

Protest of) Date: February 10, 1988
ERIC HEFTY & ASSOCIATES)
Advertisement for A/E Services) P.S. Protest No. 87-102

DECISION

Eric Hefty and Associates (Eric Hefty) protests the award or proposed award to others of a contract for architectural services for the design of the New Hellgate Station, Missoula, MT. The protester contends that "significant evaluation factors" by which the selection of an architectural/engineering (A/E) firm is made were not published in the Commerce Business Daily (CBD), and that the preference for local architectural firms stated in the CBD notice was not followed.

To solicit interest of architects in a project for the design of a post office in Missoula, the Postal Service's San Bruno Facilities Service Center published notice of the project in the CBD on March 20, 1987. Firms which possessed the qualifications listed in the advertisement were invited to submit a completed SF 255 (A/E and Related Services Questionnaire for Specific Project), a completed SF 254 (A/E and Related Services Questionnaire), and a completed SF 254 for each of their proposed consultants. The advertisement stated that the selection would consider the information submitted in the SF 255 and 254s; and that with respect to geographical location:

Consideration will be given to firms responding to this advertisement IAW foregoing instruction in the following order of preference: 1. Located within Metropolitan Missoula, MT. 2. Located within the State of Montana. A/E firms will be considered as local only if their sole office is in the local geographical area or they have a local branch office and all of the architectural design, coordination, and management of the project will be accomplished in that office.

Eric Hefty submitted its SF 255 and SF 254, along with the firm's resume, on April 16. The SF 255 indicated that the firm had four employees including one architect, one administrator and two draftsmen. On April 28, the A/E evaluation board established to evaluate the A/E firms' submissions met at the San Bruno Facilities Service Office and determined that to perform the required services successfully, the A/E firm must have a minimum staffing of at least two registered professional architects. During the pre-screening process, the evaluation board selected three firms to interview further ("short-list") and eliminated Eric Hefty from consideration because the firm had only

one registered architect. On May 5, the protester was notified that it had not been included on the "short-list".

On May 8, Eric Hefty protested its failure to be short-listed. It specifically contended that the advertisement did not include significant evaluation factors, including requirements regarding the number of registered architects in the firm and the total number of employees. The protester noted that the Federal Acquisition Regulations (FAR) require that significant evaluation factors be listed in the CBD notice, and assumed that this is a requirement of the Postal Service as well. The protester additionally stated that it was protesting the fact that one of the firms that was short-listed was based in Kalispell, MT, which the protester states is 120 miles outside of Missoula and, therefore, not local.

The contracting officer's October 7 statement^{1/} to this office stated that the CBD used in this instance was the typical advertisement the Postal Service provides when it seeks architectural services, and that, as a matter of practicality, the advertisements do not list all of the evaluation factors used for selection. The contracting officer stated that the purpose of requiring two registered professional architects on the staff of an A/E firm is to assure the Postal Service that the A/E firm that it selects has sufficient management, professional and administrative resources to accomplish the work and that the firm is capable of sustaining the loss of key personnel without adverse effect on work in progress. The contracting officer further stated that postal regulations require that at least three qualified firms be interviewed for each project, see PCM 18-605.2 (b), infra, that three qualified firms were not available within the first area of consideration (Missoula), and, therefore, the area of consideration was expanded to include firms located within the second area of consideration (Montana).

In the protester's comments to the contracting officer's statement, it repeated its assumption that the Postal Service was required to follow the FAR. The protester stated that the advertisement contained only two significant evaluation factors and that its experience is that six to eight factors are listed in such advertisements, and that the law^{1/} requires that all significant evaluation factors be listed.

Discussion

The protester's assumption that the Postal Service must comply with the FAR is incorrect. The PCM is the exclusive source of regulatory guidance for Postal Service procurement, and other government procurement regulations are not binding on the Postal Service. See Jarke Corporation, P.S. Protest No. 87-33, May 20, 1987;

^{1/}The contracting officer did not explain the five month delay between his receipt of the protest and the referral of the protest to General Counsel. Postal Contracting Manual (PCM) 2-407.8 e requires a contracting officer to refer protests to General Counsel for resolution within 5 days of receipt, unless the protest is one the contracting officer determines is obviously meritorious or obviously without merit (which determinations must also be made within five days of receipt). In this instance the contracting officer's disregard for the regulations does not affect the outcome of the protest, although their purpose, to provide a speedy resolution for bidding disputes, is thwarted when ignored.

^{2/}Presumably the protester is referring to the FAR.

Lubecon Maintenance Systems, Inc., P.S. Protest No. 84-78, December 17, 1984.

The protester contends that the requirement of two registered architects is a significant evaluation factor and should have been noted in the advertisement.^{1/} The information which must be included in a CBD notice for architectural services is discussed in PCM 18-603.3:

The project shall be listed with a brief statement as to its location, scope of services required, and where applicable, the estimated construction cost. Appropriate statements must be made to indicate any limitations on eligibility for consideration ... Qualifications or

^{3/}The protester also states that it was a requirement that the A/E firm have five employees on its staff (the protester has four employees), and that this requirement was another significant evaluation factor which should have been listed in the CBD notice. It is not necessary to resolve this issue except to note that the minutes of the prescreening meeting indicate that the minimum staffing requirements of the A/E firm would be set at four, not five as suggested by the protester. Furthermore, the contracting officer's report does not suggest that the protester's submission was rejected for failure to meet the minimum staffing of the firm as a whole.

performance data required from the architect-engineer firms will be described.

This requirement is further explained in Facilities Bulletin, No. DC-86-1, February 3, 1986, '3.2, which states:

Special criteria that are necessary for evaluating qualifications which are specifically and uniquely required for the project must be published in the CBD advertisement. Examples are experience in historic building renovation, renovation, repair and alteration, and seismic design. [Emphasis added.]

PCM 18-605.2 describes the duties of the A/E evaluation board. Subsection (b) states:

When procurement of architect-engineer services is proposed, the board shall review the data files on qualified firms including firms furnishing SF's 254 and 255 in response to the public notice of particular contract, and shall evaluate the firms in accordance with the criteria set forth in 18-605.3. After making this review and technical evaluation, the board shall visit in the office of, and hold discussions with, not less than three of the most qualified firms regarding anticipated concepts and related utility of alternative methods of approach for furnishing the required services.

PCM 18.605.3 provides:

The criteria used by the evaluation boards in making evaluations shall consist of the following:

* * *

(b) Capability of the firm to sustain loss of key personnel without adverse effect on current work, and the general stability of the firm.

These duties are explained further in Facilities Bulletin, No. DC-86-1, February 3, 1986, '5.2:

Minutes of Meetings

Complete minutes of the prescreening meeting must be kept, including as a minimum:

* * *

5.2.4 The criteria established for prescreening evaluation, including minimum or maximum size of the prime firm, the project-specific disciplines required and the minimum number of professional staff, listed by discipline, necessary to accomplish the project work in a satisfactory and timely manner.

There is no Postal Service decision that sets the standard of review for the selection of an A/E contractor. The Comptroller General has stated:

Our review of the agency selection of an A-E contractor is limited to examining whether that selection is reasonable. We will question the agency's judgment only if it is shown to be arbitrary. Leyendecker & Cavazos, B-194762, Sept. 24, 1979, 79-2 CPD & 217. In this regard, the protester bears the burden of affirmatively proving its case. Albert C. Martin and Associates/ Daniel, Mann, Johnson and Mendenhall, B-221746, Apr. 7, 1986, 86-1 CPD & 343.

Engineering Sciences, Inc., Comp. Gen. Dec. B-226871, July 29, 1987, 87-2 CPD & 109. We adopt the Comptroller General's rule. The A/E Evaluation Board met on April 28 and determined that the A/E firm would have to employ a minimum of two registered architects to manage the project adequately. This criterion is consistent with PCM 18-605.3 which states that criteria used in making an A/E evaluation selection includes the capability of the firm to withstand the loss of key personnel without a negative impact on current work.^{4/} It appears that the decision of the A/E board was reasonable. The project involved the construction and design of a new facility, and completion could be seriously delayed by a permanent or temporary loss of the sole architect in the A/E firm. The protester has not introduced any evidence that would indicate that the Postal Service acted in an arbitrary manner and, therefore, has not met its burden.

Eric Hefty also protests that one of the firms that was short-listed was located in Kalispell, MT, 120 miles outside of Missoula and, therefore, not local. The contracting officer states that when three qualifying firms could not be found within the first area of consideration, the area of consideration was expanded to include firms within the second area of consideration. The protester misinterprets the advertisement. The advertisement states that any A/E firm in Montana will meet the geographical requirements, with first preference given to Missoula firms. If there are an insufficient number of qualified Missoula firms (fewer than three) the Postal Service may look to the

^{4/}The protester is held to constructive notice of PCM provisions, which have the force and effect of law. Donahower and Associates, Inc., P.S. Protest No. 84-89, February 11, 1985. In Tierra Engineering Consultants, Inc., Comp. Gen. Dec. B-222616, August 12, 1986, 86-2 CPD & 180, an A/E contended the evaluation of firms interested in a design contract improperly considered as a factor the past performance of each firm when past performance was not listed as a criterion for evaluation in the CBD announcement. In concluding that reliance on that factor was not improper, the Comptroller General relied in part on requirements set forth in the applicable procurement regulations. The Comptroller General concluded, "Offerors therefore are charged with at least constructive knowledge of this criterion, and Tierra cannot argue that it was unaware of it or that the [procuring agency] may not consider past performance."

second preference area, Montana.

The protest is denied.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[checked against original JLS 3/9/93]