



19
COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

31174

B-177745

July 13, 1973

International Container Service, Inc.
P.O. Box F
Bellevue, Washington 98009

Attention: Mr. R. E. Glynn
Secretary-Treasurer

Gentlemen:

Reference is made to your letter of March 21, 1973, and prior correspondence, protesting against the award of a contract to SDC Cold Storage, a division of Farwest Capital Co., Inc. (hereinafter SDC), under request for proposals (RFP) DSA 137-73-R-0196, issued by the Defense Personnel Support Center (DPSC), Alameda, California.

Your protest essentially concerns the question of whether you were a responsible prospective contractor and the manner in which it was determined that you were not. You generally deny deficiencies which were cited in an unfavorable preaward survey and upon which the contracting officer based his determination of irresponsibility. Further, you state that the question of your responsibility should have been referred to the Small Business Administration (SBA) for possible issuance of a certificate of competency (COC). In this regard, you dispute the contracting officer's view that deficiencies concerning "safety" and "sanitation" are not included in the definition of "capacity." You further contend that the execution of a certificate of urgency on December 27, 1972, was without any basis, since the current contract did not expire until January 31, 1973, and it could have been extended to allow sufficient time for referral to SBA and for correction of any deficiencies. You also point out that whatever urgency existed was due to the Government's unilateral action in extending the closing date for receipt of proposals from October 25, 1972, to November 29, 1972.

The RFP was issued September 15, 1972, for one year's refrigerated warehouse services involving the receipt, storage, assembly, and distribution of perishable and nonperishable food in and from the Seattle, Washington, area, including export transportation. Three proposals were received and after evaluation it was determined that the ICS proposal was lowest in price, and the SDC proposal was second lowest.

PUBLISHED DECISION
63 Comp. Gen.

720228

091405

On December 4, 1972, the contracting officer requested DCASR-Seattle to conduct a preaward survey of ICS. The results of the survey, dated December 22, 1972, were unfavorable. The contracting officer has summarized the findings as follows:

* * * In brief, the preaward findings established that the offeror was determined to be unsatisfactory as to "Production Capability" because it could not perform any proposed contract without extensive use of overtime charges, which the firm intended to pass on to the Government. Under the heading of "Plant Facility and Equipment" the offeror was determined unsatisfactory by reason of six listed deficiencies; principal among them being a finding that the temperature in all freezers is not maintained at 0° F. or below, as required, a finding that the premises were in violation of five regulations of the City of Seattle, and a finding that the ceiling in the chill room was supported by portable jacks, which if hit by a forklift might allow the ceiling to collapse. Under the headings of "Transportation" and "Ability to Meet Required Schedules" the offeror was found to be unsatisfactory for four reasons, significant among the reasons being that the proposed facilities were equipped to handle only 7 trucks, as opposed to a requirement of the solicitation that the contractor be in a position to simultaneously load or unload not less than 12 trucks (D-6a, page 12), a capability to handle only 1 rail car, as opposed to a provision in the solicitation requiring the capability to simultaneously load or unload not less than 4 rail cars (D-6b, page 12) and, even if it was economically feasible to construct more extensive truck loading and unloading platforms, the effect of such would be to allow no maneuverability of trucks within the premises and that trucks would be required to block city streets and sidewalks. Moreover, the facility was found to contain only one door leading into the warehouse, wherein all of this high volume of traffic would be required to move both in and out, simultaneously. Under the heading of "Sanitation" there was found to be not less than nine specified unsatisfactory conditions significant among them being a finding that insulation was peeling off the walls in the chill room, an inadequate chill inspection room requiring extensive modification, poor lighting, debris on dock areas and interior floors, broken windows, lack of covered dock areas, and no opportunity at this location for Veterinary Inspectors to transport samples from receiving rooms to inspection rooms without interfering with operations or transporting for stuffs outside and thus exposing them to the elements.

Based upon the results of the preaward survey, the contracting officer determined on December 27, 1972, that ICS was not a responsible prospective contractor. Since ICS represented in its proposal that it was a small business concern, the contracting officer also considered the question of whether the determination should be referred to SBA for the possible issuance of a COC. In this regard, Armed Services Procurement Regulation (ASPR) 1-705.4(c) provides that if the proposal of a small business concern is to be rejected solely because the contracting officer has determined the concern to be nonresponsible as to capacity or credit, the matter shall be referred to the SBA. In the instant case, the contracting officer has stated that his determination of nonresponsibility was predicated primarily upon health, safety, and sanitation factors. The contracting officer doubted that the standards of ASPR 1-903.2(b), which provides that procurement of foods is required to be made only from those sources which meet certain sanitation requirements, fell within the meaning of "capacity." He reasoned that since neither the words "safety" nor "sanitation" appear within the definition of "capacity" in ASPR 1-705.4, the determination of nonresponsibility was not based solely on lack of capacity or credit, and thus referral to SBA was not required. In any event, he found that award had to be made without further delay, and prepared a certificate of urgency, dated December 27, 1972, which was duly approved by the Commander, Subsistence Regional Headquarters, Oakland, and forwarded to SBA. Award was made to SDC on January 2, 1973.

ASPR 1-705.4(a) defines "capacity" as "the overall ability of a prospective small business contractor to meet quality, quantity, and time requirements of a proposed contract and includes ability to perform, organization, experience, technical knowledge, skills, 'know-how,' technical equipment, and facilities or the ability to obtain them. * * *" In addition, the regulation cross-references "capacity" with ASPR 1-903.2, which deals with additional standards, including standards for the procurement of food (ASPR 1-903.2(b)). Upon review of the preaward survey and the determination of nonresponsibility, it appears that all of the deficiencies cited, including those regarding health, safety, and sanitation, relate to ICS' "overall ability * * * to meet quality, quantity, and time requirements." B-171168, May 4, 1971. It therefore appears that the nonresponsibility of ICS related to its deficiencies in the areas of capacity or credit. Such being the case, the contracting officer was required under ASPR 1-705.4(c)(iv) to promptly refer the matter of ICS' responsibility to SBA for COC consideration unless a certificate of urgency indicating the specific reasons why an award must be made without the delay incident to referral was promptly filed with SBA.

Concerning the matter of urgency, the contracting officer states that, under the terms of the prior contract for warehouse services with SDC, the Government reserved the right, in the event award was made to another concern, to place freezer and cooler items at the new location beginning January 16, 1973, so that stock could be built up at that location and inventory depleted at the incumbent contractor's warehouse. He further states that it is considered essential to make an award at least 45 days prior to the date the Government must exercise this option and, for that reason, receipt of proposals was scheduled for October 25, 1972, with a projected award date of November 25, 1972. The 45 day lead time is necessary so that all contracting officers within DPSC can be informed of the Seattle storage location in ample time to assure that all supply contracts on FOB destination terms reflect the proper consignee point. If the correct information is not furnished in a timely manner, the contracting officer states that a chaotic situation could result; hundreds of change orders to existing contracts would be required and many rail and truck deliveries might be misrouted to an incorrect consignee point.

The closing date for receipt of proposals was extended from October 25, 1972, to November 29, 1972, because of a significant amendment to the Service Contract Act. This amendment required the contracting officer to obtain a new wage determination from the Department of Labor, which was received on November 20, 1972. Although this delay doubtless contributed to the circumstances which later gave rise to a determination of urgency, it was due to factors beyond the control of the contracting officer or the procuring agency. Furthermore, it does not appear that the preaward survey or the contracting officer's consideration of its results were accomplished in a dilatory manner. In short, the contracting officer was faced on December 27, 1972, with the decision whether to refer the matter of ICS' responsibility to SBA or to execute a certificate of urgency. At that time, only 20 days remained before January 16, 1973, the date for the Government to exercise its option to place storage items at a new location. As you point out, if award were eventually made to SDC, there would be no chaotic situation, since all deliveries would continue to be routed to the incumbent contractor. However, the contracting officer had to consider the possibility that referral to SBA might result in the issuance of a COC and an award to ICS, in which event it appears that the administrative difficulties referred to above could easily have occurred. With respect to your contention that the current contract should have been extended to allow sufficient time for referral to SBA, the contracting officer has indicated that, as the RFP provided for a contract term commencing February 1, 1973, and ending January 31, 1974, with estimated requirements for the 12 month period, it was

B-177745

considered that any contract awarded after the contract completion date would be of questionable legal validity. Based upon the foregoing, the contracting officer decided to issue a certificate of urgency and to proceed with award to SDC. As a general rule, the Office will not question administrative determinations of urgency in procurement. B-167686, October 14, 1969. Our review of the record as a whole affords no basis for concluding that the contracting officer's decision to make an award without incurring the cost of an SBA referral was unjustified or unreasonable. B-16209, October 1967.

With regard to the question of your responsibility, it has been the rule of our Office to accept the contracting officer's determination of responsibility, unless it is shown by convincing evidence that the finding was arbitrary, capricious, or not supported by substantial evidence. 51 Comp. Gen. 233 (1971); 43 Comp. Gen. 100 (1964). On the present record, we find no basis to question the determination of nonresponsibility.

Accordingly, the protest is denied.

Sincerely yours,

Paul G. Denbling

Acting Comptroller General
of the United States