



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

Decision

Matter of: Keeson, Inc.; Ingram Demolition, Inc.

File: B-245625; B-245655

Date: January 24, 1992

William E. Hughes III, Esq., Whyte and Hirschboeck, for Keeson, Inc., and Joseph Ingram, Jr. for Ingram Demolition, Inc., the protesters.

Robert E. Beeton, Department of Veterans Affairs, for the agency.

Stephanie G. Weldon, Esq., Glenn G. Wolcott, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Solicitations unduly restrict competition where agency's standard clause automatically excludes any offeror alleged to have violated asbestos regulations, without regard to validity of allegation.

2. Solicitation provision which requires offeror to have completed 5 asbestos abatement projects with the last 3 years but also to have 5 years of an established asbestos abatement business is unduly restrictive in the absence of any rational explanation as to why agency's needs require such a restrictive provision.

DECISION

Keeson, Inc. protests the terms of solicitation No. 695-9-92; Ingram Demolition, Inc. protests the terms of solicitation No. 680-18-91. Both solicitations were issued by the Department of Veterans Affairs (VA) for asbestos removal and related work at VA Medical Centers.¹ Both solicitations include a clause establishing definitive responsibility criteria which both protesters challenge as being unduly restrictive of competition.

We sustain the protests.

¹Solicitation No. 695-9-92 relates to work to be performed at the VA Medical Center in Milwaukee, Wisconsin; solicitation No. 680-18-91 relates to work to be performed at the VA Medical Center in Tuskegee, Alabama.

The solicitations contain the following clause identifying certain minimum qualifications offerors must possess:

"C. Minimum Qualifications: Abatement Construction Company and assigned personnel for this project shall meet the following minimum requirements:

"1. The-Abatement-Construction Company: has an established asbestos abatement business for 5 years, has conducted within the last 3 years 5 asbestos abatement projects 3 of which are of comparable complexity and dollar value with this project; has not defaulted on any project within the last five years; has not been cited or has not been a defending party of any legal action for violation of asbestos regulations during the last five years; [and] . . . has an adequate number of qualified personnel available for this project"

The VA states that this provision is included in all Department of Veterans Affairs solicitations for this type of work and cannot be waived on an individual basis by local procurement officials.

Keeson challenges the VA's exclusion of any offeror that has been "cited or . . . been a defending party of any legal action for violation of asbestos regulations" or that has "defaulted on any project" within the last 5 years. Both Keeson and Ingram challenge the exclusion of any offeror that has not been "an established asbestos abatement business" for at least 5 years.

In defending the solicitations, the agency asserts that the requirements established by the challenged clause are reasonable, offering the following explanation:

"Since this work is to be performed throughout an inhabited hospital, the requirements set forth in the solicitation are reasonable. Due to the hazardous and critical nature of the work, and the need to comply with local, state and Federal environmental laws, a contractor with proven capabilities is required. The requirements set forth in the solicitation were imposed for the safety and protection of veterans being treated in the hospital, government personnel employed by the hospital, visitors, and contractor employees working on the asbestos abatement project."

The agency recited this paragraph verbatim in its response to both protests and, in both protests, this paragraph

constituted the complete substantive explanation supporting the challenged restrictions.

INTERESTED PARTY

As a preliminary matter, the VA challenges Keeson's standing as an interested party to bring its protest. Pursuant to the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551, 3553(a) (1988), and our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1991), a protester must be an interested party before this Office will consider the merits of its protest; that is, the protester must have a direct economic interest in the award of the contract or a substantial prospect of receiving an award if the issues are resolved in its favor. See, e.g., Fed. Information Technologies, Inc., B-240855, Sept. 20, 1990, 90-2 CPD ¶ 245. The VA notes that, after filing its protest, Keeson submitted an offer which was not low. The VA asserts that, because Keeson is not the low offeror, it is not in line for contract award and, therefore, does not qualify as an interested party. We disagree.

The solicitation challenged by Keeson does not provide for award on the basis of price. Rather, the request for proposals provides for award on the basis of two technical criteria (technical approach and organization, personnel, facilities) as well as cost. Where an agency uses such an evaluation approach, award to an offeror with a significantly higher price than that offered by a competitor may be made if that offeror's proposal offers a significant technical advantage to the government. See Textron Marine Systems, B-243693, Aug. 19, 1991, 91-2 CPD ¶ 162; Cadillac Gage Co., B-209102, July 15, 1983, 83-2 CPD ¶ 96. The agency has provided no information regarding the relative ranking of Keeson's technical proposal with regard to the other proposals or any documentation of a final ranking of proposals based on both cost and technical factors. Accordingly, the fact that Keeson was not the low offeror does not establish that it would not be in line for award if its protest were sustained. Keeson therefore qualifies as an interested party.

REGULATORY VIOLATIONS AND PRIOR DEFAULT

Keeson protests VA's exclusion of any offeror that has been "cited or . . . been a defending party [in] any legal action for violation of asbestos regulations during the last five years." Keeson argues that this restriction gives no consideration to whether a particular allegation of regulatory violations had merit and effectively excludes those exonerated of alleged violations along with actual violators. The agency's response, quoted in its entirety above, does not address this issue.

In preparing for the procurement of supplies or services, the procuring agency must specify its needs and solicit offers in a manner designed to achieve full and open competition, so that all responsible sources are permitted to compete, 41 U.S.C. § 253(a) (1988). A solicitation may include restrictive provisions only to the extent necessary to satisfy the needs of the agency or as otherwise authorized by law. 41 U.S.C. § 253(a)(2)(B). Where a solicitation provision is challenged as restrictive, the procuring agency must provide support for its belief that the challenged provision is necessary to satisfy its needs. The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable; that is, whether the explanation can withstand logical scrutiny. Military Servs., Inc. of Georgia, B-221384, Apr. 30, 1986, 86-1 CPD ¶ 423. If an agency's explanation is inadequate or does not respond to the issue raised, our Office generally will have no basis for concluding that the challenged qualifications are reasonably related to the agency's minimum needs. See Wadell Eng'g Corp., 60 Comp. Gen. 11 (1980), 80-2 CPD ¶ 269; Am. President Lines, Ltd., B-236834.3, July 20, 1990, 90-2 CPD ¶ 53.

Here, the exclusion of any offeror charged with violating asbestos regulations clearly constitutes a significant restriction on the field of competition.² This exclusion applies without any consideration of the validity of the allegations,³ and in fact, since the agency has expressly stated that the provision may not be waived on an individual

²For example, by precluding any party that has "been a defending party of any legal action for violation of asbestos regulations during the last five years," the clause effectively excludes any party named as a defendant in a civil suit involving alleged regulatory violations--even if that suit is brought by, or on behalf of, one of the excluded party's competitors.

³The effect of these restrictions is analogous to an agency's repeated determinations of nonresponsibility or a long-term attempt by an agency to preclude a company from competing for government contracts which have been held to constitute de facto debarments. See Old Dominion Dairy Prods., Inc. v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980). Such actions require that the party being debarred must be afforded procedural due process, including notice and an opportunity to be heard on the basis for debarment. See FAR § 9.406-3; Frank Cain & Sons, Inc.--Request for Recon., B-236893.2, June 1, 1990, 90-1 CPD ¶ 516; Deloitte Haskins & Sells, B-222747, July 24, 1986, 86-2 CPD ¶ 107.

basis, the provision excludes an offeror even after a binding determination that the allegations were without merit. Thus, on this record, we find no reasonable basis for the provision and conclude that it unduly restricts competition⁴ in violation of CICA, 41 U.S.C. § 253.

Keeson also objects to exclusion of an offeror that has "defaulted on any project within the last five years." In context, we read this restriction as limited to a party's default on an asbestos abatement project, rather than on any project as the protester would read it. We find no basis, however, for an automatic exclusion of an offeror who has been defaulted on an asbestos project at any time within the previous 5 years. There is absolutely no showing on this record that the agency's needs warrant such an exclusion.

OFFEROR EXPERIENCE REQUIREMENT

Both Keeson and Ingram challenge the requirement that an offeror must have been "an established asbestos abatement business for 5 years." Both protesters note that, although their respective companies have not existed in their present forms for 5 years, the personnel which are the essence of their companies more than meet the experience requirement.⁵ The protesters argue that the requirement for corporate experience, in and of itself, provides no guarantee that the individuals actually involved in performing the work will have any experience in asbestos related projects and merely limits the field of competition to asbestos abatement companies that happen to have existed in the same corporate form for at least 5 years.

As indicated, the agency provides no explanation as to why, in seeking to protect people in and around its medical centers, the determining factor regarding an offeror's experience is whether the offeror has existed in its present

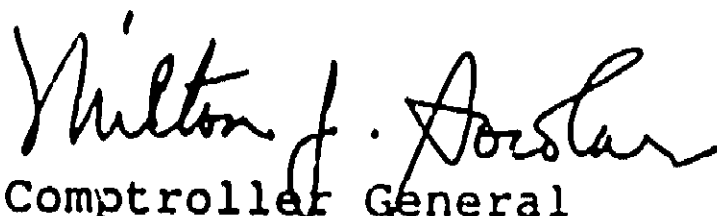
⁴Even if the restriction were limited to situations where the defending party had not been exonerated, we would question the length of the period involved. We note that the 5-year period of exclusion following a citation for a regulatory violation is substantially longer than the 3-year period normally imposed in debarment actions under the FAR. See FAR § 9.406-4.

⁵Ingram states that it has been in business for approximately 3 years and that its four superintendents each have more than 5 years experience and a combined amount of 29 years experience in the asbestos abatement industry. Keeson lists 10 asbestos abatement projects in which its personnel have been involved ranging in value from \$150,000 to \$800,000.

form and has had an established asbestos abatement business for at least 5 years. While a reasonable offeror experience requirement will be upheld, see, e.g., Brevco, Inc., B-232388, Dec. 29, 1988, 88-2 CPD ¶ 634, we have no basis on this record for concluding that the requirement here is reasonable. For example, although we do not dispute the VA's belief that offeror experience is a relevant consideration in connection with health and safety concerns in the hospital environment, the solicitations require that offerors have "conducted within the last 3 years 5 asbestos abatement projects 3 of which are of comparable complexity and dollar value with this project."⁶ The agency has failed to provide any rational explanation as to why offerors who have successfully performed the requisite number of similar projects and who employ individuals with appropriate experience⁷ are, nonetheless, incapable of meeting the government's needs simply because they do not have an additional 2 years of experience in their current corporate or other business status. Since the agency has offered no rational support for this restriction, we find it unduly restrictive. See Wadell Eng'g Corp., 60 Comp. Gen. 11, supra; Am. President Lines, Ltd., B-236834.3, supra; Military Servs., Inc. of Georgia, B-221384, supra.

RECOMMENDATION

Since the solicitation provision challenged by the protesters is unduly restrictive and therefore violates CICA's requirement that procuring agencies obtain full and open competition, we sustain the protests and recommend that the VA cancel these solicitations and recompete its requirements under new solicitations with provisions that are consistent with this decision. We also find that Keelson and Ingram are entitled to the costs of filing and pursuing their protests, including reasonable attorneys' fees.


Acting Comptroller General
of the United States

⁶Neither Keelson nor Ingram has challenged this requirement.

⁷The experience of the individuals actually involved in performing the work obviously also can affect the health and safety of the hospital inhabitants.