Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Johnson Controls World Services, Inc.

File: B-285144

Date: July 6, 2000

Kathleen Little, Esq., David R. Johnson, Esq., James R. Farnsworth, Esq., and Suzanne D. Reifman, Esq., Vinson & Elkins, for the protester.
John A. Ordway, Esq., Berliner, Corcoran & Rowe, and Jacqueline B. Gayner, Esq., Ross, Suchoff, Hankin, Maidenbaum, Handwerker & Mazel, for Citywide Office Management Services of Port Washington, Inc., the intervenor.
Col. Nicholas P. Retson and Raymond M. Saunders, Esq., Department of the Army, for the agency.
Henry J. Gorczycki, Esq., and James Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging terms of solicitation for base operations and maintenance services is denied where the protest grounds are factually unsupported or the protester has failed to establish that the challenged provisions prejudice the firm.

DECISION

Johnson Controls World Services, Inc. protests request for quotations (RFQ) No. DADW35-00-T-0142, issued by the Department of the Army, Military District of Washington Acquisition Center (MDWAC), Fort Belvoir, Virginia, for base operations and maintenance services for Fort Hamilton, Brooklyn, New York.

We deny the protest.

In March 1998, the U.S. Army Corps of Engineers, New York District, issued request for proposals (RFP) No. DACA51-98-R-0007, for the services for 1 year with 4 option years. Under the RFP, the Corps awarded a contract to Citywide Office Management Services. This award and other aspects of this procurement were the subject of a number of successive protests by all three offerors under that RFP, i.e., Johnson Controls, Citywide and Meridian Management Corporation. Our Office twice sustained protests against the Citywide award. See Johnson Controls World Servs.,

Inc.; Meridian Management Corp., B-281287.5 et al., June 21, 1999, 2000 CPD ¶ __; Meridian Management Corp.; Johnson Controls World Servs., Inc., B-281287.10, B-281287.11, Feb. 8, 2000, 2000 CPD ¶ __.

Although the Corps awarded the contract to Citywide, it has stayed performance of that contract because of the various protests. Since April 1999, MDWAC has been obtaining interim services for Fort Hamilton under the protester's incumbent contract and, after that contract expired, under a series of month-long, sole-source purchase orders, each in excess of $500,000, issued, pursuant to commercial item procedures, to the protester. Following our February 8, 2000 decision, the Army transferred adminstration of the RFP source selection process from the Corps's New York District to its Philadelphia District. Subsequently, the MDWAC contracting officer determined that acquisition of interim services on a month-to-month basis by sole-source purchase order was inefficient and did not provide for competition, and, on March 31, 2000, issued the RFQ protested here. Agency Report at 2.

The RFQ, issued pursuant to Federal Acquisition Regulation (FAR) part 12 commercial item procedures to the three offerors that have been competing under the Corps's RFP, contemplates the award of a fixed-price contract for a base period of 4½ months with 8 option months.[1] RFQ at 1-2, § L.23, at L-13. The RFQ contains detailed specifications covering all aspects of the service requirements. The RFQ, as initially issued, requested technical and price proposals, and stated that award would be made based on the most advantageous offer, considering technical and price factors. RFQ §§ L.34, M.4, M.7. Quotations were due by April 15. RFQ at 1.

After the RFQ was issued, MDWAC met with the three solicited firms, and stated that technical proposals and cost information would not be required, and that quotes need only include a completed schedule of prices, as required by section B of the RFQ, and representations and certifications included in the RFQ. The agency stated that the firms would be considered "technically qualified" and that award would be made "to the lowest bidder." Agency Report at 2-3; Protest, Tab 1, Declaration of Johnson Controls' General Manager, at 2-3. On April 7, the agency amended the RFQ by deleting all sections that made reference to technical or cost proposals, and extending the submission due date to April 17. RFQ amend. 0001, at 3. The bottom-line quote prices on the RFQ are to be disclosed at a public bid opening. Contracting Officer's Statement at 4.

Johnson Controls protested the RFQ on April 14. The protester alleges that the solicited services are not a commercial item, so that the RFQ was improperly issued under commercial item procedures. Protest at 7-8; Protester's Comments at 3-7.

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[1] FAR part 12 prescribes streamlined policies and procedures for the acquisition of commercial items. These procedures may be used only where commercial items are the subject of the procurement. FAR § 12.102.

The protester also alleges that a source selection scheme based on lowest price unfairly favors Citywide, that the participation in the preparation of the RFQ by the senior quality assurance evaluator for Fort Hamilton creates the appearance of an impropriety that taints the procurement, that public disclosure of RFQ prices for this bridge contract competition will prejudice the competition under the Corps's RFP for the long-term contract for these services, and that the agency had no basis to determine that all three bidders were technically qualified.[2] Protest at 5-9; Protester's Comments at 7-12. Based on our review, none of the protester's contentions provides a basis for sustaining its protest.

As noted, the protester alleges that commercial item procedures could not be properly employed here because the solicited services do not constitute a "commercial item." Even assuming that this is the case, Johnson Controls has not presented any basis on which we can conclude that the agency's actions would have prejudiced the protester. Prejudice is an essential element of every viable protest and even where the record establishes a procurement deficiency, we will sustain a protest on this basis only where it resulted in competitive prejudice. See Hughes Missile Sys. Co., B-272418 et al., Oct. 30, 1996, 96-2 CPD ¶ 221 at 14; A-1 Postage Meters and Shipping Sys., B-266219, Feb. 7, 1996, 96-1 CPD ¶ 47 at 4. We do not find the protester will be competitively prejudiced here, inasmuch as it does not claim that any of the provisions or procedures unique to commercial item procurements put it at a competitive disadvantage, nor has it shown that the use of commercial item procedures otherwise prejudices the protester's competitive position.

For example, although the protester claims that the agency improperly invoked expedited procedures (i.e., a response time of less than 30 days from issuance of the solicitation) permissible under commercial item procedures, Protester's Comments at 2, the protester does not contend that it did not have adequate time to prepare and submit a quotation. Indeed, Johnson Controls timely submitted a quotation and, given that Johnson Controls was the incumbent contractor and more recently has been performing these services under monthly commercial item purchase orders, there does not appear to be a potential competitor in a better position to timely prepare a price quotation for these services.

Johnson Controls also alleges that it suffered prejudice from the agency's use of commercial item procedures in that the RFQ stated a price-only selection scheme. Protester's Comments at 7. However, a price-only, sealed bid selection scheme is not unique to commercial item procurements; indeed, it is required where sealed bidding procedures are employed. FAR §§ 14.103-2(d), 14.408-1(a). Where, as here, an agency does not require technical proposals (e.g., because the solicitation contains detailed specifications and the offeror's understanding and past

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[2] The agency suspended the public opening of the bottom-line quote prices pending resolution of this protest.

performance do not need to be evaluated) or discussions, it may employ a price-only sealed bidding evaluation scheme. See FAR subpart 6.4; Racal Corp., B-240579, Dec. 4, 1990, 90-2 CPD ¶ 453 at 3-5. Since a price-only basis for award is not unique to commercial item procedures and may be used even if those procedures cannot, any alleged prejudice from the price-only selection scheme is not attributable to commercial item procedures.

Since the protester has not demonstrated, and it is not otherwise apparent from the record, that Johnson Controls was prejudiced by the agency's use of commercial item procedures, we will not decide the issue of whether the services are properly designated as commercial items or whether the solicitation was properly issued under commercial item procedures. See CW Gov't Travel, Inc. d/b/a Carlson Wagonlit Travel; American Express Travel Related Servs. Co., Inc., B-283408, B-283408.2, Nov. 17, 1999, 99-2 CPD ¶ 89 at 5 (need not decide protest of agency's determination that services are not commercial items where protester is not prejudiced by that determination); cf. Smelkinson Sysco Food Servs., B-281631, Mar. 15, 1999, 99-1 CPD ¶ 57 at 3 (our Office sustained a protest that price-related disclosure requirements in a commercial item solicitation are not consistent with commercial practice and are unfairly burdensome to the protester and other potential offerors); Aalco Forwarding, Inc., et al., B-277241.8, B-277241.9, Oct. 21, 1997, 97-2 CPD ¶ 110 at 5-22 (our Office considered a protest that a commercial item solicitation was not properly issued, that the use of commercial item procedures harmed the protesters' competitive positions, and that burdensome non-commercial practices were imposed by the solicitation).

Johnson Controls also alleges that the RFQ's price-only selection scheme unfairly favors Citywide and disfavors the protester. In this regard, the protester points to the participation in the preparation of the RFQ by Fort Hamilton's senior quality assurance evaluator, who has an alleged conflict of interest favoring Citywide and bias against Johnson Controls. Protest at 6; Protester's Comments at 12.

However, it does not appear that the price-only selection scheme places Johnson Controls at an unfair competitive disadvantage. It had a fair opportunity to prepare and submit a quote with full knowledge of the price-only selection scheme, and the protester has presented no legal basis why the agency must construct a selection scheme to compensate if the protester cannot be competitive on price. Moreover, we think the agency reasonably elected to conduct a simple, price-only competition, given the agency's judgment that no technical proposals or discussions were necessary, the history of the Corps's continuing difficulties with the source selection process under the pending RFP, and the Army's need for performance of interim services until those difficulties can be resolved. Furthermore, procurement regulations allow for such a selection scheme, either under commercial item procedures incorporating sealed bidding procedures, FAR § 12.203, or directly through sealed bidding procedures. FAR §§ 14.103-2(d), 14.408-1(a). Since this type of procurement is permitted by regulation and appears reasonable under the present circumstances, the protest does not present a sufficient basis to sustain the protest.

In any case, the record shows that the MDWAC contracting officer decided on the procurement approach, not Fort Hamilton officials. While the agency concedes that the Fort Hamilton employee in question did participate in preparing the statement of work, Agency Report at 3-4, Tab 10, Statement of Fort Hamilton Official, the protester does not challenge any terms of the statement of work or allege that the statement of work provides the other competitors with an unfair competitive advantage. Moreover, even if we assume, arguendo, that the agency's actions intentionally disfavored Johnson Controls, the protester must still demonstrate that the agency's actions were not reasonable, which Johnson Controls has not done here. See Dr. Robert J. Telepak, B-247681, June 29, 1992, 92-2 CPD ¶ 4 at 4 (evidence that agency action was based on animus toward protester is not sufficient basis to sustain protest where the agency's action also had a reasonable basis).

On a related point, the protester challenges the agency's intent to conduct a public bid opening and announce bid prices while the RFP for long-term services is being competed.[3] However, as stated above, the procedures for sealed bidding can be employed by the agency under this procurement. Accordingly, the agency may properly conduct a public opening with only limited restrictions not applicable here. FAR Subpart 14.4. The fact that these same services will be the subject of a long-term negotiated acquisition provides no basis to object to the public disclosure of the bottom line prices for the short-term bridge contract.

Finally, the protester challenges the contracting officer's statement that all three firms would be considered "technically qualified," essentially alleging that such a determination has no reasonable basis considering that Citywide's prior proposal under the Corps's RFP should have been determined technically unacceptable in accordance with our prior decision sustaining the protests against the Citywide award. Protest at 8; Protester's Comments at 8-9. Each procurement stands on its own; the acceptability of Citywide's proposal under a different solicitation is irrelevant to the determination of whether its submission in response to this RFQ can properly be accepted, particularly given that the offerors' proposal will not form the basis for the contract award under this RFQ. See Copy Graphics, B-273028, Nov. 13, 1996, 96-2 CPD ¶ 185 at 4 n.3. Since the RFQ is being conducted as a sealed bidding procurement, the award is to be made to the responsible bidder whose bid, conforming to the terms of the solicitation, will be most advantageous considering only price, as stated in the RFQ. See FAR § 14.408-1(a). The contracting officer's statement clearly refers to the apparent ability of all three firms in the field of potential competitors to perform under the contemplated contract, and thus relates to the responsibility determination that the contracting officer will have to make

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[3] The time for submission of proposals under the RFP was several hours prior to the time for submission of quotes under the RFQ. Contracting Officer's Statement at 4.

prior to awarding a contract after bid opening.[4] FAR § 9.103; see FAR § 14.408-2. Since a determination that a bidder or offeror is capable of performing a contract is based, in large measure, on subjective judgments that generally are not susceptible to reasoned review, our Office will not review an agency's affirmative determination of responsibility absent a showing of possible bad faith on the part of procurement officials, or that definitive responsibility criteria have been misapplied. 4 C.F.R. § 21.5(c) (2000); King-Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177 at 2. To the extent the contracting officer's statement contemplates an affirmative determination of responsibility for Citywide, there has been no showing here that the contracting officer acted in bad faith in making the statement, or misapplied definitive responsibility criteria. We thus have no basis to review this protest issue.

The protest is denied.

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[4] The fact that aspects of Citywide's proposal on the RFP were technically unacceptable does not necessarily mean that Citywide cannot successfully perform in accordance with the RFQ.