

Protest of) Date: March 1, 1990
DANIEL J. KEATING CONSTRUCTION COMPANY)
Solicitation No. 419980-89-A-0065) P.S. Protest No. 89-92

DECISION

Daniel J. Keating Construction Company ("Keating") protests the contracting officer's decision to exclude it from a presolicitation list of most qualified contractors for the construction of a new postal facility. Keating was deemed to have insufficient experience in construction projects of similar size and scope.

On September 11, 1989, an advertisement placed by the Philadelphia Facilities Service Center appeared in the Commerce Business Daily (CBD) notifying interested sources that prequalification packages for construction of a new GMF/VMF in Harrisburg, PA, under Solicitation No. 419980-89-A-0065, would be available on September 11. The due date for receipt of prequalification statements was October 11. Because of a protest, an amendment was issued and the date for receipt of prequalification statements was extended to October 20.

The CBD synopsis explained that the project had an estimated cost range of \$45 million to \$55 million, and stated the following criteria would be used in evaluating each offeror's prequalification package:

1. Construction experience. Experience of ten years as a prime contractor w/ a min of five years experience in projects of similar size and scope.
2. Financial stability, have ability to secure bonding capacity in the amount of fifty million dollars.
3. Organization and the management capability to provide the construction of a postal facility on a postal controlled property.
4. References and previous clients.

Other factors to be considered include: Prior experience in Postal Service construction; staffing availability; [and] Minority Business Enterprise (MBE) participation and commitment.

The synopsis concluded: "Firms selected as being the most qualified will be placed on the prequalification list."

The prequalification package contained space for those interested in submitting their qualifications to list projects in the following categories: comparable projects completed "in last five (5) years," projects for the U.S. Postal Service, projects for other government agencies, other major nongovernment current contracts, and four largest projects completed.

Twenty-one responses were received. A Postal Service evaluation committee reviewed each offeror's prequalification statement. Eleven contractors were recommended by the committee as most qualified; Keating was not among them. The contracting officer informed Keating of its elimination by letter dated December 8, received by Keating December 14. The letter set forth the reason for Keating's nonselection: "Your submittal did not present comparable construction experience for a facility of this size and scope."

Keating's timely protest of the contracting officer's decision was received in this office on December 28. Keating claims its prequalification statement affirmatively demonstrates its ability to perform the project in question. It notes it has shown financial capacity, a good performance record, and a history of business integrity. Keating also asserts its submittal demonstrates that it has the necessary construction experience to perform the Harrisburg project. It cites its recently completed \$39 million regional air hub facility for United Parcel Service, as well as partially completed projects (for a \$64 million hospital and a \$212 million convention center) as evidence that Keating should have been included among those deemed most qualified by the evaluation committee.

The contracting officer responded to Keating's protest by letter dated January 10, 1990. The contracting officer states that Keating's prequalification submittal failed to demonstrate sufficient construction experience on projects of similar size and scope. He notes that Keating's largest projects listed - the convention center and the hospital - are only partially complete. Because the regional air hub facility was the only completed project by Keating considered similar in size and scope to the proposed Harrisburg project, the contracting officer states that the evaluation committee had a reasonable doubt that Keating met the prequalification criteria. The contracting officer did not rely on any other evaluation criteria to justify this determination.

At Keating's request, a protest conference was held on January 25, in accordance with Procurement Manual (PM) 4.5.7 j. At that conference, Keating reiterated its claim that its prequalification statement contained sufficient evidence of similar construction experience to warrant its inclusion as a prequalified contractor. Keating also argued that the limit on relevant similar projects to be listed by the offeror in its submittal to those performed within the last five years was arbitrary.^{1/}

^{1/}This element of Keating's protest alleges a deficiency in the terms of the prequalification forms. PM 4.5.4 b requires that protests based on apparent deficiencies in the terms of a solicitation be filed before the due date for receipt of proposals. 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. 88-52, November 1,

Following the conference, Keating, by letter dated January 31, timely filed written comments with this office, in accordance with PM 4.5.7 j. In those comments, Keating first faults the contracting officer for failing to define the term "most qualified" in either the CBD synopsis or the prequalification package.^{1/} Keating also asserts the contracting officer was arbitrary and unreasonable in failing to include Keating as a most qualified contractor. Keating claims that the large, partially completed projects listed in its prequalification package illustrate its experience in pre-construction planning and its ability to perform complex projects under budget and ahead of schedule. It also notes several projects listed in its package, in a cost range of \$21 million to \$32 million, which were not noted by the contracting officer in his statement. Finally, Keating notes that the contracting officer has not challenged its qualifications regarding the remaining evaluation criteria. It claims the contracting officer did not fairly evaluate its prequalification proposal and that Keating presented ample evidence that it is a most qualified offeror.

Discussion

This office plays a limited role in reviewing the technical evaluation of prequalification or similar information submitted by a potential offeror. See Southern Air Transport, P.S. Protest No. 89-56, October 3, 1989. The technical determinations of a contracting officer will not be overturned unless they are arbitrary, capricious, or otherwise unsupported by substantial evidence. Id.; POVECO, Inc., et al., P.S. Protest No. 85-43, October 30, 1985. The protester bears the burden of overcoming the "presumption of correctness" which accompanies the statements of contracting officers. Southern Air Transport, supra; Data Flow Corporation, P.S. Protest No. 83-54, October 28, 1983. Accordingly, we must determine if Keating has met this burden and shown that the contracting officer's decision was arbitrary or not supported by substantial evidence.

The CBD announcement of the project listed among the criteria upon which prequalification submittals would be judged that contractors must have "a min[imum] of five years experience^[1/] in projects of similar size and scope." This is a standard similar to a definitive responsibility criterion,^{1/} and its inclusion in the prequalification

1988. Thus, this portion of Keating's protest must be dismissed as untimely. This office has no authority to rule on untimely protests. American Telephone Distributors, Inc., P.S. Protest No. 87-117, February 23, 1988.

^{2/}Again, we dismiss this portion of Keating's protest as untimely since it relates to the terms of the prequalification notice and was not raised until after the due date for receipt of prequalification statements. See footnote 1, above.

^{3/}While the language of the requirement is not clear, we assume that the intent was to require comparable experience within the five years preceding the prequalification process. The prequalification form requests identification of "comparable-size projects COMPLETED in last five (5) years." It is apparent from Keating's comments that it shares that interpretation.

^{4/}Definitive responsibility criteria are specific and objective standards established for measuring an offeror's ability to perform the contract. TLT Construction Corp., Inc., P.S. Protest No. 89-75, January

standards was not timely challenged by Keating (see footnotes 1 and 2, above). Once established in the CBD as a requirement, the contracting officer is not able to consider only general construction experience and disregard the absolute requirement for five years' comparable experience.

Keating's prequalification statement listed projects completed within the last five years valued at \$39.6 million, \$25 million, \$27.3 million, \$23 million, \$7.7 million, \$21 million, and \$23 million. The \$39.6 million project was the only one the contracting officer deemed to be of similar size to the \$45 to \$55 million range given for the GMF/VMF project. Based on this information regarding experience, the contracting officer could reasonably have concluded that Keating had insufficient projects within the last five years of a comparable size and scope to the GMF/VMF project.^{4/}

However, the record raises questions whether that standard was applied evenhandedly to all prequalification submissions. An offeror that was prequalified listed projects completed within the last five years of \$47.3 million, \$11.6 million, \$17.7 million, \$21 million, and \$5 million.^{5/} It listed nearly complete projects of \$33 million (85% complete), \$44.8 million (80%), and \$14.1 million (99%). In addition to the projects completed within the last five years as listed above, Keating's submittal also reflected a \$64 million project 75% complete, a \$212 million project 5% complete, and a \$14.5 million project 99% complete. We discern no difference between the relevant experience records of these two companies, and, therefore, cannot find sufficient evidence to support the contracting officer's conclusion that Keating failed to meet the five-year experience requirement while the other contractor did.

18, 1990. We will not overturn a contracting officer's application of definitive responsibility criteria if the contracting officer had before him information from which he reasonably could have determined that the criteria were or were not met. Id.

^{5/}Keating also complains that it was not given credit for current projects which, when completed, would be comparable in size to the Harrisburg GMF/VMF project. The CBD synopsis does not state that only completed construction projects would count towards meeting the "similar size and scope" requirement, although the request that contractors list "comparable-size projects COMPLETED in last five (5) years" is some evidence that only completed work would be considered. We need not decide whether the language used in the CBD announcement was sufficient to put contractors on notice that only completed jobs would count towards meeting the minimum experience requirement, but Keating's arguments and the contracting officer's failure to refute them suggest ambiguity in the requirement. If the contracting officer intends to look only at completed projects or at percentage of completion as a gauge of experience, that requirement should be made clear to those submitting prequalification statements.

^{6/}This prequalified offeror's largest listed project, \$48.5 million, was completed in September 1983, more than five years before the due date for prequalification statements. If we are correct in assuming (see footnote 3, above) that the period to be considered is the past 5 years, the contracting officer was not free to consider the \$48.5 million project in meeting the comparable size and scope requirement. Eliminating consideration of this project leaves the recent construction experience of the prequalified offeror and Keating, as outlined in their respective prequalification statements, practically identical, with a slight apparent edge to Keating.

The evaluation of a proposal must be based on factors outlined in the solicitation (Cohlma Airline, Inc., P.S. Protest No. 87-41, October 30, 1987), and contractors submitting prequalification packages are entitled to the same consistent application of stated evaluation criteria, not only to their own proposals but to their competitors' as well. See CFI, P.S. Protest No. 88-82, February 17, 1989 ("[U]nequal treatment among offerors is unacceptable because all offerors must be treated fairly and equally."). The CBD synopsis required a minimum of five years of experience in the construction of similar-sized projects. By rejecting Keating's proposal for failure to list sufficient completed construction projects and prequalifying a competitor with indistinguishable experience, the contracting officer departed from the evenhanded application required when using specific, objective standards such as that set forth in the CBD announcement. "Once offerors are informed of evaluation criteria, the procuring agency must adhere to those criteria or inform all offerors of any changes made in the evaluation scheme." POVECO, Inc., P.S. Protest No. 85-9, May 21, 1985, quoting PAE GmbH, Comp. Gen. Dec. B-212403.3 et al., July 24, 1984, 84-2 CPD & 93. If the contracting officer wished to change the evaluation criteria from those listed in the CBD synopsis, he should have issued an amendment to the synopsis or canceled the prequalification synopsis and issued a new one incorporating the necessary changes. See TPI International Airways, Inc., P.S. Protest No. 87-40, October 30, 1987.

To afford Keating equal treatment, the contracting officer must reevaluate Keating and the other offerors using the same standards: either those set forth in the CBD announcement or other standards communicated to all potential offerors. If the contracting officer wishes to change or clarify any of the standards, the prequalification process should be started over or the requirements amended and conveyed to all those who submitted prequalification packages. Equal consideration of all prequalification submittals according to the established standards must follow.

The protest is sustained.

William J. Jones
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Office of Contracts and Property Law

[checked against original JLS 5/26/93]