

DECISION

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

15873

FILE: B-199524

DATE: January 13, 1981

MATTER OF: Edward E. Davis Contracting, Inc.

[Protest of Navy Contract Award]

DIGEST:

1. Navy's refusal to release records of prior procurement without first processing a written request was not improper.
2. Mere allegation of improper influence and preferential treatment of other bidders, without independent evidence in record, constitutes speculation and will not satisfy protester's burden of affirmatively proving its case.
3. Protests of bond requirements in solicitation and allegedly insufficient specifications are untimely since they involve defects on face of solicitation and were not filed in GAO prior to bid opening date as required by 4 C.F.R. § 20.2 (b)(1).

Edward E. Davis Contracting, Inc. (Davis) protests the award of a contract by the Department of the Navy to any other firm under invitation for bids (IFB) No. N62467-80-B-5013, which solicited offers for the maintenance and repair of 520 family housing units at the Naval Air Station, Meridian, Mississippi (NAS-Meridian). Award notwithstanding this protest was made to C.E. Preston, the low bidder, on August 13, 1980. Davis did not submit a bid.

Davis states that under the prior solicitation, as for this one, bids were to be submitted on a lump sum basis for all the work. However, within 10 days of bid opening and prior to award, the low bidder was to submit a "schedule of prices" for the services required--the total of which must equal the amount of the bid--which provides the basis upon which payments are made under the contract or withheld for unsatisfactory work. Davis requested from NAS-Meridian a copy of the incumbent contractor's "schedule of prices"

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as an aid to Davis in preparing its bid. Davis' protest largely stems from the fact that by the time this request was processed by the Navy under procedures implementing the Freedom of Information Act (FOIA) (5 U.S.C. § 552 (1976)), the bid opening had occurred.

The solicitation was issued on June 3, 1980 and set July 3 as the bid opening date. On June 24, 10 days prior to bid opening, Davis' representative appeared at NAS-Meridian and asked for a copy of the "schedule of prices" contained in the then-existing contract and an abstract of the bids which had been received in response to the prior solicitation. He was told that his request would have to be processed according to Department of Defense regulations implementing the FOIA, which meant that the request would have to be in writing, specify exactly which documents were wanted and include a promise to pay for their reproduction. The request would then be forwarded to Navy counsel in Charleston, South Carolina, for review and approval.

Davis objects to having been required to obtain this information through the FOIA procedure because by the time the request was administratively processed, the bid opening had passed and the information was no longer useful. Davis asserts that not only was the agency's failure to immediately furnish the information contrary to provisions in the IFB, but was intended by the Navy to preclude Davis from bidding. In addition, Davis alleges that it was not treated fairly in that the information it was required to obtain through a FOIA request was given over the telephone to at least one other bidder: Davis suggests this preferential treatment may have occurred because of a family relationship between that bidder and personnel in the procurement or family housing office at the base.

Davis' argument that it was entitled to immediate release of information concerning the prior contract rests upon two provisions in the IFB. The cover sheet accompanying the IFB stated in part:

"INFORMATION REGARDING BIDDING MATERIAL.

Specification 06-80-5013 and other bidding data and information may be obtained or examined upon application to the Officer in Charge of Construction [OICC] * * *."

Similarly, the cover sheet to NAVFAC Specification 06-80-5013, "Maintenance and Repair of 520 Units of Family Housing at the Naval Air Station, Meridian, Mississippi", included the following notice:

"All inquiries concerning any phase of this specification, prior to bid opening, shall be made to the [OICC] * * *. The Government specifications and forms mentioned and other information necessary may be obtained or examined on application to the [OICC] * * *."

Davis' position is that the incumbent contractor's "schedule of prices" and the abstract of bids received under the prior solicitation were bidding "data" and "information" which it was entitled to "obtain" or "examine" on-the-spot: that is, immediately upon "application" to the OICC. As we understand the Navy's position, however, the clauses quoted above were directed to information generally made available to all bidders-- such as bid forms, specifications and drawings, if any--not to information which had to be extracted from the agency's contract files and which would not ordinarily be distributed to all bidders.

DOD regulations provide that FOIA requests for agency records will be granted in all but certain specified instances, "when a person requests in writing that the record be made available." (Emphasis added.) 32 C.F.R. § 286.11. Both the EOIA and the DOD regulations further allow agencies ten days following receipt of a request to examine the specified records for information not subject to FOIA disclosure and thus to determine whether or not the request should be granted. 5 U.S.C. § 552 (a)(6)(i); 32 C.F.R. § 286.11 (d)(1). Documents pertaining to past procurements are considered "agency records" under FOIA (see, for example, Jack Thrift and Company, B-194553, March 11, 1980, 80-1 CPD 187), and it thus appears that

the outlined procedures were applicable in the instant case. While Davis maintains that these formalities were unnecessary and used merely as a means to withhold information, we find no evidence in the record to support a ruling that the Navy's action was improper. In this regard, we note the Navy specifically denies that the protester was told it was being required to submit a written request as a means of delaying the receipt of this information until after bid opening.

As for Davis' allegation that by virtue of family relationship another bidder was orally given the same information Davis was required to request in writing, the Navy advises that the incumbent contractor's father is employed at NAS-Meridian, but not in the housing division or the procurement office. The Navy observes that not only is the father's employment unrelated to the administration of this contract but that it would make no logical sense for the incumbent contractor to request from the Navy the "schedule of prices" which the incumbent had prepared. The Navy suggests that the protester's allegation is based upon inaccurate information and is without merit.

It is not the practice of our Office to conduct investigations for the purpose of establishing the validity of a protester's unsubstantiated statements. Robinson Industries, Inc., B-194157, January 8, 1980, 80-1 CPD 20. Rather, it is the responsibility of the protester to present evidence sufficient to affirmatively establish its allegations. Robinson Industries, Inc., supra; Reliable Maintenance Service, Inc.--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337. Absent independent evidence of improper influence or preferential treatment, these charges amount to mere speculation and, as such, fall short of satisfying the protester's burden of affirmatively proving its case as to this issue. A.R.&S. Enterprises, Inc., B-197303, July 8, 1980, 80-2 CPD 17; Ronald Campbell Company, B-196018, March 25, 1980, 80-1 CPD 216.

Davis also advances two additional grounds of protest: first, there was no reason to require bid and performance bonds in this solicitation since they were not required in past contracts for the same services and, second, several of the work specifications in the IFB were so vague that an accurate bid price could not be calculated. The Navy refutes these contentions. We find, however, that both of these issues are untimely.

Our Bid Protest Procedures provide that protests of alleged improprieties in a solicitation which are apparent prior to the bid opening date must be filed in our Office prior to that date. 4 C.F.R. § 20.2(b) (1) (1980). We have held that protests based upon allegedly insufficient specifications concern defects on the face of the solicitation and, thus, are untimely where filed subsequent to the date set for bid opening. International Technical Services, B-196011, January 18, 1980, 80-1 CPD 58; Winston T. McCleery, Consultants, B-196380.2, January 2, 1980, 80-1 CPD 7. Similarly, protests against inclusion of bond requirements in a solicitation are untimely unless filed prior to bid opening. American Aquarius Waste Disposal, B-197078, January 2, 1980, 80-1 CPD 8.

In this case, July 3, 1980 was the designated bid opening date and Davis' protest was not received in our Office until July 9, 1980. Consequently, these issues are untimely raised and not for consideration on the merits. It should be noted that the term "filed" is defined in 4 C.F.R. § 20.2 (b)(3) as "receipt in the contracting agency or in the General Accounting Office as the case may be." (Emphasis added.) See also Garrison Construction, Inc., B-196959, February 26, 1980, 80-1 CPD 159.

For the reasons discussed above, the protest is denied in part and dismissed in part. We point out, however, that we have disapproved of the bidding procedure used here whereby only a total price was to be submitted at the time of bid opening with the low bidder submitting thereafter a detailed "Schedule of Prices" which formed the basis upon which payment would be made for the services performed. Garrett Enterprises, Inc., B-196659, September 29, 1980, 59 Comp. Gen. _____, 80-2 CPD 227. The holding

in Garrett currently is being reconsidered at the request of the Navy. Consequently, and since the protester here has not raised the issue, we do not believe any recommendation for corrective action in this case is warranted.

Milton J. Arosler

For the Comptroller General
of the United States