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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-192375 DATE: June 28, 1979

MATTER OF: Randolph Engineering, Inc. DLG 01966

DIGEST:

1. Where contracting agency admits that certain evaluation factors used in selecting architect-engineer firms were too vague, and where evaluation did not provide for required consideration of effecting equitable distribution of contracts, protest is sustained.

2. Request by protester whose protest was sustained by contracting agency to participate in agency's efforts to clarify regulations regarding source selection of architect and engineering services, to review awardee's design and to receive copy of agency's instructions regarding inspections of procuring offices' practices is not considered under GAO bid protest function.

3. Claim for anticipated profits and expenses incurred in pursuing protest are denied since no legal basis exists for payment.

Randolph Engineering, Inc. (Randolph), protests its rejection by a U.S. Air Force architect and engineer selection board with regard to Project Number CR-5-78-0085 at Carswell Air Force Base, Texas. DLG 01967

The synopsis in the Commerce Business Daily requested interested firms to submit Experience Data Forms, Standard Forms 254 and/or 255, outlining their qualifications for a project entitled "To Upgrade Raw Commercial and Stand-By Power Sources and Switching Equipment at the Automated Digital Weather Station." Randolph contends that the Selection Board failed to evaluate the firms in accordance

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[ALLEGATION THAT EVALUATION CRITERIA WERE VAGUE]

with the criteria set forth in the synopsis. Randolph also suggests that neither the Selection Board nor the competing firms understood the Government's requirement; Randolph contends that its competitors' lack of understanding is evidenced by the failure of any of them to mention the need for an uninterruptable power system in the project and to indicate recent related work experience.

The Brooks Bill, 40 U.S.C. § 541 et seq. (1976), states the Federal Government's policy in the procurement of architect-engineer (A-E) services. Generally, the selection procedures prescribed require a contracting agency to publicly announce requirements for A-E services. The contracting agency then evaluates A-E statements of qualifications and performance data already on file and statements submitted by other firms in response to the public announcement. Thereafter, discussions must be held with "no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach" for providing the services requested. Based on established and published criteria, which are not to relate either directly or indirectly to the fees to be paid the firm, the contracting agency then ranks in order of preference no less than three firms deemed most highly qualified. Negotiations are held with the A-E firm ranked first. Only if the agency is unable to agree with the firm as to a fair and reasonable price are negotiations terminated and the second ranked firm invited to submit its proposed fee.

The implementing regulations at Defense Acquisition Regulation (DAR) § 18-402.1 (1976 ed.) provide that the selection of A-E firms shall not be based upon competitive bidding procedures but rather upon the professional qualifications necessary for satisfactory performance of the services required, subject to the following additional considerations, which were listed as the selection evaluation criteria in the Commerce Business Daily synopsis:

"(i) specialized experience of the firm in the type of work required;

"(ii) capacity of the firm to accomplish the work in the required time;

"(iii) past experience, if any, of the firm with respect to performance on Department of Defense contracts;

"(iv) location of the firm in the general geographical area of the project, provided that there is an appropriate number of qualified firms therein for consideration; and

"(v) volume of work previously awarded to the firm by the Department of Defense, with the object of effecting an equitable distribution of Department of Defense architect-engineer contracts among qualified architect-engineer firms including minority-owned firms and firms that have not had prior Department of Defense contracts."

In evaluating the information submitted in response to the synopsis, the Selection Board used the following seven criteria: "Technical Qualifications," Specialized Experience," "Proximity to Work," "Organization Adequacy," "Availability," "Excellence of Work," and "Remarks." Randolph received maximum points (45 each) under "Specialized Experience" and "Availability," 42 of a possible 45 points under "Proximity to Work," 32 of 45 points on "Technical Qualifications" and 35 of 45 points on "Organization Adequacy." Randolph received only 5 of the possible 25 points under "Excellence of Work" and "Remarks" combined.

In response to the protest, the Air Force concedes that the evaluation criteria "Excellence of Work" and "Remarks" were so broad and vague that there was no sound basis upon which an evaluator could rate the firms. The Air Force has therefore "sustained" the protest at its level and is taking corrective action to clarify its regulations covering source selection of A-E firms,

and has sent a letter to its Inspector General asking that review of source selections and regulations be made an item of interest in conducting inspections. Nevertheless, the Air Force states that even if Randolph had received maximum points for the two evaluation criteria deemed arbitrary, it would not have displaced the firm which was awarded the contract.

We also point out, however, that the evaluation factors used by the agency do not encompass consideration of effecting an equitable distribution of contracts among qualified firms, as required by DAR § 18-402.1(v). Although we cannot state that had this factor been considered, and had all evaluation criteria been better defined, Randolph would have been awarded a contract, we can say that its absence violated the applicable regulations. Accordingly, we too sustain this protest. Nevertheless, as the project is substantially complete, no effective remedy is feasible at this time. We are recommending to the Secretary of the Air Force that corrective action be taken to preclude the recurrence of this deficiency in the future.

As to whether the Selection Board clearly understood the requirements of the project, we need only point out that the Project Engineer, who presumably had such an understanding, was a member of the group, and that the minutes of the Board's meetings indicate that the project requirements were discussed and analyzed. With respect to Randolph's competitors, Randolph is protesting their understanding at the stage in the procurement where only experience data forms, and not proposals, were being evaluated. Thus, under A-E procurement procedures there was no need for them to discuss their approaches to the project at that time. In any case, and contrary to Randolph's assumptions, the submittal of the top-ranked firm indicated extensive recent experience on related projects, and in fact directed specific attention to its experience with "uninterruptable and regulated power sources, phase monitoring, grounding, etc. as applied to computer installations."

In view of the Air Force's position on the inadequacy of the two evaluation criteria, Randolph has requested that it be permitted (1) to participate in the Air Force's

efforts to clarify the regulations, (2) to obtain a copy of the Air Force's letter to its Inspector General, (3) to review the design documents for the project, and (4) to be reimbursed for its lost profits and expenses in pursuing the protest.

The Air Force has provided Randolph with a copy of its letter to the Inspector General of the Air Force but has declined Randolph's requests to participate in the clarification of the regulations and to review the design documents. These matters are internal to the Air Force and involve nothing appropriate for consideration under our Bid Protest Procedures, 4 C.F.R. Part 20 (1978). In addition, it is well established that anticipated profits may not be awarded to an unsuccessful offeror. See Keco Industries, Inc. v. United States, 428 F.2d 1233 (Ct. Cl. 1970); Heyer Products Company v. United States, 140 F. Supp. 409 (Ct. Cl. 1956). Finally, the expenses incurred in pursuing a protest are noncompensable. Descomp, Inc. v. Sampson, 377 F. Supp. 254 (D.Del. 1974); T & H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345.

R. F. Keller

Acting Comptroller General
of the United States