that 75 percent of the required services could not be performed by Vertrans using in-house resources.

By letters of September 28 and October 16, Vertrans requested that GSA reverse its determination and submitted documents dated May 16 entitled "Agreement for Professional Services" for each "employee" and one document entitled "Employment Agreement" to demonstrate that the firm did meet the 75 percent in-house capability requirement. Upon consideration of the documents, the contracting officer determined that the agreements in question were for consulting services rather than permanent employment, with the exception of the employment agreement between the sole proprietor and one other person dated March 20, 1989. Based on this finding, GSA again rejected Vertrans as nonresponsive on October 26, 1990. A letter from the IG to GSA followed on November 1, confirming the IG's original findings and noting that Vertrans stated on October 16 that the firm was paying payroll taxes for only one employee, a secretary/receptionist. Vertrans again asked for reconsideration of the GSA determination and was informed by telephone on November 15 that GSA would not reconsider. Vertrans filed its protest in our Office on that day.

Upon further review, on December 11 the contracting officer rescinded the determination that Vertrans' offer was non-responsive as inappropriate in a negotiated procurement. The evaluation board then reconvened and determined on December 14 that negotiations should begin with Syska, now the highest rated offeror, since Vertrans' original higher ranking had been based on its inaccurate SF 254 and SF 255, and, based on the new information, Vertrans had received a significantly lower score under the organization and management evaluation factor.

Vertrans essentially argues that its design team fulfills the requirement of the solicitation for a primary firm with 75 percent of services performance in-house, although its team members are not strictly "employees."

Our review of the agency selection of an A-E contractor is limited to examining whether that selection is reasonable. Harding Lawson Assocs., Inc., B-230219, May 20, 1988, 88-1 CPD ¶ 483. It is not the function of our Office to make our own determination of the relative merits of the submissions of A-E firms. The procuring officials enjoy a reasonable degree of discretion in evaluating such submissions and we will not substitute our judgment for that of the procuring agency by conducting an independent examination. Id.

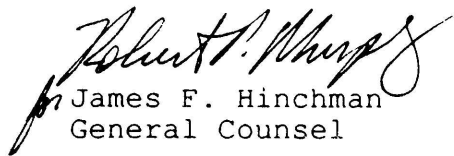
While awards may not be based on criteria not made known to prospective offerors, here GSA clearly announced in the CBD notice that the project would be limited to firms "performing at least 75 percent of services in-house," with "in-house resources," and that preference would be given to firms with "in-house technicians and mechanics." In addition, the instructions to SF 254 and SF 255, which were to be submitted to GSA by the closing date, indicate that offerors are to show the "total number of employees" (SF 254), or the "number of personnel . . . presently employed" (SF 255). The forms distinguish between employees/personnel and outside consultants/associates.

Vertrans has acknowledged that its firm does not have professional employees; rather, Vertrans is a group of design professionals affiliated by formal agreement with Vertrans, who agree to share in projects as a design team, with the president of Vertrans as the sole principal. Vertrans further admits that the design team members do not draw salaries from the firm and that Vertrans pays payroll taxes for only one employee, a secretary/receptionist.

Under these circumstances, we find it was reasonable for GSA to conclude that the employment status of the design team members reflected on Vertrans' SF 254 and SF 255 was inaccurate because Vertrans by its own admission does not have salaried, in-house employees on its staff, as required by the CBD notice. Accordingly, it was also reasonable for the evaluation board to reconvene and change its rating of Vertrans in the organization and management area as a result of the new information provided by the audit, in light of the agency's stated requirement for an in-house professional capability. Oceanprobe, Inc., B-221222, Feb. 26, 1986, 86-1 CPD ¶ 197. If Vertrans had an objection to the restriction of the solicitation to firms with in-house capability, it should have protested the inclusion of that requirement in the CBD

notice before the September 7, 1989, closing date for receipt of SF 254 and SF 255. See 4 C.F.R. § 21.2(a)(1) (1990).

The protest is denied.


for James F. Hinchman
General Counsel