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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Vador Ventures, Inc.

File: B-296394, B-296394.2

Date: August 5, 2005

Richard D. Lieberman, Esq., McCarthy, Sweeney & Harkaway, PC, for the protester.
James H. Roberts, Esq., Van Scoyoc Kelly PLLC, for Odoi Associates, Inc., an
intervenor.

Kathleen M. McCartney, Esq., General Services Administration, for the agency.

Peter D. Verchinski, Esq., and David A. Ashen, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest that awardee's proposed key personnel do not meet solicitation's definitive responsibility criteria requiring experience managing or supervising the operation of an 800,000 square foot building is denied where the agency has reasonably determined that experience of awardee's personnel with two buildings (totaling 971,425 square feet), operated in major respects as one building, and having integrated systems with equipment sized to operate the two buildings together, satisfied the requirements.

DECISION

Vador Ventures, Inc. protests the General Services Administration's (GSA) award of a contract to Odoi Associates, Inc., under invitation for bids (IFB) No. GS11P04YED0224, for building management services. Vador principally asserts that award to Odoi was improper because Odoi failed to meet the definitive responsibility criteria set forth in the solicitation.

We deny the protest.

The IFB, issued as a section 8(a) set-aside, contemplated the award of a fixed-price contract for an initial period of one year, with 4 option years, for commercial facility management services, including operation and maintenance services, elevator maintenance services, and custodial services, at the Postal Square Building, 2 Massachusetts Avenue, NE, Washington, D.C. The IFB stated that award would be made to the lowest-priced, responsive, responsible bidder.

The IFB set forth specific experience qualifications for key personnel the awardee was to provide under the contract, including the project manager, any alternate project managers, and on-site supervisory employees. For the project manager and the alternate project managers, the solicitation required 4 years experience (within the past 5 years) “in managing the operation, maintenance and repair, custodial services, building alterations, customer relations requirements, and all other operational components of a building with at least 800,000 square feet of occupiable space.” IFB, Section J, exh. 1, at 2. The supervisory employees were to possess at least 4 years of recent (within the past 5 years) experience “in directing personnel responsible for accomplishment of work in their respective program area in a building of at least 800,000 square feet of occupiable office space.” *Id.* at 4. Further, the IFB required that the apparent low bidder submit, “**within 5 working days after notice to the apparent low bidder,**” detailed personnel resumes explaining how each individual had obtained the required experience. IFB, amend. 4, Section J, exh. 1, at Revised Page 2, 4 (emphasis in original). The solicitation did not state when award would be made.

The agency received 14 bids by the closing time on April 7, including Odoi’s low bid of \$10,559,398, and Vador’s second low bid of \$12,315,353. By letter dated April 18, the agency informed Odoi that it was the apparent low bidder, and asked that it submit, among other things, the resumes required under the solicitation. On April 26, Odoi submitted the required information, and the agency awarded the contract 3 days later.

Vador thereafter filed this protest with our Office, alleging that the experience requirements laid out in the solicitation constitute definitive responsibility criteria that the awardee failed to meet.¹ Specifically, Vador asserts that Odoi’s personnel do not have experience working in an 800,000 square foot building.

¹ After receiving the agency report, Vador filed a supplemental protest on June 16, alleging that the awardee’s bid was unbalanced, that the agency failed to perform a price reasonableness analysis of the awardee’s bid, and that the agency improperly made an affirmative responsibility determination. We dismiss Vador’s assertion regarding the alleged unbalancing of the awardee’s bid as untimely filed. According to the record, which Vador does not challenge, Vador was emailed a copy of the bid abstract on April 21. Vador then had 10 days to protest the awardee’s pricing; its failure to do so renders this ground untimely. 4 C.F.R. § 21.2(a)(2) (2005). Further, Vador’s assertion that the agency did not properly evaluate the reasonableness of Odoi’s low price provides no basis to question the award, since a price reasonableness evaluation is intended to determine whether offered prices are higher than warranted, not lower. *Satellite Servs., Inc.*, B-295866, B-295866.2, Apr. 20, 2005, 2005 CPD ¶ 84 at 3 n.3. Finally, GAO does not generally consider challenges to affirmative determinations of responsibility, except under limited (continued...)

Responsibility is a term used to describe the offeror's ability to meet its contract obligations. See generally Federal Acquisition Regulation (FAR) subpart 9.1. In most cases, responsibility is determined on the basis of what the FAR refers to as general standards of responsibility, such as adequacy of financial resources, ability to meet delivery schedules, and a satisfactory record of past performance and of business integrity and ethics. FAR § 9.104-1. In some cases, however, an agency will include in a solicitation a special standard of responsibility, FAR § 9.104-2, which is often referred to as a definitive criterion of responsibility. Definitive responsibility criteria are specific and objective standards established by an agency as a precondition to award which are designed to measure a prospective contractor's ability to perform the contract. FAR § 9.104-2; Specialty Marine, Inc., B-292053, May 19, 2003, 2003 CPD ¶ 106 at 2-3.

Because definitive responsibility criteria limit the competition to those who can meet them, and because compliance with them is not a matter of subjective business judgment but can be determined objectively, offerors must meet such criteria as a precondition for award. We consider protests alleging that a contracting officer failed to enforce the criteria. The Mary Kathleen Collins Trust, B-261019.2, Sept. 29, 1995, 96-1 CPD ¶ 164 at 3; T. Warehouse Corp., B-248951, Oct. 9, 1992, 92-2 CPD ¶ 235.

As a preliminary matter, GSA maintains that the experience requirements here do not constitute definitive responsibility criteria. This is so because, according to GSA, the solicitation did not specifically require the apparent low bidder to submit proof of the key personnel's experience prior to contract award. As stated above, definitive responsibility criteria are special standards that must be met as a precondition for award. In this case, the solicitation required that the resumes be submitted within 5 days after notification of a firm's apparent low bidder status, and made no reference to when award would be made. Consequently, the agency argues, award could have been made before the resumes were received, and thus award was not contingent upon the potential awardee's ability to meet the requirements. The agency maintains that whether the key personnel meet the experience requirements is a matter of contract administration.

We find this argument unpersuasive. As noted by the agency, our Office has dismissed protests on the ground that certain requirements (such as license requirements) are not definitive responsibility criteria when the solicitation does not require offerors to meet, or demonstrate the ability to meet, the requirement prior to

(...continued)
circumstances not alleged or evident here. 4 C.F.R. § 21.5(c). These protest grounds are dismissed.

award. See, e.g., Transcontinental Enters., Inc., B-294765, Nov. 30 2004, 2004 CPD ¶ 240 at 3 n.2. However, while the solicitation here did not explicitly state that the agency would evaluate the key personnel experience prior to award, we find that in requiring submission of resumes within 5 working days of notice to the apparent low bidder, the solicitation reasonably indicated to bidders that the resumes would be evaluated before award in order to determine whether the low bidder was able to comply with the key personnel experience requirements laid out in the solicitation.² In our view, had GSA intended the resumes to be matters of contract administration (and not definitive responsibility criteria), one would reasonably expect that the requirement would have been for submission sometime after award had been made, rather than before award. We therefore find that the key personnel experience requirements possess all of the principal characteristics of a definitive responsibility criterion—they concern the capability of the offeror, not a specific product, and they are objective standards established by the agency as a precondition to award. See Specialty Marine, Inc., B-292053, May 19, 2003, 2003 CPD ¶ 106 at 3.

Vador asserts that Odoi's key personnel failed to satisfy the definitive responsibility criteria because they did not have experience managing or supervising the operation of an 800,000 square foot building. Specifically, Vador contends that the agency improperly waived this requirement by considering two separate buildings, the Wilbur J. Cohen Building and the Mary E. Switzer Building in Washington, D.C., to be one qualifying building under the solicitation's requirements. Vador argues that because the two buildings have different street addresses and are separated by a street, with each building containing less than 800,000 occupiable square feet, the experience of Odoi's key personnel managing or supervising the operation of the two buildings together did not satisfy the solicitation requirements.

Where, as here, a protester asserts that a definitive responsibility criterion has not been satisfied, we will review the record to ascertain whether evidence of compliance has been submitted from which the contracting official reasonably could conclude that the criterion had been met; generally, a contracting agency has broad discretion in determining whether offerors meet definitive responsibility criteria. Carter Chevrolet Agency, Inc., B-270962, B-270962.2, May 1, 1996, 96-1 CPD ¶ 210 at 4. Further, literal compliance with definitive responsibility criteria is not required where there is evidence that an offeror has exhibited a level of achievement

² Indeed, further evidence that the solicitation requirement for submission of resumes "within 5 working days after notice to the apparent low bidder" was intended to result in submission of the resumes prior to award is found in the fact that the solicitation included a requirement that information demonstrating compliance with certain contractor experience requirements be submitted "within 5 working days after notice to the apparent low bidder" and specifically stated that such information "will be examined for authenticity prior to contract award." IFB, amend. 4, Section J, exh. 1, at Revised Page 6.

equivalent to the specified criteria. HAP Constr., Inc., B-278515, Feb. 9, 1998, 98-1 CPD ¶ 48 at 4; Western Roofing Serv., B-232666.3, Apr. 11, 1989, 89-1 CPD ¶ 368 at 4.

We find no basis to question the agency's position that experience managing or supervising the operation of the Cohen and Switzer buildings was qualifying experience. The Cohen and Switzer buildings, while having two separate street addresses, share many of the same basic operating systems. The agency reports, and the protester does not dispute, that many of the Cohen and Switzer buildings' electrical, mechanical, and plumbing systems are unified operating systems with the equipment sized to operate the two buildings together. For example, the two buildings share a single, common chiller system for cooling the buildings. The two buildings are serviced by a single, common feed that supplies high pressure steam, and by a single, common electrical feed. (Indeed, the two buildings are billed by the steam and electrical providers as if they were one building.) The heating and air conditioning of the two buildings are controlled by a single, common energy management control system. Furthermore, contracted commercial facilities management services for the two buildings have always been obtained under one contract, and the buildings have always been serviced as one. Since the combined occupiable square footage of the two buildings is 971,425 square feet, and the two buildings function as one building in most important respects, we find that GSA has reasonably concluded that experience managing or supervising the operation of the two buildings could satisfy the IFB's requirement for experience managing or supervising an 800,000 square foot building.

Vador asserts that considering the combined Cohen and Switzer buildings to be a single unit is inconsistent with a question and answer incorporated into the solicitation. Specifically, in response to a question as to whether "the contractor [may] submit personnel who have had similar experience on more than 990,000³ square feet of occupiable space for a complex of buildings, not just a single building," the agency answered

No. A building the size of Postal Square presents certain complexities that need a level of experience and abilities that can only be gained by working in a large facility. In order to ensure we are going to get that level of ability this requirement must be met.

IFB, amend. 4, at 4.

As noted by the agency, however, a complex of buildings may contain separate systems for each building. Here, in contrast, the Cohen and Switzer buildings operate in major respects as one building, having integrated systems with equipment sized to operate the two buildings together. Thus, the agency could reasonably

³ This was subsequently changed to 800,000 square feet.

conclude that the experience of the awardee's personnel with the two buildings (totaling 971,425 square feet), operated in major respects as one building, provided experience comparable to that which would be obtained managing and supervising the operation of a single, 800,000 square foot building.

The protest is denied.

Anthony H. Gamboa
General Counsel