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DECISION



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

FILE: B-202966.4
B-202966.5
MATTER OF: TWI Incorporated

DATE: November 30, 1982

DIGEST:

1. When more than a year has elapsed since issuance of a solicitation, without award being made, and the contracting agency's estimates have been revised to add and/or to delete a substantial number of items, reinstatement or award under canceled solicitation would not be in the best interest of the Government.
2. While lack of precise estimates or inability to draft exact specifications may make formal advertising impracticable, agency's desire to obtain cost and pricing data does not provide a legal basis to negotiate.

TWI Incorporated protests the cancellation and reissuance of a solicitation for repair of watertight closures--doors, scuttles, and hatches--aboard ships. The protested actions were taken by the Naval Supply Center, Norfolk, Virginia. We deny the protest.

Background:

This procurement has been the subject of two prior decisions by our Office: TWI Incorporated, 61 Comp. Gen. 99 (1981), 81-2 CPD 424, and B&M Marine Repairs, Inc.--Request for Reconsideration, B-202966.2, February 16, 1982, 82-1 CPD 131.

In our initial decision, we sustained TWI's protest on grounds that the apparently low bid of B&M, the incumbent contractor, was unbalanced. We found that the Navy's estimates in invitation for bids No. N00189-81-B-0037 were not sufficiently accurate to

permit a determination that acceptance of B&M's bid would result in the lowest actual cost to the Government. We therefore recommended that the Navy discard it and make award to the next-lowest bidder who had submitted a mathematically balanced bid, which we defined as one in which each item (or in the case of options, each year) carries its proportionate share of the cost of work plus profit and overhead.

We denied B&M's subsequent request for reconsideration because it was based primarily on facts that could have been presented during the initial protest; the firm did not contend that we had made any errors of law. In addition, we declined to consider information relating to events which had occurred after bid opening, such as the type and quantity of repairs ordered by the Navy and the price of materials purchased by B&M. (We note, however, that B&M, in its comments on this protest, reiterates its request for consideration of such information.)

Upon receipt of our decision on the request for reconsideration, the Navy, which had extended B&M's contract, canceled the solicitation on grounds that all five remaining bids were mathematically unbalanced. The contracting officer determined that in order to be considered balanced, the low bid would have to be low for both base and option quantities on each of 48 line items and sub-items; that the second-low bidder would have to be second-low on each of these, and so on.

TWI's Protest:

TWI, which believed it should have been in line for award following our decisions, was advised of the cancellation approximately a year after the March 31, 1981 bid opening date. The firm immediately protested to our Office. Rather than issuing a decision on that protest, we wrote the Secretary of the Navy, stating that in our opinion the method used by the contracting officer to determine that all bids were mathematically unbalanced had no relation to whether the prices of particular items accurately reflected their share of bidders' costs, profit, and overhead. Since we did not believe that a compelling reason--required by law--to cancel the solicitation existed, we asked the Secretary to take action to have the bids evaluated in a meaningful way. See B-202966.3, April 23, 1982.

The Navy's Response:

The Navy responded by arguing--as it had previously--that some bidders probably had concentrated all labor costs in certain line items, and that prices for other items included only materials. The Navy therefore reevaluated all bids by grouping various line items and sub-items, representing both labor and materials, into what it believed were combinations necessary to repair the different types of steel closures covered by the solicitation. Using unit prices of B&M, TWI, and two other bidders, the Navy estimated that for five typical repair jobs, B&M would still be evaluated as the low bidder. The Navy therefore concluded that B&M's bid was not materially unbalanced, i.e., that there was no doubt that acceptance of it would have been likely to result in the lowest actual cost to the Government.

The Navy, however, did not advocate award to B&M under the 1981 invitation for bids. Rather, on July 2, 1982, it issued a request for proposals, No. N00189-82-R-0315. The Navy states that in the year between TWI's first protest and the reevaluation of bids, it has acquired additional experience and has revised its estimates--previously based on a single year's "historical" data and a factor for unforeseen growth--accordingly. As a result, the Navy points out, the new solicitation differs materially from the canceled one. It requires prices for 107 items and sub-items for a base and each of two option years. More than 30 of the new items and sub-items pertain to repair of aluminum closures, not included in the canceled solicitation. The increased number of items also is due to breaking out of functions which the Navy's experience indicates are separate and distinct. In addition, the Navy has eliminated items representing labor or materials which have not been ordered under B&M's current contract.

Most importantly, the Navy indicates, the new procurement will be negotiated. The contracting officer states that negotiation will aid in resolving the "multiple pricing problems" that are likely to occur among offerors who have different approaches to estimating and performing marine repairs and will permit the Navy to obtain the cost and pricing data necessary to determine whether their offers are unbalanced.

GAO Analysis:

Our review of the examples of labor and material-intensive items cited by the Navy shows that B&M apparently did concentrate labor costs in certain items and included only materials in other items. However, the labor-intensive items, for which B&M bid relatively high prices, had low estimated quantities, while the material-intensive items, for which B&M bid relatively low prices, had high estimated quantities. In our opinion, this tends to confirm the fact that B&M's bid was mathematically unbalanced and, in the absence of accurate estimates, would not have resulted in the lowest cost to the Government.

We also continue to believe that the contracting officer's initial method of determining that all bids other than B&M's were mathematically unbalanced, justifying cancellation of the invitation for bids, was erroneous. In our opinion, different bidders may have had different costs for the same items, as well as different margins of profit and overhead. Thus, we do not view the premise that the low bidder must be low on all items in order to be mathematically balanced as a valid one. In addition, a single bidder, submitting a mathematically unbalanced bid, could have made all other bids appear to be unbalanced.

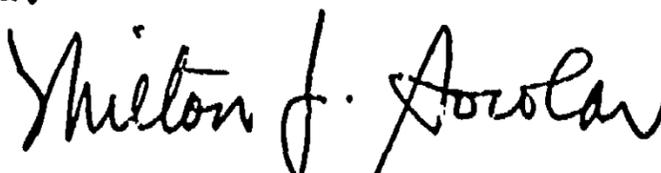
We do not, however, believe that it would be in the best interest of the Government to reinstate or make award under the original solicitation. The revision of the Navy's estimates, the addition of a substantial number of items pertaining to the repair of aluminum closures, and the deletion of unordered items, in our opinion, justify resolicitation. See generally Edward B. Friel, Inc., 55 Comp. Gen. 231 (1975), 75-2 CPD 174. But the Navy's desire to obtain cost and pricing data does not justify negotiation. Contracting agencies are required by 10 U.S.C. § 2304 (a) (1976) to obtain competition through formal advertising whenever it is feasible and practicable to do so. See Sorbus, Inc., B-183942, July 12, 1976, 76-2 CPD 31. There is a statutory exception for "impracticability" which may be used, for example, when the exact nature or amount of repair work to be done is not known, Defense Acquisition Regulation § 3-210.1 (ix) (DPC 76-12, October 28, 1977), or when it is impossible to draft adequate specifications. Id., § 3-210.2(xiii).

Here, however, the Navy has assured us that the estimated quantity and type of repairs listed in its revised solicitation are consistent with past usage and anticipated future orders. Moreover, the solicitation incorporates Navy standards and drawings for removal, cleaning, repair, reinstallation, and alignment of each type of closure so we cannot conclude that the specifications are inadequate. Thus, the legal basis to negotiate this contract is not apparent. Cf., Informatix, Inc., B-190203, March 20, 1978, 78-2 CPD 215 (in which we found discussions could add nothing to the method of comparing prices--by extending and totaling unit prices--outlined in a solicitation).

Under ordinary circumstances, we would recommend that the Navy cancel the request for proposals and reissue an invitation for bids, with the caveat that if it plans to use an evaluation scheme in which items are grouped in the combinations needed to perform typical repair jobs, it should so indicate in the invitation, since bidders and offerors are entitled to know how their prices will be evaluated. Edward B. Friel, Inc., supra.

However, cancellation and resolicitation on an advertised basis could further prolong the procurement and would involve more cost to the offerors. In the interim, the incumbent contractor would continue to perform under month-to-month extensions--an arrangement that in our opinion is tantamount to a negotiated, sole source procurement. Under the circumstances, we will not object to the Navy's making award under the request for proposals.

The protest is denied.

for 
Comptroller General
of the United States