Perry

143731

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: J&J Maintenance, Inc.--Reconsideration

File: B-240799.3; B-240802.3

Date: April 23, 1991

Donald E. Barnhill, Esq., East & Barnhill, for the protester. Anne B. Perry, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Decision holding that there is no requirement for a common cut-off date for receipt of revisions to proposals under step one of two-step sealed bid procurement is affirmed on reconsideration where governing regulations and policy behind this procurement method clearly demonstrate that there is no such requirement.

2. Contention that General Accounting Office (GAO) failed to adequately address argument that awardee failed to meet solicitation's minimum staffing requirements and that therefore its bid was nonresponsive is without merit where GAO's review not only included a review of the responsiveness of the awardee's bid submitted under step two but--contrary to the protester's belief--also the technical acceptability of the awardee's proposal under step one.

3. General Accounting Office affirms its dismissal, as untimely, of contention that awardee had not met alleged definitive responsibility criteria, where that issue was first raised in protester's post-conference comments and clearly was not presented in the initial protest.

DECISION

J&J Maintenance, Inc. requests reconsideration of our decision in J&J Maintenance, Inc., B-240799; B-240802, Dec. 19, 1990, 90-2 CPD ¶ 504, in which we dismissed in part and denied in part its protests under a two-step sealed bid procurement (solicitation Nos. DAKF23-90-R-0301 and DAKF23-90-B-0045), issued by the Department of the Army for maintenance services for the United States Army Medical and Dental Activities at Fort Campbell, Kentucky. We affirm our decision.

Under step one of this procurement the agency conducted several rounds of discussions with both offerors but did not always establish the same cut-off date for receipt of their revised proposals. In our decision, we found that in a two-step sealed bidding acquisition there i no requirement for a common cut-off date for discussions, and that since J&J Maintenance was provided with an opportunity sufficient to make its step one proposal acceptable, the agency had satisfied its obligation, under Federal Acquisition Regulation (FAR) § 14.503-1(f)(1), to obtain additional information from offerors who are not technically acceptable but are reasonably susceptible to being made so. In addition, we found that the agency did not engage in technical leveling or technical transfusion in its discussions with the low offeror, Hospital Shared Services of Colorado (HSSC). We further found that HSSC's bid was fully responsive to the terms of the solicitation, and that the protester's allegation that HSSC would not be able to perform at its bid price concerned a matter of responsibility not reviewed by our Office.

In its request for reconsideration, J&J Maintenance challenges our decision on three grounds. First, the protester alleges that we erred in concluding that there was no requirement for a common cut-off date. Second, the protester alleges we failed to adequately address whether HSSC met the minimum staffing requirements of the solicitation. Lastly, J&J Maintenance argues that we erred in dismissing the protester's allegation that HSSC did not meet what the protester now calls the definitive responsibility criteria of the solicitation.

In support of its first argument--that we erred in not finding a requirement for a common cut-off date under step one of the procurement--the protester states that in the two decisions it found which referred to the closing dates under the first step of a two-step procurement, there were common cut-off dates.1/ J&J Maintenance alleges that "[i]ndeed the practice of fixing a common cut-off date is so standard that it explains the lack of precedent on this issue." The protester also argues that we misinterpreted the applicable FAR provision insofar as it states that the "contracting officer shall fix an appropriate time for bidders to conclude discussions . . . ." FAR § 14.503-1(f)(2).

We are not persuaded by these assertions. The fact that contracting agencies on different two-step procurements may have required common cut-off dates does not mean that a common cut-off date is a regulatory requirement. Further, the lack

---

1/ The protester cites B-127307, March 30, 1970, and Control Central Corp.; American Technical Servs., Inc., B-214466.2; B-214466.3, July 9, 1984, 84-2 CPD ¶ 28.

of precedent in the area does not demonstrate that a common cut-off date requirement is a self-evident proposition; it may indicate only that this issue has not been appropriately raised previously. With respect to the regulations, we find, again, that the protester fails to read the regulation as a whole. FAR § 14.503-1(f) provides for contracting officers to engage in discussions with those offerors who can make their proposals acceptable by the submission of additional clarifying and supplementing information the purpose of which is to widen the arena of competition under step two of the procurement. Correspondingly, since proposals which are technically acceptable as initially submitted are already eligible to compete under step two, the contracting officer need not engage in discussions with the offerors who submitted those proposals, and the regulation does not provide for discussions with such offerors. Since discussions need not be held with all offerors, it would be illogical to conclude that there is a requirement for a common cut-off date for all offerors. Further, while the regulations governing negotiated procurements specifically require a common cut-off date, the regulations governing two-step procurements do not. Compare FAR §§ 15.611(b)(3) and 14.503-1(f)(2). Accordingly, we affirm our prior holding that there is no requirement for a common cut-off date during step one.

J&J Maintenance next argues that we failed to adequately address its argument that HSSC did not meet the solicitation's minimum staffing requirement and that therefore its bid under step two was nonresponsive. The protester cites Palmetto Enters., Inc. et al., B-193843 et al., Aug. 2, 1979, 79-2 CPD ¶ 74, in support of its argument. Palmetto is inapposite since it involved a nonresponsiveness determination based on a bidder's specific indication in its manning charts that it did not meet the minimum number of staff hours required by the solicitation. No such circumstances are present here; rather, J&J's argument in this regard is nothing more than an allegation that since HSSC's bid appears to be below cost, the bid must not include the requisite number of staff hours. In addition, the protester believes that we did not review HSSC's step one proposal but merely its bid under step two. In fact, as part of our resolution of the initial protest, we reviewed HSSC's proposal under step one as well as its bid under step two and determined that HSSC bid the minimum staff hours required under the contract line items under dispute, and thus, unlike the bidder in Palmetto, fully complied with all material terms and conditions of the solicitation.

Lastly, J&J Maintenance argues that our decision erred in dismissing as untimely and piecemeal its allegations made in its post-conference comments that HSSC failed to meet definitive responsibility criteria and therefore should have been found nonresponsible. The protester concedes that in its

protest it never referred to "definitive responsibility criteria." Nevertheless, it now contends that its correspondence was sufficient to timely and adequately raise the issue of whether HSSC had failed to meet alleged definitive responsibility in the form of minimum staffing requirements. Even assuming that this procurement involves a definitive responsibility criterion, of which we are not persuaded,2/ we disagree with J&J Maintenance's position. The protester was quite specific as to its bases for protest and it clearly did not present this issue in its initial protest. Accordingly, the dismissal portion of our decision was appropriate.

The prior decision is affirmed.

James F. Hinchman
General Counsel

2/ The protester contends on reconsideration that because the procurement's minimum staffing requirements are "specific," they therefore constitute "definitive" responsibility criteria. Specificity or objectivity alone is not the hallmark of whether a solicitation requirement is a definitive responsibility criterion: it is whether it is established as a measure of an offeror's ability to perform a contract and must be satisfied by an offeror as a prerequisite to an affirmative responsibility determination. It does not include matters which are evaluated in determining the technical acceptability of an offeror's proposal. Commercial Bldg. Serv., Inc., B-237865.2; B-237865.3, May 16, 1990, 90-1 CPD ¶ 473. Here, as we noted above, HSSC's proposed staffing was evaluated and found acceptable under step one of this procurement.