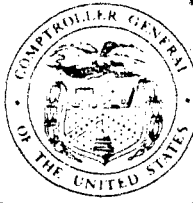


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DECISION



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

[Protest of IFB Cancellation]

FILE: B-197595

DATE: December 3, 1980

MATTER OF: Baxter & Sons Elevator Co., Inc.

DIGEST:

1. Opening of bids on scheduled date constitutes initial agency action adverse to protest against specifications filed with agency. Subsequent protest to GAO not filed within 10 days of notification of adverse agency action is untimely.
2. Where contracting officer finds small business nonresponsible, matter of small business responsibility is to be conclusively determined by Small Business Administration. Contracting officer is bound by SBA decision and cannot cancel solicitation absent compelling independent justification.
3. GAO will not question affirmative responsibility determination (issuance of certificate of competency) by SBA unless fraud or failure to consider vital information is shown.

Baxter & Sons Elevator Co., Inc. (Baxter), protests the cancellation of invitation for bids (IFB) No. 671-1-80, issued by Veterans Administration Audie L. Murphy Memorial Veterans Hospital, San Antonio, Texas (VA), on July 26, 1979, for elevator maintenance. Baxter also contests the VA's resolicitation of the contract as a sole-source procurement from the Otis Elevator Co. (Otis).

The IFB was issued as a 100-percent set-aside for small business, with date of bid opening scheduled for August 27, 1979. Specifications in the IFB required that prospective contractors maintain a supply of original manufacturer's replacement parts in the hospital machine room and a maintenance stock

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inventory of new parts for repair of each elevator located within a 24-hour delivery time from San Antonio. It was emphasized that "genuine manufacturer's new parts" be used and that "no substitutions shall be permitted."

On August 23, 1979, Baxter sent a letter to the contracting officer opposing the specifications as unduly restrictive to small businesses and seeking their amendment. Baxter claimed the listing of replacement parts was unnecessarily extensive and the 24-hour delivery requirement was unreasonable. It was alleged that both restrictions had been incorporated into the specifications for the sole purpose of retaining Otis (the original installer) as maintenance representative.

On August 27, 1979, three bids were opened and Baxter was the low bidder.

During the months of September and October 1979, the hospital's chief engineer and contracting officer visited Baxter's offices in San Antonio and Dallas. At that time it was found that Baxter did not have the repair parts on hand as required by the specifications. Similar inquiries were made at the offices of the next lowest bidder, with the same result.

On November 27, 1979, a certificate of competency (COC) for Baxter was requested from the Small Business Administration (SBA) Dallas Office. In December 1979, VA informed the SBA that Baxter was considered to be responsive but nonresponsive because sufficient elevator parts were not in its warehouse inventory. On January 11, 1980, the SBA informed VA that a COC would be recommended for Baxter. On January 16, 1980, a meeting was held between representatives of the VA and SBA, at which time the IFB specifications and the needs of the hospital were discussed.

The next day, January 17, 1980, VA hospital officials met and decided to cancel the IFB. The SBA was notified of this decision by letter dated January 24, 1980. The following day, January 25, 1980, Baxter sent a mailgram to our Office, protesting the cancellation. On January 28, 1980,

the Dallas SBA issued a COC to Baxter. Subsequently, a sole-source contract was awarded to Otis.

In its protest, Baxter raises the following three issues: (1) reasonableness of the specifications, (2) propriety of the cancellation, and (3) validity of VA's resolicitation as a sole-source procurement.

Baxter presents evidence intended to prove the unduly restrictive nature of VA's specifications. However, we must dismiss this portion of the protest because of the failure to meet the filing deadline prescribed by our Bid Protest Procedures, 4 C.F.R. part 20 (1980). Section 20.2(a) requires that if a protest has been filed initially with the contracting agency, any subsequent protest to our Office must be filed within 10 working days after notification of adverse agency action. The opening of bids on the scheduled date constituted initial action adverse to the protester's interest (i.e., to its protest of the IFB specifications). See Hydraulic Technology, B-196450, January 7, 1980, 80-1 CPD 19, and cases cited therein. Therefore, Baxter's protest against the specifications in the IFB is dismissed as untimely.

Since the VA found Baxter to be nonresponsive, it was required by the Small Business Act to refer the matter to the SBA, which conclusively determines the matter by issuing or refusing to issue a COC. 15 U.S.C. § 637(b)(7)(A) (1976). See Old Hickory Services, B-192906.2, February 9, 1979, 79-1 CPD 92; Prestype, Inc., B-194328, August 17, 1979, 79-2 CPD 127.

In this case, the VA properly referred the question of Baxter's responsibility to the SBA Regional Office in Dallas, Texas. However, after learning of the SBA's intention to issue a COC to the protester, and after meeting with representatives of the Dallas SBA in an attempt to resolve the matter, the VA canceled the IFB. The heart of this protest, then, goes to an agency's authority to cancel a small business solicitation, allegedly to change the specification, in the face of an anticipated issuance of a COC by SBA.

Federal Procurement Regulation (FPR) § 1-2.404-1(a) (1964 ed. circ. 1) allows solicitations to be canceled only for compelling reasons. A compelling reason for cancellation exists where the solicitation no longer represents the Government's needs or the agency determines that its needs can be met by a less expensive approach than that called for in the solicitation. See Honeywell Information Systems, Inc., B-193177.2, December 6, 1979, 79-2 CPD 392, at p. 5, and cases cited therein.

In its report dated June 9, 1980, the VA offers the following as reasons for cancellation of the IFB:

"a. Small Business Administration indicated in the meeting of January 16, 1980 that they would not support the Veterans Administration in enforcement of the spare parts requirement. (This dictated a requirement to rewrite the solicitation.)

"b. The specifications as written in the IFB of July 26, 1979 do not have any performance requirement. The specifications instead relied on the requirement to maintain a spare parts inventory. It was reasoned that a competent contractor, providing they have the required spare parts on hand, should be able to provide prompt service and maintain the elevators satisfactorily. It was also reasoned that an elevator contractor normally maintaining this type of elevator equipment would maintain substantial spare parts in his inventory."

The validity of the VA cancellation of this IFB is dependent upon whether these facts constitute a compelling reason under the cited regulation. We find that the VA has failed to present a sufficiently compelling reason to justify cancellation of the IFB in this case.

As to the first alleged ground for cancellation, we cannot agree with the VA's parenthetical assertion

that a rewrite of the solicitation was warranted by its dispute with the SBA over the spare parts restriction. We are aware of no limitation binding the SBA to the conditions stated in the IFB. We have held that contracting agencies cannot overcome the SBA's statutory authority to make determinations regarding all aspects of small business responsibility by specifying "special standards" or "definitive criteria" in the solicitation. J. Baranello and Sons, B-192221, May 9, 1979, 79-1 CPD 322; Microforms Management Corp., B-195350.2, February 4, 1980, 80-1 CPD 88.

Additionally, GAO is not empowered to question SBA's issuance of a COC unless the record shows that it was fraudulent, or that certain vital information bearing on the small business bidder's responsibility was not considered. J. Baranello and Sons, supra. Here, there is neither evidence of fraud nor of SBA's failure to consider the spare parts issue. In fact, the record discloses that on January 16, 1980, representatives of the VA hospital and the Dallas Regional Office met and discussed the parts requirement and the need for parts availability (VA memorandum dated April 15, 1980). This clearly indicates SBA's full awareness of the issue. Microforms Management Corp., supra. Consequently, the SBA's decision not to enforce the spare parts restriction in the solicitation did not "dictate" or justify a new solicitation.

As to the second factor offered as a basis for cancellation, we do not see the significance of the specific "performance requirement" as stated by the VA. A reading of the entire report concerning the necessity to change the specification makes it clear that this suggested revision of the specification is nothing more than a restatement of the spare parts requirement. It does not reflect any change in Government needs, nor does it clarify any ambiguity or correct a deficiency present in the original solicitation. See FPR § 1-2.404-1(b)(1).

This revision of the IFB specifications was apparently designed to circumvent the affirmative responsibility determination by the SBA. The VA's explanation relates to the bidders' ability to comply with the specifications, which is by definition a

matter of responsibility. Further, the record indicates that while the SBA did not disagree with the VA's need for prompt performance as required by the specifications, the SBA concluded that Baxter could meet the performance requirement without maintaining the spare parts inventory required by the solicitation to insure timely performance. The SBA's resolution of the issue is binding upon the contracting officer, appealable only to the SBA Central Office in Washington, D.C., as prescribed by FPR § 1-1.708-2(e). It cannot be overcome by rewording the disputed restriction and calling it a "performance requirement." See J. Baranello and Sons, supra.

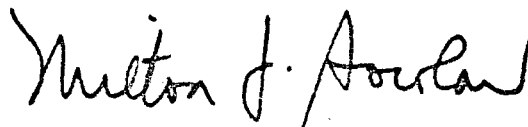
Accordingly, we find the VA has failed to provide a cogent reason on which to base its cancellation of the IFB. Therefore, the sole-source award to Otis was not justified.

The protest is sustained.

The VA has informed us that the current maintenance contract with Otis is operating on a month-to-month basis. In considering an appropriate remedy, then, extent of performance and cost to the Government are not relevant factors. We therefore recommend that the VA terminate the contract with Otis and make an award to Baxter and Sons Elevator Co., Inc.

By letter of today, we are advising the Administrator of Veterans Affairs of our recommendation.

Since this decision contains a recommendation for corrective action to be taken, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 326 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.



For the Comptroller General
of the United States