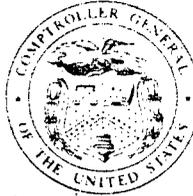


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DECISION



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

[Protest Alleging that Contracting Agency Improperly Evaluated Bids]

FILE: B-198314

DATE: January 13, 1981

MATTER OF: International Technical Services Corporation

DIGEST:

1. Portions of protest which contend that conflicts existed in specification are untimely as these alleged defects should have been apparent from face of IFB yet protest was not filed until after bid opening.
2. Protest that evaluation was improper, filed within 10 days from time protester was informed by agency that another bidder was determined to be low, is timely even though protester could possibly have performed necessary calculation on bids which were available to public to determine that it was not low bidder much earlier, because timeliness is not measured until protester has learned of action by agency which is inconsistent with protester's interests.
3. Where award date was unavoidably delayed so as to shorten contract performance period by one month, award to bidder evaluated as low under original performance period is not improper, even though bidder would not be low under evaluation based on shorter performance period, since competition was fair and cost of resoliciting rather than awarding contract might equal or exceed savings associated with acceptance of bid which was low for shorter performance period.
4. Where agency is informed of protest in writing prior to award it should not award contract except in accordance with determination and notice requirements in Defense Acquisition Regulation § 2-407.8(b).

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International Technical Services Corporation (ITS) protests the award of a contract to Tabulating, Inc. (Tabulating) under invitation for bids (IFB) No. N00604-79-B-0146, issued by the Naval Supply Center, Pearl Harbor, Hawaii, for data entry (keypunching) services.

(The basis of ITS' protest is that the contracting agency improperly evaluated bids, resulting in an erroneous award to the second low bidder.) Specifically, "ITS argues that it was improper for the Navy to base its price evaluation on the 31-month contractual performance period set forth in the IFB as the "basic economic unit" when an unanticipated delay in the award of the contract reduced the actual contract performance period to 30 months. ITS contends that had the contracting officer "properly based his cost comparison on 30 months of actual performance under the contract," ITS' overall adjusted price would be lower than that of the awardee.² ITS also alleges that the IFB improperly provided, under amended Section D.111.1(b), for the addition of annual utilities costs to basic bid prices because Section F.18.3 of the IFB already required the contractor to reimburse the Government for the costs of electrical power. ITS states, however, that as it is the actual low bidder under a 30-month evaluation period, this additional defect is not significant. Finally,³ (ITS argues that the Navy violated Defense Acquisition Regulation (DAR) §§ 2-407.8(b)(2) and 2-407.8(b)(3) (1976 ed.) by awarding the contract to Tabulating while the protest was pending without obtaining the proper determination or informing our Office.)

The Navy argues that ITS' protest should be dismissed as untimely under section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. Part 20 (1980) because the initial protest telegram was not filed until March 31, 1980, which was after bid opening. That telegram set forth the grounds of protest as:

" * * * IFB, as amended, contains conflicting service specifications and cost comparison evaluation criteria which render competitive bidding and evaluation of bids on an equal basis impossible, and on the further ground that a proper resolution and application of these conflicting terms would result in ITS Corporation being evaluated the low bidder.
* * *"

It is the Navy's view that the grounds of protest raised in ITS' original protest telegram concern improprieties which were apparent on the face of the IFB and that a protest of this nature should have been filed prior to the November 14, 1979 bid opening date. ✓ 4 C.F.R. § 20.2(b)(1).

We agree with the agency that all the portions of the ITS protest which concern alleged conflicts in the specifications (including the contention raised subsequent to the initial protest telegram concerning sections D.111.1(b) and F.18.3 of the specifications) are untimely under 4 C.F.R. § 20.2(b)(1) as they were not raised prior to bid opening. It is our view, however, that the initial protest telegram also raised the issue of the propriety of the Navy's evaluation of bids which was not apparent from the face of the IFB and thus not subject to the timeliness requirements of 4 C.F.R. § 20.2(b)(1).

In any event, the Navy argues that the remaining portion of the protest dealing with the evaluation is untimely under ✓ 4 C.F.R. § 20.2(b)(2), because it was not filed within 10 working days after ITS should have known the basis for the protest. The agency states that since this procurement was advertised, bid prices were available to all competitors on the November 14 bid opening date and ITS could have determined which bid was low based on the evaluation provisions set forth in the IFB. Thus, the Navy argues, ITS should have known the basis of its protest as soon as the anticipated performance date of March 1, 1980 passed without an award being made.

We believe that ITS' protest was timely. It is not significant that ITS could have performed its own evaluation and found that it was not the low bidder before it was informed by the agency on March 27 that Tabulating had been designated the low bidder. The significant event was the agency's determination of the low bidder. Nor do we believe the passing of the March 1 performance date to be the significant event. ITS apparently believed that the evaluation scheme was flexible and would take into account the reduced performance period. In any event, on March 1 the agency had not indicated when award would be made, so the protester could have reasonably expected that the IFB might have been canceled if the evaluation factors were determined to have been rendered deficient by the passage of time. In this case, timeliness was not to be measured until the protester has learned of agency action or intended action which the protester believes to be incorrect or inimical to its interest. Werner-Herbison-Padgett, B-195956, January 23, 1980, 80-1 CPD 66. ITS protested within 10 days from the time it was informed that Tabulating was determined to be the low bidder.

The IFB schedule contained three line items and estimated quantities for each. The bid evaluation provisions required bidders to quote prices for all items, representing performance for a base period of March 1, 1980 through September 30, 1981 (item 0001) and for each of two option years running from October 1, 1980 through September 30, 1981 (item 0002), and from October 1, 1981 through September 30, 1982 (item 0003). In addition, the IFB required bidders to list the Government-furnished equipment (GFE) and facilities they intended to use and the evaluation provision set forth the amount which would be added to bids for the use of particular GFE or facilities.

In addition, Clause J. 126, entitled "Fixed Price Options", stated:

"Since all the items to be acquired under this solicitation will be required for 31 months (hereafter referred to as 'basic economic unit'), and since basic economic unit costs are synonymous with lowest overall costs, the contract resulting

from this solicitation must contain options for renewals for subsequent fiscal years within the projected basic economic unit at fixed prices * * *. Despite the foregoing, offerors are reminded that although the evaluation which will lead to contract award will be based on economic unit costs, the exercise of the option(s) is dependent not only on the continued existence of the requirement and the availability of funds, but also on an affirmative determination that such exercise is in the best interests of the Government. (Emphasis added.)

* * * * *

"(2) Offers will be evaluated for the purposes of award by adding the total price of all optional periods and, if applicable, all stated optional quantities to the total price for the initial contract period covering the initial items. These prices will be adjusted by the appropriate Government cost factors* * *."

Clause H.101 of the IFB, entitled "DURATION OF CONTRACT PERIOD" provided:

"This contract shall become effective on 1 March 1980 or on the date of award, whichever is later, and shall continue in effect during the period ending 30 September 1980, unless terminated in accordance with other provisions herein."

Bids were opened on November 14 after adjustments for the use of GFE and Government facilities, the two low bids were evaluated based on the 31-month "basic economic unit" as follows:

	<u>7 Mo.</u>	<u>1st Option</u>	<u>2nd Option</u>	<u>Total</u>
ITS	\$137,387.14	219,094.72	216,806.87	573,288.97
Tabulating	\$128,910	221,495.28	222,005.58	572,410.86
				Difference between evaluated totals \$ 878.24

However, due to a number of administrative delays, award was not made to Tabulating as the low bidder until March 31, 1980.

ITS asserts that while Tabulating's overall adjusted price is low when the 31-month "basic economic unit" evaluation period is used, ITS' adjusted price is low on a 30-month basis with prices for the initial 7-month period pro-rated to account for a 6- instead of 7- month initial period of performance. In this regard ITS notes that its adjusted price for the 7-month period is \$8,477.38 higher than Tabulating's adjusted price for that period. ITS argues that had the agency based its price evaluation on 30 months of actual performance, its adjusted price (computed by taking six/sevenths of the evaluated totals) for the 6-month period would be only \$7,266.33 higher than Tabulating's adjusted price for 6 months. That approximately \$1,200 decrease in the difference between the two bids more than offsets the original evaluated difference of \$878.24, with the result that the ITS adjusted price would have been \$553,662.34 as compared to \$553,992.15 for Tabulating. The Navy does not dispute ITS' calculations but ITS and the Navy disagree as to the legal propriety of evaluating these prices on a 31-month basis when the anticipated period of contract performance was reduced to 30 months due to the unforeseen delay in award.

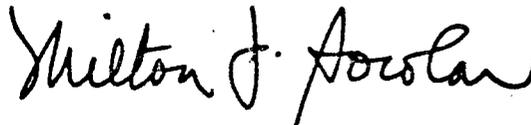
When the 31-month "basic economic unit" was established as the IFB's controlling evaluation period and after bids had been opened and subsequently evaluated, the Navy had no reason to believe that the evaluation results would not reflect the lowest overall cost of actual performance. It was not until approximately three months had expired after bids were opened and evaluated that the agency realized that intervening circumstances would delay the award beyond March 1.

We note that the evaluation factors set out in Clause J. 126 made no cross reference to Clause H.101 (addressing the duration of the contract period), nor did they otherwise provide for any modification of the 31-month "basic economic unit" in the event of an unforeseen delay in award beyond March 1. Thus, there was no provision in the IFB for altering the evaluation period in the event award were to be delayed to such an extent as to affect the performance period. A contracting agency may not evaluate bids in a manner which is inconsistent with the evaluation factors set forth in the solicitation to overcome an intervening circumstance which was unforeseen at the time the solicitation was prepared. See Crown Laundry and Cleaners; Tri-States Service Company--Reconsideration, B-196118.2, B-196118.3, April 2, 1980, 80-1 CPD 245. To permit otherwise would be contrary to the legal requirement that these evaluation factors be made known in advance of bid opening so that all bidders can compete on an equal basis. See 36 Comp. Gen. (1956). Therefore, it would have been improper to have evaluated bids in the manner suggested by the protester.

The advertising statute governing this procurement requires that award to be made "to the responsible bidder whose bid conforms to the invitation and will be most advantageous to the United States, price and other factors considered." 10 U.S.C. § 2305(c) (1976). Normally this means that award must be made on the basis of the most favorable cost to the Government measured by all the actual work to be awarded. Any measure which incorporates more or less than the work to be contracted for in selecting the lowest bidder does not obtain the benefits of full and free competition as required by 10 U.S.C. § 2305(c). See Linolex Systems, Inc., et al., 53 Comp. Gen. 895 (1974), 74-1 CPD 296; Crown Laundry and Cleaners, B-196118, January 30, 1980, 80-1 CPD 82; Chemical Technology, Inc., B-182940, February 22, 1977, 77-1 CPD 126; Square Deal Trucking Co., Inc., B-183695, October 2, 1975, 75-2 CPD 206. Thus, for example, it would be improper for an RFP to provide for evaluation on the basis of a 24-month performance period when other RFP provisions would limit actual performance to 22-months. Linolex Systems, supra.

In this case, however, we think it would be unreasonable to strictly apply this rule. Unlike Linolex, this is not a case where the solicitation contributed to a faulty evaluation. Rather, the RFP evaluation approach was consistent with the applicable law and was clearly set forth so that there was no reasonable doubt among potential or actual competitors as to the actual basis for evaluation and award. The protester and others competed on this basis, and the agency in fact conducted its evaluation on that basis and was prepared to make award to the evaluated low bidder. It was only because of unanticipated delays resulting from higher level review that award to that winner was made for a 30-month rather than a 31-month performance period. Although an evaluation based on a 30-month performance period would have shown the protester to be the evaluated low bidder, as discussed above the RFP did not permit evaluation on that basis and under the circumstances we do not believe the agency was required to reject all bids and resolicit--the only other alternative--when the evaluated differences between the bidders was not large and when it may well have cost the Government as much or more to resolicit than it would have saved by making a 30-month award to ITS. In short, we believe the agency acted reasonably in this instance. Therefore, the protest is denied.

We do agree with the protester that the agency awarded the contract to Tabulating without complying with the requirements of DAR § 2-407.8(b) after the contracting activity had received written notice of the protest from the protester. See New Haven Ambulance Service, Inc., 57 Comp. Gen. 361 (1978), 78-1 CPD 225. We are bringing this matter to the attention to the Secretary and recommending appropriate corrective action.



For the Comptroller General
of the United States