

Protest of)	Date: November 1, 1988
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J.W. BATESON COMPANY, INC.)	
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GMF and VMF, Denver, CO)	P.S. Protest No. 88-52

DECISION

Through its counsel, J.W. Bateson Company, Inc. ("Bateson") protests the terms of the prequalification package for the competition for construction of a new General Mail Facility ("GMF") and Vehicle Maintenance Facility ("VMF") in Denver, CO, which was issued by the Chicago Facilities Service Center ("FSC"). Bateson objects to the use of the prequalification procedure^{1/} generally, and more specifically to the prequalification package's provision that limits the number of selected firms to a maximum of seven.

Background

The Chicago FSC issued a prequalification package for the construction of a new GMF and VMF in Denver, CO, under Solicitation No. 169982-88-A-0037, on July 15, 1988. The package contained the statement that "no more than seven (7) contractors will be prequalified." Prequalification statements were to be postmarked not later than August 16, or received (if not mailed) by August 19. Bateson's protest was received by this office August 12.

Bateson states three bases for its protest. First, it contends that, because the prequalification package was issued before August 1, 1988, the date on which implementation of the new Procurement Manual ("PM") at FSCs was scheduled, the procurement was governed by the Postal Contracting Manual ("PCM"), under which the prequalification process would not be proper. Second, Bateson contends that, even if the PM is applicable, the maximum of seven prequalified contractors ("seven-firm limitation") is irrational and in conflict with PM 11.5.4.b.2, which provides that the Assistant Postmaster General ("APMG"), Facilities, or authorized designees, "will evaluate the statements received and select all qualified firms. . . ." (Emphasis added.)

^{1/} Under the prequalification process, contractors submit statements of their qualifications in response to a Postal Service invitation that sets out experience or other requirements for the project. An evaluation committee reviews the statements and places selected firms on a list of prequalified firms. Only firms on the list are eligible to submit proposals for the construction project.

The third basis for Bateson's protest is its argument that the seven-firm limitation is in conflict with the Postal Service's policy of obtaining contracts that maximize monetary return as well as with historical practice and logic.

The contracting officer submitted a report, dated August 24, and supplemented that report on September 1. The contracting officer contends that, if the prequalification package is not a solicitation, the protest is either untimely or premature. However, he acknowledges that if the package is considered a solicitation, the protest would be timely.

On the issue of which regulations govern the instant procurement process, the contracting officer argues that the PM governs because both evaluation of prequalification statements submitted by contractors and contract award would occur subsequent to the PM's August 1 implementation date at FSCs. He asserts that the ambiguity of the PM on issues of transition allows contracting officials to act flexibly in changing from PCM to PM procedures. Further, the contracting officer emphasizes that, prior to preparation of the prequalification package, he discussed his long-held expectation that PM procedures would be used for the Denver project with his superiors at the Chicago FSC and at postal headquarters, and that their approval was obtained before the package was issued. In this regard, the contracting officer provided a memorandum from the APMG, Facilities, dated August 31, memorializing his approval of the use of prequalification procedures in May of 1988, and authorizing a deviation from PCM procedures in the event that the PCM is found to govern the instant procurement.

The contracting officer defends the use of the seven-firm limitation on several grounds. First, he states that the limitation is supported by the Facilities Design and Construction Handbook ("D&C Handbook"), which was in circulation in draft form while the prequalification package was being prepared, and was issued with only minor relevant changes August 1.^{1/} The contracting officer acknowledges that the seven-firm

^{2/} As issued, the D&C Handbook provides:

Determine if the solicitation will be provided to only the most highly qualified firms (a minimum of three and preferably no more than seven), following review and evaluation of all prequalification statements (single projects); or if solicitations will be rotated among prequalified firms on a master list maintained over a 12-month period (standard projects).

Procedure 210.20 ("Prequalification Planning"), Step 4.

Based on the overall evaluation of statements submitted, the committee will recommend a list of the most qualified firms for approval by the contracting officer. The number of firms to be prequalified for the selected list will depend upon whether the list is for a single project or a category of projects.

Procedure 210.30 ("Evaluation of Prequalification Statements"), Step 3.

The handbook's sample prequalification package, Exhibit 5 to Procedure 210.20 contains the statement that "[n]o fewer than three (3) and no more than seven (7) contractors will be prequalified." This

limitation might be arbitrary in some sense, but refers to the opinions of firms interviewed in connection with the preparation of the PM, to the effect that a cap on the number of prequalified firms would encourage highly qualified contractors to participate in the procurement process. In connection with the goal of obtaining maximum return for Postal Service dollars, he refers to problems, such as excessive delays and claims, that may be encountered in contracts with "marginally qualified" contractors that are able to meet traditional responsibility standards. Finally, he defends the seven-firm limitation as consistent with the adequate-competition standard established by the PM.

In comments received on September 14, as well as in a conference held September 30, Bateson disputes the assertions of the contracting officer regarding the possible untimeliness of its pro-test. It also argues that PCM deviation procedures may not be used to supplant completely PCM procedures, and that the deviation approval provided by the APMG, Facilities, was inadequate in any event. Bateson further asserts that any ambiguity in the procedures applicable to transition from the PCM to the PM should be resolved against the position of the Postal Service.

Bateson urges us to reject the contracting officer's reliance on the D&C Handbook, as Bateson contends that the handbook is internal and in conflict with both the Procurement Manual and the Procurement Handbook. In addition, it was available to the contracting officer only in draft form when the prequalification package was issued.

Bateson stresses that the contracting officer has acknowledged that the seven-firm limitation may be arbitrary in some sense, and asserts that his reliance on the opinions of contractors is improper as a means of supporting the view that the limitation will actually foster the participation of qualified firms in the prequalification process. It also objects to the contracting officer's references to "marginally qualified" contractors and the problems they may present for the Postal Service. Bateson views these statements as reflecting an intention by the contracting officer to construct an improper hierarchy of contractors, and possibly to discriminate against contractors for their resort to contract dispute procedures established by statute and regulation.

Five firms submitted comments on Bateson's protest. Two commenters concurred with Bateson in its opposition to the seven-firm limitation, and three supported a limitation on the number of firms to be placed on the list of prequalified contractors. Of these three, two supported the seven-firm limitation, while the third proposed a ten-firm limitation and a preference for contractors located in the same state as the project.

language is identical to that of the prequalification package that Bateson challenges in the instant protest.

Discussion

Because it was received by this office prior to the date on or before which prequalification statements were to be received by the Postal Service, the instant protest is timely. A prequalification package is to be considered a solicitation for the purposes of our protest regulations. J.W. Bateson Company, Inc., P.S. Protest No. 88-44, November 1, 1988, following Santa Fe Engineers, Comp. Gen. Dec. B-218268, June 3, 1985, 85-1 CPD & 631. Pursuant to PM 4.5.4.b a protest against the terms of a solicitation, the basis of which is apparent on the face of the solicitation, is timely if it is received before responses to the solicitation are due. Thus, we turn to the merits of the pro-test.

We conclude that the provisions of the PM govern the prequalification procedure at issue here. The Procurement Manual has been issued as a final rule, with an effective date of June 1, 1988. 53 FR 24265, June 28, 1988. Given the manual's status as a regulation in effect on the prequalification package's date of issuance, the "implementation dates" set out in the Federal Register notice are matters of procedure that may be the subject of a deviation under PM 1.4.1. It is clear from the record before us that the contracting officer acted well in advance of the issuance of the prequalification package to discuss his intention to utilize the PM's prequalification procedures with officials in "channels" through the APMG, Facilities, and that he obtained the approval of that APMG, the individual authorized by PM 1.4.2.c.2 to grant deviations. Thus, the contracting officer could proceed with the prequalification process under the provisions of the PM.

We agree with the protester that the seven-firm limitation is inconsistent with PM 11.5.4.b. That provision is clear, in its terms, in directing the selection of all qualified firms. We find nothing in the provision's context that suggests or supports the contracting officer's interpretation. The prequalification procedure is analogous to the first step of a two-step negotiated procurement, in which a competitive range of technically accept-able proposals is determined. In the first step of such a procedure, it is appropriate to consider responsibility-related factors in determining the competitive range. See, e.g., 58 Comp. Gen. 415, 425 (1979) (noting permissibility of use of "responsibility-related factors in making relative assessments of the merits of competing proposals" (emphasis in original)). However, it is unduly restrictive of competition to determine in advance that no more than a fixed number of firms will be within the competitive range. Compare 54 Comp. Gen. 1096 (1975) (no objection to use of BOA-type procedures for procurement of consulting services that provided for award "to all firms found to be within the competitive range") with 54 Comp. Gen. 606 (1975) (proposed use of master agreements for procurement of consulting services unduly restrictive of competition where only 10 most qualified firms selected for master agreements).

We find that the arguments advanced by the contracting officer do not justify the application of a seven-firm limitation. As a handbook in draft when the prequalification package was issued, the D&C Handbook could do no more than indicate that other contracting officials shared the contracting officer's approach to implementation of prequalification procedures in the construction area. Even as issued in final form August 1, the D&C Handbook could not be effective to change the PM's specific

requirement to select all qualified firms.

The support found by the contracting officer in opinions expressed by contractors in connection with the preparation of the PM, and in Postal Service experience with "marginally qualified" contractors is also unavailing. Whatever inquiry may have been made among contractors in preparing the PM, their reported view that a cap on the number of prequalified contractors would encourage participation in the process is simply not reflected in the regulations, or in the Federal Register notices that presented the draft and final regulations to the public. Those notices referred only to benefits in reduced contracting lead time and in reduced requirements for quality assurance and inspection. 52 FR 36590, September 30, 1987 (proposed rule). Problems assertedly associated with "marginally qualified" contractors should be, and are, irrelevant to the prequalification process as defined in PM 11.5.4.^{1/}

Having concluded that the seven-firm limitation is inconsistent with PM 11.5.4.b, we do not reach issues of interpretation and application of PM-based policies, such as the achievement of adequate competition or the acquisition of contracts that return the most for the Postal Service's money. Whatever consistency these policies may have with possible variations on other PM provisions, we find no basis for concluding that they alter or avoid the plain requirement of PM 11.5.4.b that all qualified firms be selected in the prequalification process.

The contracting officer should amend the prequalification package to eliminate the seven-firm limitation.

The protest is sustained to the extent indicated.

William J. Jones
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Office of Contracts and Property Law

[checked against original JLS 3/3/93]

^{3/} It might also be noted that the seven-firm limitation does nothing to resolve these problems, since, at least as presented in the Denver prequalification package, it does not undertake to assure that only the seven best qualified firms are selected.