

144094



Comptroller General
of the United States

Washington, D.C. 20546

Decision

Matter of: Logistics Operations, Inc.

File: B-240726.4

Date: June 4, 1991

Oscar J. Sanders for the protester.

John J. Duffy, Esq., for Tate Facilities Service, Inc. an interested party.

Louis E. Hansen, Esq., Defense Logistics Agency, for the agency.

James M. Cunningham, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest against solicitation workload estimates is untimely where first filed months after closing date for receipt of initial proposals.

2. Cost realism analysis was not required where contracting agency properly did not require offerors to submit cost proposals because of anticipated price competition for service requirements which were not new but had been previously contracted for and where quality or service shortfalls were not concerns in view of past contract cost experience.

DECISION

Logistics Operations, Inc. (LOI) protests an award to Tate Facilities Service, Inc., by the Defense Logistics Agency (DLA) under DLA request for proposals (RFP) No. DLA005-90-R-0003, issued on July 31, 1990, for operation on a firm, fixed-price contract basis, of DLA's "consolidation and containerization point," Lathrop, California. LOI contends that the RFP's workload estimates were defective and that DLA failed to make a proper cost realism analysis of Tate's proposed price which LOI considers to be unreasonably low.

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

Offerors were asked to submit proposals which would demonstrate, in detail, how the offeror intended to perform the work requirements under the RFP. Offerors were advised that award would be made to the "responsible offeror submitting the lowest-priced technically acceptable proposal." Seven offers were received on September 5, 1991. After evaluating proposals, DLA awarded a contract to FWK on December 31, 1990. However, DLA rescinded FWK's contract on January 23, 1991, when FWK provided evidence of a "mistake in [its] certification as a small disadvantaged business concern." Immediately thereafter, DLA awarded a contract to Tate, prompting LOI's current protest which was filed in our office on January 29.

LOI's protest against the RFP's workload estimates is untimely filed under our Bid Protest Regulations, 4 C.F.R. § 21.2(a) (1991), since the protest concerns an alleged, apparent solicitation impropriety and was filed months after the RFP's closing date. While the protester alludes to certain information which became available after the closing date, his basic contention concerns alleged changes which occurred prior to the closing date, and which were known by the agency and the protester prior to the closing date. Consequently, we dismiss this ground of protest.

We have previously decided that DLA was not required to obtain cost or pricing data under this RFP because of the expected price competition and since the RFP provided for award to the lowest-priced, technically acceptable offeror. Caltech Serv. Corp., B-240726, Dec. 18, 1990, 90-2 CPD ¶ 497. The absence of cost information limits DLA's ability to perform a cost realism evaluation. To the extent LOI is protesting that the RFP should have required offerors to provide DLA with information suitable for a cost realism analysis, LOI's protest is untimely. It was not filed in our Office prior to the closing date for receipt of proposals. See 4 C.F.R. § 21.2(a)(1).

While Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 215.805.70(b), provides that there may be instances where there is "information available [only] from government sources to perform a cost realism analysis," the record does not show the availability to DLA of other cost information. Further, there is no requirement that an agency conduct a cost realism analysis merely because such information is available. DFARS § 215.805.70(a) provides that a cost realism analysis may be appropriate even when adequate competition exists, thus making the decision of whether to consider such an analysis a matter of agency discretion. See Research Management Corp., 64 Comp. Gen. 368 (1990), 90-1 CPD ¶ 352. There is nothing in this record which suggests that the agency abused its discretion in determining that a cost

realism analysis was not needed particularly since cost or pricing data was not required under the RFP, the requirements are not new, and the quality of service was not a concern because of the agency's past contract experience.

To the extent that LOI is alleging that Tate's price is unreasonable because Tate has submitted a below-cost offer under this RFP, which is for a firm, fixed-price contract, the allegation concerns Tate's ability to perform the contract at the offered price, which is a matter of responsibility. Here, the agency has determined that Tate is responsible, and our Office will not review such an affirmation determination of responsibility absent a showing of possible fraud or bad faith by government officials, or misapplication of definitive responsibility criteria, neither of which are present. See 4 C.F.R. § 21.3(m)(5); Keyes Fibre Co., B-225509, Apr. 7, 1987, 87-1 CPD ¶ 383. The submission of a below-cost offer is not legally objectionable in itself. Hose-McCann, Tel. Co., Inc., B-240382.3, Sept. 24, 1990, 90-2 CPD ¶ 252. Consequently, we dismiss this ground of protest.

The protest is dismissed in part and denied in part.


James F. Hinchman
General Counsel