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DECISION

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

FILE: B-200008 DATE: January 16, 1981

MATTER OF: Apex International Management Services, Inc.

DIGEST:

1. Decision to cancel and resolicit procurement lacks sound basis where based on conjecture without reference to available evidence and clearly available alternative which would have preserved procurement was rejected. Since low prices have been disclosed, solicitation should be reinstated to preclude auction.

2. Related prior protests, mooted by cancellation of solicitation but which form large part of purported bases for cancellation, will be considered in connection with protest by low offeror against cancellation. Parties to prior protests have participated actively in present matter and have had fair opportunity to present arguments.

3. Because of interest by court, protests against solicitation and conduct of procurement will be considered even though untimely under GAO Bid Protest Procedures, 4 C.F.R. part 20 (1980).

4. Contention of inadequate time to prepare initial proposal is unpersuasive in view of lack of objection by other offerors and adequacy of competition. Allegation that solicitation provision is "confusing," raised after receipt of initial proposals, is not a basis for finding of prejudice, particularly where protester took no action to obtain clarification. Contention of unequal negotiations, based on request for clarification of protester's proposal

to which protester did not respond in substance, leading to elimination from competitive range, is without merit.

5. Allegation by incumbent of prejudice attributable to unequal and inadequate time to prepare best and final offer is denied where record indicates other offerors used about equal or less time without objection. Allegation that contracting officer failed to verify low offer and took no action to preclude "buy-in" is without merit where low offeror's costs were questioned during negotiations and use of multi-year fixed-price contract is specific measure against possible "buy-ins" contemplated under regulations.

On September 8, 1980, Apex International Management Services, Inc. (Apex), filed a protest with us and an action in the United States District Court for the District of Columbia, Apex International Management Services, Inc. v. Clifford L. Alexander, et al., Civil Action No. 80-2274. Essentially, Apex contests a decision by the United States Army to cancel a request for proposals for fixed-price multi-year contractor operation of Government-owned laundry facilities in the Federal Republic of Germany. On September 12, 1980, the court issued a preliminary injunction prohibiting the resolicitation of this requirement until 10 days after our resolution of Apex's protest.

We find Apex's protest to have merit.

Related Protests and Court Action

Apex's challenge to the cancellation followed two related prior controversies involving this same procurement. In the first of these, on August 18, 1980, Dyneteria filed a protest (B-200008) with us in which Dyneteria charged that it had not been afforded adequate time to respond to the solicitation and that the application of German labor laws to the

procurement was "confusing." Subsequently, on August 20, 1980, Jets Services, Inc. (Jets), the incumbent contractor for the preceding 4 years, also filed a protest (B-200008.2) in which Jets argued that it was denied adequate time to prepare its best and final offer; Jets also contested the propriety of the contracting officer's decision to award the contract to another offeror whose offer was "25-27" percent lower than the Army's fair cost estimate. On August 22 and 27 Jets supplemented its protest with additional charges. On August 29 Dyneteria, after examination of the Jets protest, expanded its own protest to challenge the Army's conduct of negotiations.

On August 29 these protests culminated in a lawsuit in the United States District Court for the District of Columbia entitled Jets Services, Inc. v. United States Department of the Army, et al., Civil Action No. 80-2226. Dyneteria participated in this action. On that day the court granted a temporary restraining order prohibiting award of the contract until September 5, 1980, the date set for hearing on Jets' motion for a preliminary injunction. Jets' lawsuit was withdrawn by stipulation on September 2, 1980, after the Army canceled the solicitation on August 30. On September 5 the Army and Jets signed a 6-month extension to Jets' current contract.

Background

The solicitation for these services was issued on June 27, 1980, with performance to begin on October 1, 1980, with a minimum 30-day mobilization period for the awardee to prepare for performance. A preproposal conference was held on July 9, 1980, during which the contracting officer advised offerors that the awardee would have a 39-day transition period, based on an anticipated award date of August 22. Site visits to each of the laundry facilities covered by the solicitation were conducted during the week of July 14-18. Dyneteria neither attended the preproposal conference nor participated in the site visits. Six offers were submitted by the closing date of July 23.

During the evaluation of proposals the Army sent a telegraphic message to Dyneteria requesting clarification of both its cost and technical proposals and

advising Dyneteria that if the requested information were not submitted by August 7, 1980, Dyneteria's proposal would be declared "non-responsive." The Army's message asked for Dyneteria to submit its materials by special delivery mail and also requested telephonic advice of Dyneteria's position. Dyneteria responded to this request with a message stating: "Due to short time given for response to your message, it will be necessary to be declared non-responsive. Thank you."

Negotiations with the five firms remaining in the competitive range were conducted during the week of August 11. The contracting officer negotiated with Jets on the afternoon of August 14. Best and final offers were due at 9 a.m. on August 15. All five offerors in the competitive range submitted best and final offers prior to the deadline. On the Army's advice that it was the low offeror, Apex initiated mobilization, including such steps as forming a German company and getting firm commitments from suppliers. Jets, the third low offeror, attempted after the deadline to submit a further price revision which was rejected by the contracting officer.

The contracting officer, by telex message dated August 21, sought authority to award the contract to the low offeror despite the pending protests of Dyneteria and Jets to which we referred above. This message generally indicated that the procurement was entirely proper and that all offerors had been made aware of and accepted the short time available for the procurement. The request for authority to award the contract was granted in messages from the Office of the Principal Assistant for Contracting (OPAC) and the Assistant Secretary of the Army for Research Development and Acquisition (SARDA), subject to the condition that Apex document its responsibility.

Despite continuing contact between the contracting officer and Apex's representatives, Apex had not furnished sufficient evidence of its responsibility as of August 29, on which date the contracting officer was advised that a preaward survey at Apex's home office

had resulted in a negative finding of financial capability. On that date, the United States District Court for the District of Columbia issued the temporary restraining order in Jets Service, Inc. v. Department of the Army, et al., supra.

On the morning of August 30, the contracting officer again met with Apex's local representative to discuss the subject of Apex's responsibility. At that meeting, Apex's representative agreed to travel to Apex's home office in Florida and return on September 2, 1980, with performance bonds in response to the contracting officer's suggestion that he would accept these bonds as evidence of Apex's financial capacity. The contracting officer did not advise Apex of the restraining order.

Later in the day on August 30, the contracting officer canceled the solicitation. The determination and findings cites the following seven factors as supporting a finding that there was a compelling reason to cancel the solicitation:

"(a) The solicitation closing date, the evaluation, the negotiations, and the best and final were compressed.

"(b) The time was further curtailed by the oral assurances of award by 22 or 24 Aug 80.

"(c) The urgency of the 39-day mobilization may not have been necessary.

"(d) The low offeror has a negative preaward.

"(e) The nature of the JETS protest leads me to believe that sensitive procurement information has leaked perhaps giving one or more offerors an unfair advantage.

"(f) The nature of the protest leads me to believe that certain parts of the RFP are subject to being interpreted as ambiguous.

"(g) The injunction precludes the Government from awarding and allowing a 30-day mobilization period for contractor commencement of work effective 1 October 1980."

Apex argues that none of these factors is a reason to cancel the solicitation and also contends that the Army was obligated to find it responsible and award it the contract because Apex had responded to all of the Army's requests for information. The Army argues that the cumulative effect of the various bases for cancellation cited in the determination and findings cast such uncertainty over the award of the contract that the contracting officer had no viable alternative course of action which would ensure the uninterrupted continuation of these vital services.

GAO Analysis

We find no sound basis for the cancellation of this solicitation in the circumstances existing on the date of cancellation. We think that no matter what action the contracting officer determined to take with respect to the solicitation, whether to cancel, reopen negotiations, or merely extend, he had no viable option on August 30 but to extend Jets' contract if the 30-day mobilization period guaranteed by the solicitation were to be preserved. We do not agree with the Army, however, that cancellation and resolicitation of the procurement was necessary. On the contrary, we are convinced that the contracting officer, by arranging an extension of Jets' contract on August 30, could have preserved this procurement and that the cancellation of the solicitation was unnecessary on that date.

The Army had a clear opportunity to extend Jets' contract without cancellation of the solicitation. Jets specifically offered to extend its contract in a letter to the Army dated August 22; during the oral hearing on August 29 on Jets' application for a temporary restraining order, Jets represented to the court that "* * * we have offered to extend the contract, to do whatever can be done to smooth any transition and also to make sure that the services the Army needs continue to be performed" and "* * * we have made the offer to extend our performance, to continue our performance, for whatever period is necessary."

The first two justifications for the cancellation both relate to the compression of the time available to conduct this procurement. We perceive no basis for a finding that the competition was unduly prejudiced by the time constraints here. On the contrary, the extent of the competition without timely objection to the schedule by any offeror or potential offeror suggests that the time available did not unduly influence the competition, Serv-Air, Inc., B-194717, September 4, 1979, 79-2 CPD 176; Dyneteria, Inc., B-181589, October 29, 1974, 74-2 CPD 230, and there is no evidence that the constraints may have been unjustified.

The reference in the determination and findings to the "39-day mobilization" is an outgrowth of the oral assurances to offerors at the preproposal conference that the awardee would have 39 days to mobilize prior to the October 1, 1980, beginning of performance, based on the expected award date of August 22. The solicitation, as we pointed out above, provides for a minimum 30-day transition period and also provides that it cannot be modified except in writing. The contracting officer indicates that he was concerned that he could not tell whether the proposals were predicated on a 30- or 39-day mobilization period and that reopening negotiations to clarify this question might be improper because of Jets' apparent knowledge of its competitors' prices. The Army has suggested no way in which an offeror's anticipation of an extra 9 days to prepare for performance might have prejudiced the competition and we can identify none from the record before us.

And, to the extent that any offeror may actually have required 39 days to mobilize, we see no reason why this period could not have been included in the extension of Jets' contract.

Neither Apex's negative preaward survey nor Jets learning of its competitors' prices provides a reasonable basis for the cancellation of this procurement. Apex was still actively trying to demonstrate its financial capability and Jets' knowledge of the other offers does not appear to have prejudiced the competition. Jets was the third low offeror and even if Apex were unable to establish its capability, the second low offeror was still available.

The contracting officer's concern with the possibility of ambiguities in the solicitation originated in the Jets and Dyneteria protests and certain remarks in the OPAC and SARDA messages granting authority to award the contract while these two protests were pending. These problems primarily relate to the offerors' understanding of the wage scales required under German law. Dyneteria's allegations of "confusing" information in the solicitation were not raised until long after the date set for receipt of initial proposals and only after Dyneteria was threatened with elimination from the competitive range. Jets' various suggestions of ambiguities or shortcomings in the solicitation were not made until after Jets fully participated in the procurement without complaint and only after Jets obtained the information that there were two lower offers. Jets made these comments largely in the context of attempting to explain how the two lower offerors might have been misled into miscalculating their prices. We are particularly concerned that the contracting officer relied on the unsupported allegations in these protests without turning to the offerors' cost proposals to ascertain whether there was actually a problem. We note in this connection that Apex's proposal was in fact examined in response to Jets' allegations and was found to contain satisfactory wage scales.

The OPAC message granting authority to award the contract while the Jets and Dyneteria protests were pending also referred to an error in Apex's

proposal in responding to the economic price adjustment clause contained in the solicitation. Apex did not follow the specified format and was not totally clear in indicating what costs Apex might seek to adjust under the clause. The contracting officer apparently relied on OPAC's statements for his suspicion that this clause may have been ambiguous. The other remark which concerned the contracting officer was advice that specific sections of German law should not be cited in solicitations.

We have two principal objections to the contracting officer's suspicions here: (1) OPAC's concern was with Apex's response, not the solicitation which appears clear to us on its face; and (2) the contracting officer did not refer to the offerors' proposals to ascertain whether anyone may in fact have been materially misled by the clause. Apex's deviations were relatively insignificant and we find no evidence here of any prejudice to the competition.

We have long recognized that contracting officials have broad discretion to determine whether a solicitation should be canceled and the requirement reprocured. See, e.g., 36 Comp. Gen. 364 (1956); 49 Comp. Gen. 244 (1969); Colonial Ford Truck Sales, Inc., B-179926, February 19, 1974, 74-1 CPD 80. Our review of discretionary determinations is limited to the question of the reasonableness of the exercise of discretion. See, e.g., Sperry-Univac, B-195028, January 3, 1980, 80-1 CPD 10; Tracor, Inc., B-195736, January 24, 1980, 80-1 CPD 69; BEI Electronics, Inc., 58 Comp. Gen. 340 (1979), 79-1 CPD 202. To be sustainable, a contracting officer's discretionary decision must reflect the reasoned judgment of the contracting officer based on the investigation and evaluation of the evidence reasonably available at the time decision is made. Fairfield Scientific Corporation v. United States, 611 F.2d 854 (Ct. Cl. 1979); General Electric Company v. United States, 412 F.2d 1215 (Ct. Cl. 1969); Schlesinger v. United States, 390 F.2d 702 (1968); John A. Johnson Contracting Corp. v. United States, 132 Ct. Cl. 645, 132 F.Supp. 698 (1955). We think the determination to cancel this solicitation falls short of this standard.

The Army's decision appears to have been reached on the basis of conjecture as to potential prejudice without reference to available evidence which might have dispelled these concerns and without recourse, for which no reasonable justification has been offered, to a clearly available alternative which would have preserved the competition. In our opinion, the decision to cancel this procurement lacked a sound basis.

The Apex protest is sustained.

Jets has argued that if we were to sustain Apex's protest, as we do here, we would also have to consider independently the Jets and Dyneteria protests mentioned above which would require obtaining reports from the Army in response to these protests and affording the parties time to comment. Apex filed a statement in opposition to Jets' argument in which Apex contends that our consideration of the related protests would go beyond the scope of the court's request.

The Army's justifications for the cancellation of this solicitation in large degree rest on and are identical to the bases of protest presented by Jets and Dyneteria. Consequently, we find that these matters are so inextricably intertwined that, as a practical matter, there is no alternative but to consider the three protests together. Furthermore, since both Jets and Dyneteria were aware that their protests were at issue in this case, and both firms participated actively in the present proceeding, we believe both Jets and Dyneteria have had a fair and reasonable opportunity to present their case. In conclusion here, we believe the court should have the benefit of our views.

Dyneteria's Protest

After its elimination from the competitive range, Dyneteria protested that it had not had sufficient time to prepare its initial proposal and that certain provisions of the solicitation were "confusing." All of the bases underlying these protests were apparent in the solicitation, as amended. Dyneteria's protest

of these factors was therefore untimely under section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1980), because Dyneteria did not raise these objections prior to the date set for receipt of initial proposals. Nonetheless, we will consider these questions on the merits because of the court's interest. See, e.g., Informatics, Inc., B-194734, August 22, 1979, 79-2 CPD 144.

We find Dyneteria's objections to the time for preparation of proposals to be without merit for the reasons set forth above in our discussion of the contracting officer's reasons for cancellation. As for Dyneteria's objections to the solicitation, while we agree that the specific provision to which Dyneteria refers requires close reading, we do not think this affords any basis for a conclusion of prejudice, particularly when Dyneteria failed to seek timely clarification.

Dyneteria's other objections, couched in terms of an unequal opportunity to negotiate, rest on an erroneous factual basis because the Army did not negotiate with Dyneteria, but only requested clarification of Dyneteria's initial proposal. Dyneteria responded to this request with a timely message seemingly accepting its impending elimination from the competitive range. The Army had no obligation to negotiate with Dyneteria after it was eliminated from the competitive range. Western Design Corporation, B-194561, August 17, 1979, 79-2 CPD 180.

Dyneteria's protest is denied.

Jets' Protest

Some aspects of Jets' protest are clearly untimely filed under our Bid Protest Procedures. However, consistent with our consideration of similarly untimely aspects of Dyneteria's protest, we will discuss the merits of these contentions.

Jets' protest was based in part on the assertion that it did not have sufficient time to prepare its best and final offer. Jets argued that the short time

available was both inadequate and prejudicial because other offerors had more time. We note, however, that Apex's best and final offer is dated August 14, the day after its negotiations, and that a third offeror was able to conduct its negotiations on the morning of August 14 and submit its best and final offer by 4:00 p.m. that same afternoon, in considerably less time than that afforded Jets. Jets in fact submitted its best and final offer at 7:30 a.m. on the 15th. And, despite Jets' assertions that it objected to the lack of time within which to submit its best and final offer, we find no evidence of any written complaint and the August 21 telex requesting authority to award the contract while the protests were pending indicates that all best and final offers, including presumably Jets', were submitted without qualification. We find no merit in Jets' contentions.

Jets also contended that the contracting officer failed to verify Apex's "apparently mistaken bid" as required by DAR § 2-406.3 and did not take steps to preclude buying-in as required by DAR § 1-311. Neither of these arguments has any merit. With respect to the first contention, we note first that Jets' assertion of a mistake in Apex's offer is speculative, and second, that the Army did question Apex's low costs during negotiations, to which Apex responded satisfactorily. Concerning the second contention, we note only that the use of multi-year, fixed-price solicitations, as here, is a step specifically recommended under DAR § 1-311 to preclude buy-ins.

Jets also protested that in evaluating proposals the Army ignored a wage increase which Jets promised to its employees and which a follow-on contractor would be obligated to pay under German law. There are two elements to this assertion: the first is an implied objection to other offerors' wage scales and the second to the likelihood of compliance by other offerors with German law. We note, however, that in response to Jets' complaints about Apex's wage scales, Apex's proposal was examined and found to have wage scales higher than those of the other offerors. And, the solicitation bound the awardee to comply with German law.

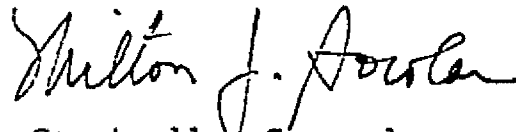
Jets also argued belatedly that (1) the solicitation was defective because the workload estimates and equipment descriptions were faulty and (2) the Army, during the preproposal conference, stated that an estimated 495 workers were required, whereas Jets states the number is actually 515-520. However (1) the site visits and inspections would have cured any substantial errors in the equipment descriptions and the solicitation provided for adjustments in price for variations in workload from the estimates, and (2) no offeror was bound by the Army's workforce estimate. In this latter connection, we find no evidence that any variations in proposed workforce were the product of anything other than the permissible exercise of business judgment by the competitors. We find these contentions also to be without merit.

Jets' protest is denied.

Recommendation for Remedial Action

In view of the foregoing, we see no impediment to award under a reinstated solicitation accompanied by any necessary termination of Jets' contract. Therefore, since the low prices have been disclosed and to avoid giving rise to an auction, we are of the view that the solicitation should be reinstated and that award be made as soon as practicable after completion of new responsibility evaluations in accordance with DAR § 1-905.2.

The parties have also argued whether the Small Business Administration's certificate of competency procedures applied to this procurement. We did not address this question in our decision because Apex, a small business, was not found to be nonresponsible by the Army and the question was premature.



For the Comptroller General
of the United States