



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hadson Defense Systems, Inc.; Research
Development Laboratories

File: B-244522; B-244522.2

Date: October 24, 1991

Joseph J. Dyer, Esq., and Leland G. Dribin, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for the protesters, Stephen M. Sorett, Esq., for AAI Corporation, Bob Cambridge, Esq., for American Systems Corporation, and William A. Wotherspoon, Esq., and Bernard Fried, Esq., for Unisys, interested parties. Jeffrey I. Kessler, Esq., Christopher E. Kernan, Esq., Dominick J. Brognano, Esq., and Philip D. Paschall, Esq., Department of the Army, for the agency. M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that 71-days was insufficient time for preparation of proposals is denied where solicitation is reprourement of recently defaulted contract, preparation period exceeded statutory minimum, and there is no indication period allowed precluded competition to the maximum extent practicable.

2. Protest alleging improprieties in solicitation as to contract type and delivery date provisions is dismissed as untimely where not filed with procuring agency or General Accounting Office prior to closing date for receipt of initial proposals.

3. Protest of apparent solicitation defect--agency's failure to set aside procurement for small disadvantaged business concerns--is dismissed as untimely where filed with General Accounting Office more than 10 working days after the protester received notice of denial of its agency-level protest.

DECISION

Hadson Defense Systems, Inc. and Research Development Laboratories (RDL) protest the terms of Department of the Army request for proposals (RFP) No. DAAB10-91-R-1035, for

the design, development, fabrication, and installation of computer-controlled maintenance training devices for three electronic warfare tactical jamming systems. Hadson and RDL raise several arguments, primarily asserting that the solicitation is restrictive of competition because it does not allow sufficient proposal preparation time.

We deny the protests in part and dismiss them in part.

BACKGROUND

The RFP is a reprocurement of a prior competitive contract, awarded to Hadson's predecessor, Ultrasystems Defense and Space, Inc., which the government terminated for default on May 24, 1990, due to inadequate progress in contract completion.¹ Prior to the issuance of the reprocurement RFP here, the Army had intended to negotiate a sole-source contract with Unisys. That intended sole-source, however, was protested by Hadson and two other firms. Subsequently, the Army canceled the sole-source procurement on January 11, 1991, after being unable to determine whether Unisys' submitted price was fair and reasonable. At the time of the cancellation, the agency notified Hadson and Unisys that the requirement for the maintenance trainers was on-going and that it intended to issue a new solicitation in the near future.

The resulting competitive reprocurement, the subject of the protest here, was synopsized in the Commerce Business Daily (CBD) on February 7. The RFP, issued on April 29, was unrestricted and requested offerors to submit firm-fixed-priced proposals. As issued, it provided for a 45-day proposal preparation period with a June 12 closing date for receipt of initial proposals. Amendment No. 3 to the RFP, dated May 30, extended the proposal preparation period an additional 26 days for a total preparation time of 71 days, with a July 8 amended closing date.² Award was to be made on the basis of the proposal determined to be most advantageous to the government, price and other factors considered. The protests here were filed prior to the amended closing date, Hadson's on June 18, and RDL's on June 27. Neither protester submitted a proposal by the July 8 amended closing

¹Ultrasystems' appeal of the legal propriety of the default termination is pending with the Armed Services Board of Contract Appeals.

²Both Hadson and RDL had requested extensions prior to the issuance of amendment No. 3.

date. The agency has received offers, but has made no award on the procurement.

PROPOSAL PREPARATION TIME

Hadson and RDL argue that the 71 days allowed for proposal preparation was inadequate; they cite in support of this argument a representation in the agency's draft justification and approval (J&A) for the canceled sole-source procurement with Unisys that it would take any company except Unisys a total of 7 months to prepare a proposal--"four months for companies unfamiliar with the systems to become knowledgeable [and] 3 months to prepare a proposal to meet the . . . requirements." Although Hadson concedes that a full 7 months preparation time may not be necessary, it contends it cannot estimate the actual time needed until its other protest bases are resolved. RDL, on the other hand, believes it could prepare a proposal within an uninterrupted 60-day period, "once [the Army] has made the minimum commitment regarding funding." (See discussion of funding allegation infra, at page 6). According to RDL, the additional 26 days for proposal preparation, provided 13 days before the initial closing date, came too late in the procurement cycle to afford effective relief, since by that time it had suspended proposal preparation in the belief that it could not prepare a viable proposal within the 45 days initially allowed.

Generally, agencies must allow a minimum 30-day response time for receipt of proposals from the date of issuance of a solicitation. 15 U.S.C. § 637(e)(3)(B) (1988); Federal Acquisition Regulation (FAR) § 5.203(b). However, in the case of a repurchase after default, the statutes and regulations governing regular federal procurements are not strictly applicable. TSCO, Inc., 65 Comp. Gen. 347 (1986), 86-1 CPD ¶ 198. To repurchase the same requirement on a defaulted contract, the contracting agency may use any terms and acquisition methods deemed appropriate for the repurchase as long as competition is obtained to the maximum extent practicable, and the repurchase is at as reasonable a price as practicable. FAR § 49.402-6; Aerosonic Corp., 68 Comp. Gen. 179 (1989), 89-1 CPD ¶ 45. We will review a repurchase to determine whether the contracting agency proceeded reasonably under the circumstances. TSCO, Inc., supra; National Med. Staffing, Inc., B-239695, Sept. 14, 1990, 90-2 CPD ¶ 212.

Here, the RFP, as amended, allowed a total of 71 days between the date the RFP was issued and the date on which proposals were due. This period of time was clearly in excess of the 30-day statutory requirement. Also, it was in excess of the standard lead time of 45 days, which the

agency asserts would generally be warranted for procurements of a complexity level similar to that here, and which was provided in the original competitive procurement with essentially the same performance requirements. The time schedule set forth in the draft J&A on the canceled sole-source procurement with Unisys does not show that the proposal preparation time period provided here was insufficient. We agree with the Army that the sole-source cancellation and the determination to proceed with a competitive procurement was inherently a recognition that the time schedules set out in the unapproved J&A were inaccurate and that other offerors could in fact compete within a more reasonable time frame. In this regard, the Army's determination to cancel was based in part on the existence of the firms which protested the sole-source to our Office, representing that they were prospective offerors.

Furthermore, both protesters were on notice in February 1991, from the synopsis of the requirement in the CBD, that the Army proposed to resolicit competitively. This notice period provided an approximate additional 3-month planning period for potential offerors. The protesters have failed to show why they were unable to submit proposals given the extended preparation period, along with the additional notice period. Hadson, specifically, has failed to give any reason why it, as the incumbent (albeit defaulted) contractor for this effort, could not prepare a timely proposal when it had already submitted an acceptable proposal for the requirement in the prior competition.

Finally, while RDL complains that the uninterrupted 60-day period it needed to prepare and submit a proposal was not available because of the agency's delay in extending the closing date, the record shows that any delay should have caused the firm no more than a 2-day interruption out of the extended 71-day total period provided. Presumably, the protester continued to work on its proposal until May 28, when it requested an extension from the agency. Even if the protester suspended its proposal preparation on May 28 until the extension was granted 2 days later, any suspension of preparation would have caused only a 2-day interruption to

the firm, and still would have left 68 days, or 8 more days than the protester now asserts it needs.³

Since the time allowed here was consistent with statutory requirements, and the protesters have not established that the time allowed was unreasonable or insufficient, particularly when measured from their initial awareness in February 1991 of the Army's intention to reprocore competitively, see Massa Prods. Corp., B-236892, Jan. 9, 1990, 90-1 CPD ¶ 38, we have no reason to object to the time allowed for preparation of proposals. See Control Data Corp., supra. (31 days found sufficient for preparation of proposals). There also is no basis for finding that the preparation period precluded competition to the maximum extent practicable. Again, there has been no showing that the time allowed was inadequate for the protesters, and there is no evidence that the allotted time period prevented other offerors from submitting proposals; the record shows that a number of proposals were received. See National Med. Staffing, Inc., supra.

CONTRACT TYPE AND DELIVERY DATE

Hadson protests as restrictive of competition the contract type--firm-fixed-price--and delivery period--24 months after award--contained in the solicitation as issued on April 29. Our Bid Protest Regulations require that protests based upon alleged solicitation improprieties apparent prior to the closing date for receipt of initial proposals be filed prior to the closing date. 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991); Engelhard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324. The alleged contract type and delivery period improprieties were apparent on the face of the solicitation and thus were required to be protested prior to the June 12 closing date for receipt of initial proposals. As Hadson's protest on these bases was not filed with our Office until June 18, it is untimely and will not be considered.

³Further, RDL fails to explain why the firm waited until May 28 to request an extension. It is apparent from the firm's May 28 letter to the agency requesting an extension that the firm's concern about the perceived insufficient time for proposal preparation was present immediately after the May 14 preproposal conference and the May 15 viewing by the firm of documents in the agency's reading room.

SMALL DISADVANTAGED BUSINESS EVALUATION PREFERENCE

RDL challenges the agency's June 3 denial of the firm's agency-level protests of May 20 and May 28, objecting to the agency's failure to include in the RFP an evaluation preference for small disadvantaged businesses (SDB).⁴ This basis of protest also is untimely. Where a protest initially is filed with a contracting agency, any subsequent protest to our Office must be filed within 10 working days of actual or constructive knowledge of initial adverse agency action on the protest, 4 C.F.R. § 21.2(a)(3). RDL acknowledges it received telephone notice of the Army's refusal to incorporate an SDB evaluation preference on June 3; it thus was required to protest on this ground to our Office no later than June 17. Since RDL did not file its protest until June 27, the protest is untimely, even though it was filed prior to the amended closing date for receipt of proposals. See Commercial Energies, Inc., B-242261.2, Mar. 21, 1991, 91-1 CPD ¶ 312.

FUNDING

RDL contends that the Army failed to assure prospective offerors that funding for the requirement would be available; the solicitation advises offerors that funds were not currently available and that award would not be made until appropriated funds were made available. This basis of protest is without merit; a firm is free to refrain from bidding if it chooses not to take the financial risk necessary to bid in the face of a solicitation notice that no funds are then available. See Calculus, Inc., B-228393, Oct. 21, 1987, 87-2 CPD ¶ 381.


ACCESS TO DATA

Hadson and RDL contend that the Army improperly restricted competition by failing to provide offerors with certain technical information, known as SEOS data, developed by Unisys under a prior contract with the Army. This argument is academic. Hadson already possesses the data, having

⁴Section 844 of the National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, 102 Stat. 2027, established for the Department of Defense (DOD) a goal of awarding SDBs 5 percent of the dollar value of contracts awarded for fiscal year 1990. As part of the implementation of this program, DOD promulgated regulations providing for the application of a 10 percent evaluation preference to SDBs. DOD Federal Acquisition Regulation Supplement (DFARS) §§ 219.7000 and 2109.7001.

obtained it from the Army as government-furnished information under the firm's defaulted contract. (Hadson is not an interested party to protest on this ground on behalf of other offerors. 4 C.F.R. § 21.1(a); see Galaxy Custodial Servs., Inc., et al., 64 Comp. Gen 593, (1985), 85-1 CPD ¶ 658).⁵ As for RDL, as mentioned above, the firm did not submit a proposal and argues only that the Army failed to provide for access to SEOS data to the successful offeror, not that the SEOS information was necessary to submit a proposal. Consequently, the issue of RDL's access to the information would be potentially viable only if we sustained its protest on other grounds; we have found RDL's protest grounds untimely or without merit. (In any event, during the pendency of the protest, the agency did provide for access to the data by RDL by authorizing Hadson to make available all SEOS data currently in its possession).⁶

The protests are denied in part and dismissed in part.


James F. Hinchman
General Counsel

⁵In its comments on the agency report, Hadson for the first time contends that it is not certain that it has all of the SEOS data. We will not consider this untimely, piecemeal presentation of the firm's protest. 4 C.F.R. § 21.2(a)(2); Anderson-Elerding Travel Serv. Inc., B-238527.3, Dec. 19, 1990, 90-2 CPD ¶ 500.

⁶In the area of access to information, Hadson further argues that the Army failed to provide offerors on the reprocurment here with discussion questions and answers that had been posed to Unisys during the canceled sole-source procurement. During the pendency of the protest, however, we reviewed the discussion questions and answers at issue and those which conveyed any additional information on the requirement were released by the agency.