



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Anjon Corporation

File: B-249115; B-249115.3

Date: October 20, 1992

J. Richard Harris and Joseph J.B. Ryan, Esq., for the protester.
Clayton S. Marsh, Esq., Geoffrey C. Cook, Esq., and Matthew S. Simchak, Esq., Ropes & Gray, for MIL Corporation, an interested party.
Demetria T. Carter, Esq. and Daniel Laquaite, Esq., Department of the Navy, for the agency.
Jacqueline Maeder, Esq., Glenn Wolcott, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging solicitation requirement that offerors submit supervisors' names for proposed personnel is untimely when filed after award.
2. Protest that awardee engaged in "bait-and-switch" tactics is denied where record does not indicate that awardee misrepresented its intention to perform the contract with the personnel it proposed.
3. Protest that agency improperly evaluated the qualifications of individual proposed by awardee is denied where record shows evaluation was reasonable and proposed employee met the minimum requirements of the solicitation.

DECISION

Anjon Corporation protests the award of a contract to MIL Corporation under request for proposals (RFP) No. N00421-91-R-0047, issued by the Department of the Navy for photographic support services for the Technical Information Department (TID), Naval Air Test Center, Patuxent River, Maryland.¹ Anjon contends that it was

¹The Naval Air Test Center is now called the Flight Test and Engineering Group, Naval Air Warfare Center Aircraft Division.

improperly required to provide supervisors' names for its proposed personnel; that the awardee was improperly allowed to substitute key personnel after award; that the agency improperly evaluated the cost realism of the awardee's proposal; and that the qualifications of a proposed employee were improperly evaluated.

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

The RFP was issued on September 3, 1991, as a small-business set-aside, and contemplated award of a cost-plus-fixed-fee contract for 1 base year with four 1-year options for special photographic services in connection with aircraft mishaps, fires, and investigations. The RFP set forth a list of qualifications for ten positions, including the key positions of photographic supervisor, Houston Fearless Lab Master II and Allen Products machine operator/maintenance technician, and quality control technician.² The RFP further stated that offerors must demonstrate that the personnel they proposed met the qualification requirements by submitting a Personnel Data Form (PDF) for each proposed employee. The PDF required, among other things, the employee's name, education (degree held, year awarded, and school), and work experience, including the employer's name and address and a narrative description outlining the proposed employee's experience and qualifications.

The RFP also provided that award would be made to the offeror submitting the low, technically acceptable proposal and stated that cost proposals would be evaluated for reasonableness and realism. The solicitation specifically provided that "[d]uring the cost realism evaluation, escalation of rates for each labor category covered by the Service Contract Act will not be made unless proposed by [the] offeror."

Six firms submitted initial proposals by the October 11, 1991, closing date. After the initial evaluation, the agency determined that four proposals, including those of Anjon and MIL, were within the competitive range. Following discussions and a request for best and final offers (BAFOs), MIL was selected for award as the low, acceptable offeror.

²Other positions included photographer, film developer, color print technician, reproduction technician, black and white printer, repairman, and chemical mixer.

Anjon subsequently filed an agency-level protest on the basis that one of the individuals proposed by MIL did not meet the personnel qualifications of the solicitation.³

By letter dated March 3, the Navy sustained Anjon's agency-level protest, finding that the individual proposed by MIL did not meet the RFP requirements and that MIL had not been given the opportunity to correct this deficiency during discussions. Because agency personnel believed that other offers may have been erroneously evaluated, it reevaluated proposals in the competitive range and identified deficiencies in proposals that had not been previously identified. By letters dated March 23, the contracting officer asked each of the four offerors to submit revisions to its proposal and to provide employer references (that is, supervisor names and telephone numbers) for its proposed personnel. The agency noted that "[r]eferences will be contacted to verify the information provided in the PDF."

Discussions were held with the four offerors and revised proposals were received on April 3, 1992. Following a technical evaluation of the revised proposals, a second round of BAFOs was conducted. All four proposals were found technically acceptable. Based on the agency's cost realism analysis, award was made to MIL as the low, acceptable offeror on June 8. This protest followed.

Anjon objects to the award to MIL on the grounds that the agency: (1) unfairly burdened the protester by requiring Anjon to supply supervisors' names for its proposed personnel; (2) improperly permitted MIL to substitute two key employees after award; (3) improperly evaluated the qualifications of MIL's personnel; and (4) improperly evaluated the cost realism of MIL's proposal.⁴

³Two other protests challenging the size status of MIL were filed with the agency and forwarded to the Small Business Administration (SBA). By letter dated March 10, the SBA found MIL eligible for award.

⁴Anjon also raises several other solicitation issues, including: that the Standard Industrial Classification (SIC) Code used by the agency was incorrect and fails to reflect the "highly technical nature of the procurement," that the solicitation should have been set aside for small disadvantaged businesses, and that the solicitation's cost realism evaluation provisions did not impose escalated wage rates on all offerors. These grounds of protest are clearly untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1992), which require that protests based upon alleged improprieties in a solicitation be filed before

(continued...)

Anjon first protests that it was unfairly burdened by the agency's requirement that it submit the supervisors' names of its proposed personnel. Anjon states that while it had "contingent agreements with all persons to come on board, should we be the awardee," it was forced to recruit new personnel when supervisors' names were required because employees were concerned about being fired once it was known they were seeking other jobs.

Anjon's protest challenging the requirement to submit supervisors' names is untimely. Anjon was informed on March 23 that its revised proposal with supervisors' names was due on April 3; however, it waited to protest this matter until June 18, after the contract had been awarded. Protests challenging alleged improprieties incorporated into a solicitation must be filed prior to the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1). Since Anjon failed to comply with the timeliness requirement of our Bid Protest Regulations, this portion of its protest is dismissed.⁵

Anjon next protests that the contracting officer improperly permitted MIL to substitute two key personnel after contract award. Anjon argues that the substitution constituted impermissible "bait-and-switch" tactics, asserting that MIL never intended to perform the contract with the personnel it proposed.

Offeror "bait-and-switch" practices, whereby an offeror proposes the use of personnel that it does not expect to actually use during contract performance, have an adverse effect on the integrity of the competitive procurement system and provide a basis for proposal rejection. Informatics, Inc., 57 Comp. Gen. 217 (1978), 78-1 CPD ¶ 53. This does not mean, however, that an offeror must use the

⁴(...continued)

responses to the solicitation are due. See Encon Mgmt., Inc., B-233044, Dec. 9, 1988, 88-2 CPD ¶ 579. If Anjon had concerns about alleged solicitation defects, it was obligated to protest those matters prior to the closing time for receipt of proposals. 4 C.F.R. § 21.2(a)(1). Anjon also contends that the agency failed to issue a solicitation amendment to reflect a changed period of performance. This contention is also untimely since protests raising alleged improprieties incorporated into an RFP must be filed before the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1).

⁵We note that the record shows that all offerors were asked to provide supervisors' names and Anjon was treated no differently than any other offeror in this respect.

personnel it proposed or risk losing the contract for which it is competing in every case. For example, where the offeror provides firm letters of commitment and the names are submitted in good faith with the consent of the respective individuals (that is, the offeror is not proposing personnel it has no intention of providing), the fact that the offeror, after award, provides substitute personnel does not make the contract award improper. See Professional Safety Consultants Co. Inc., B-247331, Apr. 29, 1992, 92-1 CPD ¶ 404; Informatix Gen. Corp., B-224182, Feb. 2, 1987, 87-1 CPD ¶ 105. In short, an offeror has a responsibility to propose persons who it reasonably expects will be available for contract performance.

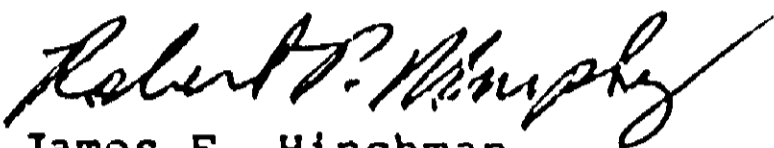
Here, while MIL proposed after award to replace its photographic supervisor and Houston Fearless Lab Master II and Allen Products machine operator/maintenance technician, the record indicates that MIL had a reasonable expectation that the people it proposed would be available for contract performance. MIL provided individual PDFs for both employees and submitted a signed letter of intent from the individual proposed to fill the photographic supervisor position. Although no letter of intent was submitted for the employee proposed to fill the position of Houston Fearless/Allen Products technician position, this individual was working for MIL's proposed subcontractor at the time the proposal was submitted; there was no indication that he would not continue in that position after MIL was awarded the contract. On this record, we find that MIL had a reasonable expectation that the people it proposed would be available to perform the contract. See Informatix Gen. Corp., supra; Unisys Corp., B-242897, June 18, 1991, 91-1 CPD ¶ 577.

Anjon next protests that MIL's personnel failed to meet the RFP qualification requirements; specifically, Anjon challenges the qualifications of MIL's photographic supervisor. Anjon also notes that it had proposed this individual as part of its proposal in a position other than photographic supervisor and asserts that, because Anjon had proposed him, he was "improperly contacted by MIL."

The RFP required that the photographic supervisor have a minimum of 5 years photographic laboratory experience with 3 years in a managerial position. The PDF for MIL's photographic supervisor indicates that since 1985 he has worked at the Naval Air Test Center Photographic Laboratory as the quality assurance supervisor "responsible for the quality of all photography produced at the photo lab." The PDF also shows that from 1978 to 1985 he provided photographic services for McDonnell Douglas Corporation

and for 2 years "[m]anaged, coordinated and trained a staff of 30 Navy enlisted men and women in all aspects of photography" Based on this information, we have no basis to question the qualifications of MIL's photographic supervisor. To the extent Anjon objects to one of its prospective employees being recruited by a competitor, its arguments are misplaced since there is nothing inherently unusual or improper with an offeror's hiring a competitor's personnel. See National Medical Staffing, Inc., B-242585.3, July 1, 1991, 91-2 CPD ¶ 1.⁶

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel

⁶Anjon also contends that the agency misevaluated the qualifications of the employee it proposed to fill the position of photographic supervisor. Anjon's protest on this regard is untimely. Anjon was notified during discussions conducted in December 1991 that its proposed photographic supervisor was unqualified. Our Regulations require that protests of agency actions be filed not later than 10 days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2). If Anjon believed that the agency had misevaluated the qualifications of its proposed employee, it was required to file a protest within 10 days of being notified of the agency's evaluation determination. Id.