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DECISION



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

FILE: B-195184

DATE: November 5, 1979

MATTER OF: ^{DLG 03269} Northland Anthropological Research, Inc.

[Protest Alleging Improper Agency Conduct]
DIGEST:

1. Incumbent contractor provided agency with monetary estimate for follow-on contract. That amount became Government estimate and established maximum amount of funding available for project. RFP, which did not reveal Government estimate, established evaluation scheme in which quality and experience factors far outweighed price. Initial proposals revealed that other competitors did not know importance of available funding. Since other competitors were placed at material disadvantage by not knowing Government estimate, all competitors were not treated equally and fairly. Protest sustained; GAO recommends that options not be exercised.
2. Protester's claim for proposal preparation costs must be denied where it cannot be shown that protester would have been awarded the contract but for the agency's action.

^{DLG 03268} Northland Anthropological Research, Inc. (NAR), protests the award of a contract for an archaeological survey of Fort Wingate, pursuant to solicitation No. DAAG49-79-R-0024, issued by Tooele Army Depot, ^{DLG 01776} Utah. NAR's protest alleges improper Army conduct concerning the negotiation and evaluation procedures.

NAR believes that the Army never intended to award a contract to one of the small businesses responding to the small business set-aside solicitation. NAR is convinced that the Army intended from the start to award a contract to the awardee, Southern Colorado University - (SCU).

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To subvert the small business restriction, NAR states that the Army appears to have engaged in an

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elaborate subterfuge designed solely to steer the final award to SCU, the incumbent contractor. NAR requests that the award to SCU be terminated and that it be compensated for its proposal preparation costs.

I. Background

Fort Wingate requested that the contractor performing the survey be on the job beginning the first week in June to correspond with the Youth Conservation Corps (YCC).

10 - Program. Since SCU managed the YCC camp in 1978, Depot personnel asked for but did not receive a sole-source procurement authorization because the contracting officer concluded that previous experience alone was not a sufficient justification when competition was available; therefore, the solicitation was issued on an unrestricted basis. On April 17, 1979, the day after issuance, the Small Business Administration (SBA) requested that the solicitation be made a 100-percent small business set-aside. This was done by amendment No. 1.

Acc 00002 - On May 1, 1979, amendment No. 2 added information concerning the criteria to be used in proposal evaluation. These criteria included prior camping, recreation, and environmental education experience of the proposed project staff and price was listed as the least important factor. The Army's evaluation scheme notified offerors that the quality of the firm's experience, management, and approach were more important relatively than price.

Initial proposals were opened on May 16 and they contained these prices:

No. 1 - <u>Wallaby Enterprises</u>	\$40,000.00
No. 2 - NAR	32,432.06
No. 3 - Professional Analysts	48,045.00
No. 4 - SCU (nonresponsive to small business requirement)	20,000.00

The funds allotted for the project were \$20,000 and additional funds were not available. Thus, the Army cancelled the solicitation and prices were not disclosed.

On May 29, 1979, it appears that SCU hired a crew chief for the survey to be in charge of YCC enrolls and to report to Fort Wingate for work on June 11, 1979; her salary would total \$3,500 for approximately 11 weeks' work.

On May 30, 1979, after learning that, NAR contacted the Army to ask if an award had been made. NAR was told that no award had been made.

Sometime after the initial proposals were opened, the contracting officer contacted the SBA Denver Regional Office and explained that no award could be made exceeding \$20,000 and requested advice on eliminating the small business set-aside. The Army reports that no comments were made by SBA and, due to the urgency, each company that originally submitted a proposal was contacted and asked for price quotations based on a new solicitation (No. DAAG49-79-R-0036) with the small business set-aside requirement removed.

Meanwhile, on June 4, 1979, NAR telephoned the Project Officer who said that no funds were available currently for the project and that this was the reason for the delay in making an award. NAR was also advised that its proposal was out of the competitive price range established upon initial inspection of proposals; thus, should funds become available, NAR would not be considered for the award of the contract.

On June 5, 1979, the contracting officer's representative telephoned NAR and explained that funds were now available for the project, but that all the small businesses submitted prices in excess of the amount budgeted by Fort Wingate for the project. The contracting officer's representative requested NAR to submit its offer telephonically that same day.

Prices obtained were as follows:

No. 1 - SCU	\$19,735.00
No. 2 - NAR	25,373.42
No. 3 - Professional Analysts	31,560.00
No. 4 - Wallaby Enterprise	36,000.00

Award was made to SCU and on June 11, 1979, work commenced on the archaeological survey of Fort Wingate.

II. NAR's Argument

From these events, NAR draws several inferences:

(1) SCU was hiring personnel for the project at a time when it could not have had any reasonable expectation that it would be awarded the contract.

(2) SCU correctly guessed the date of project initiation at a time when it was effectively barred from participation in contract negotiations.

(3) SCU began work on the archaeological survey the previous year and the data summaries from that work should have been provided to all prospective offerors.

NAR believes that the small business restriction could have been maintained and should have been maintained on this procurement, or the restriction should never have been placed at all. NAR states that if the Army wants to accept the lowest bid for these projects, it should never place a small business restriction on them.

III. The Army's Position

The Army reports that, about December 1978, a representative of SCU met with the commander of Fort Wingate to discuss the contract for the summer of 1979, the subject of this protest. They agreed that more staff would be necessary for the 1979 contract and, using SCU's staff pay as a guide, the commander estimated that \$20,000 would be needed to perform the work.

Concerning SCU's bid on the set-aside, the Army argues that, in Solar Resources, Inc., B-193264, February 9, 1979, 79-1 CPD 95, our Office has held that ineligible offerors are not prohibited from obtaining copies of a solicitation and submitting courtesy offers which contracting officers may use in determining whether small business bid prices are reasonable.

Further, the Army contends--citing Defense Acquisition Regulation § 2-404.1(b)(vi) (1976 ed.) and our decisions in Building Maintenance Specialists, Inc., B-186441, September 10, 1976, 76-2 CPD 233; and Strand Aviation, Inc., B-194411, June 4, 1979, 79-1 CPD 389--that the decision of the contracting officer to resolicit without the small business restriction was clearly proper, because all small business bids were unreasonable and far exceeded the funds available.

The Army concludes that although the contracting officer did not issue a formal resolicitation document, all offerors were treated equally and fairly in the resolicitation cycle in view of the urgency.

IV. Decision on Merits

The key to SCU's success in this procurement was clearly its knowledge of the importance of price. Since SCU was the only offeror whose price was within the Army's budget, its offer was the only one to receive consideration. The circumstances of this case and the Army's report convincingly show that SCU's agreement with the commander of Fort Wingate on the size of the staff required to do the work and SCU's knowledge of its own pay scales--which it gave to the Army--provided the sole information necessary for it to win. Equally convincing from the material before us is that the other offerors had no idea what the estimate or funding limit was or that the funding limitation was so important. We believe that the RFP's disclosed evaluation scheme indicated that quality and experience were far more important than price but the fiscal realities of the situation were that the Army wanted the best survey that it could buy for not more than \$20,000. Unquestionably, the other competitors, including NAR, were placed at a material competitive disadvantage. To avoid prejudice to other competitors, the Army should have disclosed the amount and importance of the Government estimate or the Army should have performed an independent analysis to arrive at the Government estimate and disclose it either to all or none.

Situations similar to this one occurred in Willamette-Western Corporation; Pacific Towboat & Salvage Company, 54 Comp. Gen. 375 (1974), 74-2 CPD 259; and Sam L. Huddleston & Associates, Inc., B-191218, May 25, 1978, 78-1 CPD 398. In Willamette-Western, the contracting agency released an advance copy of the solicitation to one competitor. As a result, the competitor gained approximate knowledge of the relative importance of evaluation factors, which was not disclosed in the solicitation actually issued. The knowledge enabled that competitor to tailor its proposal to satisfy the most important evaluation factors. Our Office concluded that the contracting agency's action resulted in prejudice to other offerors and we recommended corrective action. Similarly, in Sam L. Huddleston & Associates, Inc., the contracting agency knew that one firm possessed the master plan which contained invaluable information on project specifics but the agency took no action to ensure that all other competing firms possessed that critical information. Our Office concluded that it was the contracting agency's duty to have done so. There, it was clear that material information was not disclosed to all offerors and fundamental fairness required it to be in order that all offerors would be treated equally.

Accordingly, NAR's protest is sustained.

V. Proposal Preparation Costs

To recover proposal preparation costs, NAR must show that, but for the Government's arbitrary or capricious action, it would have been awarded the contract. McCarty Corporation v. United States, 499 F.2d 633 (Ct. Cl. 1974); United Power & Control Systems, Inc.; Department of the Navy--Reconsideration, B-184662, December 27, 1978, 78-2 CPD 436. Without considering whether the Army action was arbitrary or capricious, we do not believe that NAR has shown that it would have been awarded the contract. It appears that NAR cannot show that it would have been able to tailor its proposal to win the competition even if it knew of the \$20,000 funding limit for the contract. We cannot award proposal preparation costs on the speculation that NAR would have won the competition. Accordingly, NAR's proposal preparation cost claim is denied.

VI. Conclusion and Recommendation

The first term (approximately 11 weeks beginning June 11, 1979) of the contract was fully performed before the matter was ready for our consideration; however, the contract has four option periods. We recommend that the Army not exercise the options, and that the Army have a new competition to satisfy the requirement for future years.

A handwritten signature in cursive script, reading "Milton J. Arnold".

For the Comptroller General
of the United States