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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Warden Associates, Inc.

File: B-291440; B-291440.2

Date: December 27, 2002

Harlan Wax for the protester.

Kenneth W. Dodds, Esq., Small Business Administration, for the agency.

Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency established unreasonably short deadline to respond to request for quotations issued under the Federal Supply Schedule program is denied, where protester essentially admits it could have timely responded but chose not to.

DECISION

Warden Associates, Inc. protests the issuance of a task order by the Small Business Administration (SBA) under request for quotations (RFQ) SBAHQ-02-Q-0043 for consulting services related to performing cost comparisons under Office of Management and Budget Circular A-76. Warden contends that the RFQ, which sought “a technical and price proposal” under Warden’s General Services Administration (GSA) Federal Supply Schedule (FSS) contract, did not permit sufficient time for response. Warden also challenges the selection of the only vendor that submitted a response, Jefferson Consulting Group.

We deny the protest.

The record includes an SBA requisition, dated July 18, 2002, for a consultant to assist the agency in the conduct of A-76 cost comparison studies. The SBA’s estimate of the cost of services was approximately \$175,000. AR Tab C, Requisition for Services. However, funding did not become available, and the requisition therefore was not approved, until approximately 6 p.m. on Friday, September 27. At 9:15 p.m. that day, the contracting officer faxed the RFQ to four FSS vendors, including Warden, and left telephone messages with each vendor as well. Warden claims it never received the telephone message.

The RFQ sought a “technical and price proposal in accordance with your GSA schedule contract” for A-76 consulting services. These services included providing the SBA with an implementation strategy, expert advice, and training for conducting A-76 studies. Submissions were due by Monday, September 30, at 1 p.m.

On Monday morning, September 30, Warden contacted the contracting officer and sought an extension of time for filing its response to the RFQ or, in the alternative, permission to submit its response by e-mail. Its requests were denied. The contracting officer explained that the SBA needed to place the order that day, which was the last day of the fiscal year, or else funding would expire. She explained that the SBA was having difficulties with its e-mail server, and would therefore not accept e-mail submissions, but told Warden that it could submit its response by facsimile. As explained below, Warden found this to be unacceptable.

Only one vendor, Jefferson, submitted a response to the RFQ. Jefferson currently performs related A-76 consulting services for the SBA under a separate task order. Jefferson’s response to the RFQ, which was timely received by the SBA at 12:50 p.m. on September 30, included a detailed technical proposal and a quotation to perform the work for approximately the same amount as the agency estimate. The SBA placed an order for the services with Jefferson on a time and materials basis, as contemplated by the RFQ.

Warden timely protested that the SBA had not allowed sufficient response time to respond to the RFQ. In a supplemental protest, it also challenged the SBA’s issuance of the task order to Jefferson.

Warden first contends that the SBA’s establishment of a 3-day response time violates Federal Acquisition Regulation (FAR) § 5.203 (requiring a minimum 30-day response time) and 41 U.S.C. § 5 (requiring agencies to advertise for proposals). However, these rules apply to traditional negotiated procurements and not to the FSS program, which is governed instead by FAR Subpart 8.4.¹ Computer Prods., Inc., B-284702, May 24, 2000, 2000 CPD ¶ 95 at 4. Nevertheless, where, as here, an agency invites firms to submit a “technical and cost proposal” in response to an RFQ, we will review the agency’s actions to ensure that the evaluation is fair and reasonable and consistent with the terms of the RFQ. Comark Fed. Sys., B-278343, B-278343.2, Jan. 20, 1998, 98-1 CPD ¶ 34 at 4-5.

¹ As a threshold matter, Warden complains it was not specifically informed which GSA schedule was at issue or that FAR Subpart 8.4 applied. We do not find these complaints reasonable. The cover letter to the RFQ refers to Warden’s GSA schedule contract. Moreover, Warden has previously submitted quotations to the SBA for similar services under its GSA contract. Warden points to no requirement, and we are aware of none, that required the SBA to inform Warden that the RFQ responses were going to be evaluated pursuant to FAR Subpart 8.4.

FAR Subpart 8.4 does not require that vendors be permitted a specific minimum amount of time to respond to an RFQ; what is reasonable and sufficient depends on the facts and circumstances of the case. We recognize that issuing a solicitation late on Friday, September 27, 2002, and requiring submission by midday on the next business day (Monday, September 30) allows very little time, particularly where, as here, a “technical proposal” is sought. There could be circumstances where such action by an agency would lead us to sustain a protest. We have, however, recently found that almost the same amount of time (and, indeed, over the same end-of-the-fiscal-year weekend) was unobjectionable under the circumstances. Specifically, in USA Info. Sys., Inc., B-291488, Dec. 2, 2002, 2002 CPD ¶ __, the agency issued an RFQ amendment on the Internet on Friday (September 27), requiring responses by noon on Monday, an amount of time that the protester challenged as unreasonably short. We concluded that, in the unusual circumstances of that procurement, the amount of time was unobjectionable: the amendment made only relatively minor changes in the solicitation, and the protester failed to avail itself of opportunities to obtain the amendment promptly, even though it was on notice of the agency’s intent to issue a purchase order before the end of the fiscal year (on Monday, September 30). See also Military Agency Servs. Pty., Ltd., B-290414, B-290441, B-290468, B-290496, Aug. 1, 2002, 2002 CPD ¶ 130 at 6 (24-hour response time was reasonable where agency requests only price quotes and all vendors were able to timely respond).

Here, the RFQ’s call for “technical proposals” due on the next business day may well have been objectionable in other circumstances. In the context of the unique facts of this case, however, we do not find the agency’s actions to be objectionable.

During a telephonic hearing that our Office conducted, Warden admitted that it could have timely prepared and submitted the requested technical proposal; instead, according to the protester, the critical issue was the medium of submission, not its ability to prepare a technical proposal in the limited time. Warden apparently believed that it could prepare and submit its proposal by the deadline, if the agency would accept e-mail submission. Warden was unwilling, however, to fax its proposal (as the contracting officer suggested) because it was concerned that even if transmission began before 1 p.m., the last faxed page might not be received by 1 p.m.² Warden did not raise this concern about facsimile transmission with the SBA during the September 30 telephone calls, and concedes that it probably could have faxed the proposal before 1 p.m., although it would have been close to that deadline.

² Warden noted that if e-mail had been permitted, it would have submitted a proposal by e-mail. According to Warden, even if the pressure of time caused such an e-mail proposal to arrive a few minutes past the 1 p.m. deadline, the firm would have left it to the discretion of the contracting officer whether to accept the late filed submission. Warden fails to explain why this same rationale would not apply to a facsimile transmission.

Furthermore, the contracting officer stated during the telephonic hearing that she would have stood by her offer to accept the facsimile of Warden's submission.³ Warden's company personnel nevertheless decided to file a protest instead. In other words, Warden could have made a timely submission to the contracting agency, but instead chose not to.

We have no basis to sustain Warden's protest of the SBA's actions here. The contracting officer endeavored to contact the potential vendors, including Warden, by telephone as well as facsimile as soon as she learned, late on September 27, that the requisition for services had been approved and funds were available. Warden contends that the SBA's funding concerns are due solely to its lack of acquisition planning, which does not constitute sufficient justification for a short response time. Although we recognize that acquisition planning is required under FAR § 8.404(a)(2), we have also stated that as a general rule obtaining information from FSS vendors, which the SBA did here, satisfies the agency's obligation for procurement planning. See Sales Res. Consultants, Inc., B-284943, B-284943.2, June 9, 2000, 2000 CPD ¶ 102 at 4.

More importantly, the record does not establish that Warden was unable to comply with the deadline set here. We find unpersuasive Warden's distinction between e-mail submission (which, in Warden's view, would have apparently made the timeframe reasonable) and facsimile transmission (where Warden viewed the timeframe as unreasonably short). Instead, we treat the firm's decision not to respond to the RFQ as a business judgment. Accordingly, we deny Warden's protest challenging the sufficiency of the response time permitted.

Warden also protests the selection of Jefferson, alleging that Jefferson's submission was "non-responsive" to the RFQ and that Jefferson received an "unfair competitive advantage" because it allegedly had access to non-public information as a contractor currently performing related A-76 services for the SBA. Warden is not an interested party to raise these allegations, however, since it chose not to submit a quotation and because we have denied its protest challenging the deadline for responding to the RFQ. See Loral Fairchild Corp., B-242957, June 24, 1991, 91-1 CPD ¶ 594 at 6 (protester is not an interested party to further challenge procurement where protester did not submit a proposal and its protest alleging overly restrictive specifications is denied); Roy's Rabbitry, B-196452, May 9, 1980, 80-1 CPD ¶ 334 at 3 (protester is not interested party to challenge award of contract where it chose not

³ The RFQ does not prohibit the acceptance of late filed submissions. Furthermore, the FAR rules concerning late filed proposals in negotiated procurements do not apply to this FSS buy. KPMG Consulting LLP, B-290716, B-290716.2, Sept. 23, 2002, 2002 CPD ¶ 196.

to submit bid for reasons of convenience). Therefore, Warden's supplemental protest is dismissed.

The protest is denied.

Anthony H. Gamboa
General Counsel