



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Eastern Technical Enterprises, Inc.

File: B-228035

Date: October 27, 1987

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### DIGEST

1. General Accounting Office will consider a protest of an award by a firm acting as a general agent for the Maritime Administration, since the firm is acting by or for the government in issuing a solicitation for ship repair.
2. Award of a sealed bid contract must be based on the lowest total price if the bid is responsive and the bidder responsible. Statement in invitation for bids that award will not be made solely on the basis of the lowest bid merely informs bidders that responsiveness and responsibility are additional factors to be considered before award will be made.
3. General Accounting Office does not review an affirmative determination of responsibility absent a showing of possible fraud on the part of procuring officials or the misapplication of definitive responsibility criteria.
4. Protest that the solicitation manhour estimate for supplemental ship repair work is defective is untimely where filed after bid opening.

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### DECISION

Eastern Technical Enterprises Inc., protests the proposed award of a subcontract for ship repair work to B&A Marine Company, Inc. under invitation for bids (IFB) No. MA-11698 issued by American Foreign Shipping Company, Inc. acting as general agent for the Maritime Administration, U.S. Department of Transportation (MARAD).

We deny the protest in part and dismiss it in part.

A threshold issue involves jurisdiction. Under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 (Supp. III 1985), our Office considers protests concerning

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solicitations issued by federal agencies. Our implementing Bid Protest Regulations state that we will not consider protests by subcontractors unless the procurement is "by or for" the government. 4 C.F.R. § 21.3(f)(10) (1987). In this case, where American Shipping is acting as a general agent of MARAD by issuing a solicitation for ship repairs and conducting the procurement on behalf of MARAD, the firm is acting "by or for" the government. Southwest Marine of San Francisco, Inc., B-224508, Oct. 2, 1986, 86-2 CPD ¶ 388.

The IFB, issued on July 15, 1987, solicited bids for the repair of two ships, the SS Cape Avinoff and SS Cape Ann. Seven bids were received in response to the IFB. The IFB advised bidders that award would be made on "any combination of single ship bids or a combination bid for both ships as deemed most advantageous to the government." B&A submitted the low bids for both the Cape Avinoff and Cape Ann in the amounts of \$3,474,555 and \$3,309,455 respectively. The protester submitted the second low bid for the Cape Avinoff in the amount of \$3,475,000 and the third low bid for the Cape Ann in the amount of \$3,464,000. MARAD intends to award the repair work for both ships to B&A based on that firm's low price.

Eastern argues that the award to B&A for repair of the Cape Avinoff on the basis of the firm's low price for that work is improper. In this regard, Eastern states that the IFB advised bidders that:

"The award of this contract will not be made solely on the basis of the lowest bid. Evaluation of bids will include but not be limited to approval of the contractor's facility and equipment; contractor's ability to perform the contract with regard to size and competency of work force and engineering department; [and] contractor's performance on previous contracts including quality of work on-time completion and delivery of vessels."

Eastern maintains that under the terms of this provision, MARAD is required prior to award to perform a "comparative analysis" of B&A's and Eastern's technical capabilities to determine which firm's bid is most advantageous to the government.

In further support of its contention, Eastern argues that MARAD regulations at 46 C.F.R. § 338 (1986), applicable to vessel repair procurements, contemplate that factors other than cost may be included in the solicitation and evaluated. The provisions to which the protester refers provide that "the (repair) work shall be awarded to the contractor

"the (repair) work shall be awarded to the contractor submitting the lowest qualified bid. The term "lowest" shall mean the bid most advantageous to the government after evaluation of all bids by the applicable differentials and other relevant factors set forth in the invitation for bids." 46 C.F.R. § 338 (Sec 6).

With certain exceptions not applicable here, MARAD regulations require that ship repair procurements subject to the National Shipping Authority Lump Sum Repair Contract, as here, be conducted under competitive bidding procedures. See 46 C.F.R. § 338. In this case, in compliance with these regulations, an invitation requesting sealed bids was issued. Because the current procurement was conducted under sealed bids procedures, evaluation of bids based on a combination of cost and technical factors, as the protester suggests, would be inappropriate. R.P. Sita, Inc., B-217028, Jan. 22, 1985, 85-1 C.P.D. ¶ 83. The award of a contract under sealed bid procurements must be based on the most favorable cost to the government, assuming the low bid is responsive and the bidder responsible. R.P. Sita, Inc., B-217028, supra. The evaluation procedure suggested by Eastern is appropriate only in a negotiated procurement. The IFB clause to which the protester refers stating that "award will not be made solely on the basis of the lowest bid" merely informs bidders that responsiveness and responsibility are factors to be considered in addition to price before award can be made. R.P. Sita, Inc., B-217028, supra. The clause does not stipulate, as the protester argues, that bids will be evaluated based on a combination of cost and technical factors--it merely includes factors such as approval of the contractor's facility and the contractor's ability to perform the work, which are general standards of responsibility. See Washington State Commission of Vocational Education--Reconsideration, B-218249.2, July 19, 1985, 85-2 C.P.D. ¶ 59. Further, while the protester argues that above quoted MARAD relation contemplates the consideration of "other factors" in addition to price, the term "other factors" in sealed bid procurements refers to factors such as responsibility, which, as noted above, are considered in the award of any contract and does not allow the contracting agency to award on the basis of other than the low bid. Strobe Data Inc., B-220612, Jan. 28, 1986, 86-1 C.P.D. ¶ 97; see also 37 Comp. Gen. 550 (1958).

Eastern also argues that B&A does not have the capability to perform this contract and, therefore, MARAD should have found the firm nonresponsible. The protester maintains that since B&A is a small business, MARAD should refer the matter of B&A's responsibility to the Small Business Administration (SBA) under that agency's certificate of competency (COC) procedures.

MARAD has advised our Office that the contracting officer has determined B&A to be a responsible contractor for this procurement. This Office does not consider a contracting officer's affirmative determination of a firm's responsibility unless there is a showing of possible fraud or bad faith on the part of procurement officials or that the solicitation contains definitive responsibility criteria that may not have been applied. Voyager Emblems, Inc.-- Reconsideration, B-206301.2, Apr. 1, 1982, 82-1 C.P.D. ¶ 295; Voyager Emblems, Inc., B-206301, Feb. 10, 1982, 82-1 C.P.D. ¶ 127. Neither exception has been alleged.

Further, while Eastern contends that the circumstances dictate that a COC be obtained on B&A, the SBA's COC procedures are only utilized when a small business has been found nonresponsible by the contracting officer, not as here, where there has been an affirmative determination.<sup>1/</sup> Jenkins Equipment Co., Inc., B-207512, June 2, 1982, 82-1 C.P.D. ¶ 531.

Finally, Eastern argues that the solicitation estimate of 4,000 manhours for supplemental or "emerging" repair work (emerging repair work is work which becomes known only after equipment is opened and inspected) is unreasonably low. Eastern maintains that if the solicitation had contained a more realistic emerging repair work estimate, Eastern would have been the low bidder for the Cape Avinoff. In this regard, the solicitation requested hourly billing rates for any additional work above the estimated 4,000 manhours and Eastern's hourly rate was \$25.00 per hour while B&A's rate was \$26.00 per hour. Eastern points out that using these hourly rates, if bids were evaluated on the basis of 4,456 manhours instead of 4,000 hours, Eastern's bid would have been low. Eastern argues that the fact that the solicitation requested hourly rates for emerging repair work above 4,000 hours, indicates that the agency knew there would be more than 4,000 hours of such work.

This bases for protest is untimely. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), a protest based on alleged improprieties in a solicitation which are apparent prior to bid opening must be filed prior to bid opening. Here, the solicitation advised bidders that only the price

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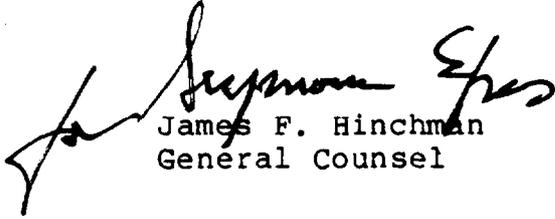
<sup>1/</sup> Neither party has argued the applicability of the COC procedure to this situation involving a subcontractor of a general agent of the government. However, it appears it would apply when appropriate. See Fredrick A. Potts & Co., Inc., 61 Comp. Gen. 379 at 383 (1982), 82-1 C.P.D. ¶ 441.

for 4,000 hours of emerging repair work would be evaluated in determining the bid most advantageous to the government. If Eastern believed that the 4,000 manhour estimate was incorrect and that bids should be evaluated based on a greater number of manhours for emerging repair work, it should have protested this before bid opening. Its failure to do so renders its protest on this issue untimely. See Cobarc Services, Inc., B-211618, May 9, 1983, 83-1 C.P.D. ¶ 492; Amray, Inc., B-208893, Jan. 10, 1983, 83-1 C.P.D. ¶ 22.

Eastern has requested the costs of pursuing its protest and bid preparation costs. Since we find Eastern's protest to be without merit, we deny the claim for costs. Actus Corp./Michael O. Hubbard and L.S.C. Assocs., B-225455, Feb. 24, 1987, 87-1 C.P.D. ¶ 209.

B&A, which submitted comments as an interested party to Eastern's protest, requests the costs of filing comments in response to Eastern's protest, including reasonable attorney fees. Under our regulations at 4 C.F.R. § 21.6(d), a protester may be entitled to costs upon a determination by this Office that a solicitation, proposed award or award does not comply with a statute or regulation. Obviously, there is no basis upon which we could award costs here.

The protest is denied in part and dismissed in part.

  
James F. Hinchman  
General Counsel