

DECISION

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

Harrington
29729

FILE: B-214823

DATE: October 30, 1984

MATTER OF: Air Life, Inc.

DIGEST:

1. Cancellation of an IFB for a requirements contract after bid opening but before award is proper where the contracting officer determines that the IFB was defective because it failed to include estimated quantities for all items.
2. Protester has not met its burden of proof where the protest is based on allegations that the awardee's offer was submitted late while the agency states it was submitted on time.
3. Award may be made on the basis of initial proposals where adequate price competition exists and the solicitation advises that award might be made without discussions.

Air Life, Inc. protests the cancellation, after bid opening, of invitation for bids (IFB) No. 614-45-84, issued by the Veterans Administration Medical Center (VA), Memphis, Tennessee for home patient oxygen service. Air Life contends that the VA did not have a sufficiently compelling reason to cancel the solicitation.

Air Life also protests the award of the contract to the only other offeror, Medical Gas and Respiratory, Inc., when the requirement was subsequently resolicited under request for proposals 614-68-84. Air Life bases this protest on its claim that Medical Gas' proposal was submitted after the closing date for receipt of proposals. We deny the protest.

The VA received six bids in response to its initial solicitation for home patient oxygen. At bid opening, the contracting officer determined that the solicitation was

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defective primarily since it contemplated the award of a requirements contract and did not include estimated quantities for all items.

Relying on Federal Procurement Regulations (FPR), § 1-2.404-1, the contracting officer advised the bidders that the solicitation was canceled. This regulation provides that after bids have been opened, award must be made to the lowest responsive, responsible bidder, "unless there is a compelling reason to reject all bids and cancel the invitation." The regulation further states that an invitation for bids may be canceled after opening but before award when the contracting officer determines that the invitation is inadequate, ambiguous or otherwise deficient. FPR, § 1-1.404-1(b)(1).

Estimates of quantities to be ordered under requirements contracts are essential in helping bidders prepare reasonable, intelligent bids and ensuring award of the contract to the lowest bidder. North American Reporting Inc; Ace-Federal Reporters, Inc., 60 Comp. Gen. 64 (1980), 80-2 CPD ¶ 364. Where such estimates are omitted, the IFB not only fails to inform bidders of the basis upon which their bids will be evaluated, but leaves the bidders to speculation and invites unbalanced bidding. Id.

At the time the bids were opened, Air Life was a subcontractor to the incumbent supplier of home oxygen, and the VA reports that Air Life thereby had access to information about the agency's requirements not provided in the solicitation, including the estimated quantities. The contracting officer evaluated Air Life's bid and found that it offered low prices on items where Air Life apparently expected a low volume and high prices where it apparently expected higher quantities would be required. The contracting officer therefore determined the bid to be unbalanced. Air Life has not contested that determination. Instead, Air Life argues that the quantity estimates were available to all bidders upon request, and thus it did not enjoy an unfair advantage. Air Life further contends that the solicitation should not have been canceled as defective because the VA had used the identical solicitation format in past acquisitions of oxygen services.

We do not find these arguments persuasive. Generally, cancellation is proper where an invitation for a requirements contract does not contain estimated quantities, without any consideration of whether the information is otherwise available to diligent bidders. See Elrich Construction Company, B-187726, Feb. 14, 1977, 77-1 CPD ¶ 105. Further, we find no support for the protester's argument that deficiencies in past solicitations should estop the agency from canceling a current solicitation containing those same deficiencies. See Wilmington Shipyard Inc. B-214467, June 27, 1984, 84-1 CPD ¶ 677. We therefore find that cancellation of the solicitation was proper.

The protester further argues that Medical Gas' proposal was late and should not have been accepted under the resolicitation of this requirement.

The deadline for the submission of proposals was specified in the RFP as 3:00 p.m. on March 12, 1984. Air Life's Vice President and its attorney were in the VA contracting offices on March 12, from 2:30 p.m. until the award decision was made at approximately 4:00 p.m. The protester states that its representatives were told that the contracting officer was meeting with another offeror (Medical Gas), whose representative was completing a proposal in a separate office. Air Life reports that VA personnel, including the contracting officer, entered and left this office several times between 2:47 and 3:12 p.m., and that the offeror did not emerge until 3:12 p.m. and then handed its proposal to the contracting officer. Air Life alleges that Medical Gas did not hand in its completed proposal until this time, and concludes, therefore, that the proposal should have been rejected as untimely. Although neither of the proposals was time-and-date stamped, the VA asserts that the proposal was submitted before the 3:00 p.m. deadline had expired. The VA also explains that the office occupied by the offeror was a storage room and VA personnel went in and out the room on business unrelated to the acquisition.

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Given the record before us, we do not believe the protester had actual knowledge of what occurred behind closed doors, nor are we persuaded that it knew that the item which was handed to the contracting officer at 3:12 p.m. was the proposal. In this regard, the VA reports that during the period in question, the offeror was given and filled out a "Bidders Mailing List Application" needed to authorize a new signature. We believe the evidence reasonably supports the VA's position that Medical Gas submitted its proposal before the 3:00 p.m. deadline. Moreover, even if the statements by the protester and the agency are irreconcilably in conflict, the protester would still have to meet the burden of affirmatively proving its case in order to prevail. The National Bank of Fort Sam Houston, B-212719, Feb. 14, 1984, 84-1 CPD # 192. We do not find that the protester has carried its burden of proof in this case. For example, the protester does not explain how it knew that the paper it allegedly saw the offeror hand to the contracting officer at 3:12 was in fact the offer.

Finally, Air Life complains that it was not given any opportunity to discuss price revisions after the proposals were submitted. Air Life argues that under FPR, § 1-3.805-1(a), the negotiation process should include written or oral discussions with all offerors within the competitive range. In a negotiated acquisition, although discussions generally are required to be conducted with offerors in a competitive range, award may be made on the basis of initial proposals where adequate price competition exists and the solicitation advises offerors that award might be made without discussions. D-K Associates, Inc., B-213417, Apr. 9, 1984, 84-1 CPD # 396. The record shows, and the protester does not dispute the fact, that these two conditions were present here and that discussions indeed were not held with any offeror.

The protest is denied.

for Milton J. Ascolan
Comptroller General
of the United States