



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: A.J. Fowler Corporation

File: B-227955, B-227955.2

Date: November 13, 1987

DIGEST

1. IFB provisions indicating the approximate number of containers contractors must provide are not unreasonably uncertain.
2. IFB provisions concerning the type of equipment needed are not unduly restrictive where the protester has not shown how the specifications restrict competition.
3. Federal Acquisition Regulation permits inclusion of minor construction tasks in services contracts.
4. Where Small Business Administration has rejected protester's charge that lower bidder is not a small business, protester would not be in line for award even if remainder of protest were sustained. Therefore, protester is not an interested party to challenge agency's evaluation of other bids.

DECISION

A.J. Fowler Corporation protests the Department of the Army's procurement of refuse collection and disposal services at Fort Bliss, Texas, pursuant to invitation for bids (IFB) No. DABT51-87-B-0139. The solicitation was issued as a total small business set-aside. Fowler has filed two protests against this procurement. The first, filed prior to bid opening, challenges the IFB's specifications. The second, filed after bid opening, challenges the acceptability of other bids submitted. We deny Fowler's first protest and dismiss its second protest.

This solicitation calls for the successful bidder to furnish the labor and equipment necessary for collection and disposal of refuse generated at Fort Bliss, Texas. Fort Bliss currently uses a "hoist-haul" collection/disposal system, whereby the refuse collection container itself is lifted onto the truck, carried to the disposal site, emptied, and returned to the collection site. The government currently owns the collection containers used.

The IFB contemplates changing the "hoist-haul" system to a system using "compaction" equipment. Under the proposed system, the refuse containers are to be emptied into the contractor's enclosed truck at the collection site. The truck must have the capability to compact the refuse. The proposed system requires the contractor to provide the collection containers.

Fowler's first protest challenges the IFB specifications on four different bases. Fowler charges that the IFB provision concerning the number of containers required is misleading; the provisions designating the kind of equipment needed are unduly restrictive; the provision concerning disposal of infectious waste is ambiguous; and the provision concerning construction of concrete pads is improper. As discussed below, we find no merit in Fowler's allegations.

Fowler first alleges that the IFB provision concerning the number of containers the contractor must provide is misleading. Specifically, Fowler refers to paragraph 3 of IFB Appendix A which requires the contractor to furnish a sufficient number of containers at each collection site to handle the refuse generated, and IFB paragraph 2.6 which states "the contractor shall provide approximately 530 . . . containers of various sizes." Fowler argues that the reference to "approximately 530" containers is vague and misleading since significantly more might actually be required depending on the amount of refuse generated. The Army responded by noting that Fort Bliss currently uses 505 containers and anticipates a need for 25 (about 5 percent) more.

Our Office has held that although specifications must be sufficiently definite to permit competition on a common basis, there is no requirement that the specifications must eliminate all performance uncertainties. Hero, Inc., 63 Comp. Gen. 117 (1983), 83-2 C.P.D. ¶ 687. Here, we do not find the provision identifying the anticipated number of required containers to be unreasonably uncertain. Accordingly, this portion of the protest is denied.

Fowler next protests that the IFB specifications unduly restrict competition. Fowler refers to paragraph 4 of the IFB's Appendix A which states, "the containers . . . shall have a hoisting attachment . . . designed to accommodate the lifting forks of the two point container hoisting devices." Fowler maintains that only front loading trucks have two point hoisting devices compatible with the required containers and thus alleges that "only front loading equipment will be acceptable." Additionally, Fowler challenges the requirement in IFB paragraph 8.1 that contractors paint all containers mocha brown.

The Army denies Fowler's assertion that the solicitation restricts competition. In its report to our Office the Army stated that "two point container hoisting devices conform and adapt to either rear or front loading equipment." Thus, according to the Army, "the specifications are written to allow use of almost any type truck whether front, side, or rear loader as long as certain safety criteria are met." Concerning the painting requirement, the Army noted that the solicitation had been amended, deleting an earlier requirement that all contractor equipment be painted the specified color, and now requiring only the containers to be so painted.

In responding to contentions that a particular specification is unduly restrictive, we recognize that contracting agencies have broad discretion in determining their minimum needs and the best methods of accommodating those needs. Mid-Atlantic Service & Supply Corporation, B-218416, July 25, 1985, 85-2 C.P.D. ¶ 86. While any specification or solicitation requirement is restrictive in the sense that something is required of offerors, only those which work a disadvantage on a particular party will be reviewed by our Office to determine whether they are unduly restrictive. A.T. Kearney, Inc., B-225708, May 7, 1987, 87-1 C.P.D. ¶ 90.

The Army has stated that either front or rear loading equipment is acceptable. Fowler has not shown this statement to be false, nor has it indicated in the documents submitted to this Office how this requirement works to its disadvantage since it acknowledges that it currently owns both front and rear loading equipment and "is capable of buying any other kind, and is willing to do so." In this regard, we note that Fowler has submitted a bid in which it apparently has offered to comply with the terms of the solicitation it is protesting. Regarding the requirement that containers be painted a particular color, while the Army has not specifically explained why this is necessary, the requirement appears reasonable on its face as a method of making the containers readily identifiable. In any event, we find nothing in the record showing that this requirement is more burdensome on Fowler than on any other offeror. Accordingly, we conclude that Fowler has not shown how the IFB provisions which specify the type of equipment needed and the color containers are to be painted restrict competition. The protest on this issue is denied.

Fowler next protests that the IFB specifications concerning collection and disposal of infectious waste are ambiguous. As the Army pointed out in its report to our Office, IFB Amendment No. 3 clearly states that infectious waste must be

handled separately and cannot be mixed or come in contact with other refuse. We find no ambiguity here and Fowler's protest on this issue is denied.

Finally, Fowler refers to paragraph 3 of IFB Appendix A(1) which, as originally written, required the contractor to "prepare and construct a concrete pad [at container locations where no concrete pads exist]." Fowler protests that this requirement calls for construction work and therefore, is improper in a services contract. The Army responded to this issue by stating that IFB Amendment No. 6 changed this requirement to read "provide a suitable concrete pad [at container locations where no pads exist]".

Although we do not believe the Army's amendment to the solicitation had any substantive effect on the nature of the tasks required, Fowler's protest on this issue is without merit. The Federal Acquisition Regulation (FAR) clearly contemplates and permits inclusion of minor construction tasks in a services contract. See FAR, 48 C.F.R. § 36.101(c) (1986); Dynalectron Corporation, 65 Comp. Gen. 291 (1986), 86-1 C.P.D. ¶ 151. The protest on this issue is denied.

Fowler's second protest was filed after bids were opened. In this protest, Fowler, the fourth-low bidder,^{1/} asserts that it is the lowest responsive, responsible offeror and should receive the award. This second protest challenges the acceptability of the three firms submitting bids lower than Fowler's, alleging that two are not small business concerns and the third has submitted an unbalanced bid.

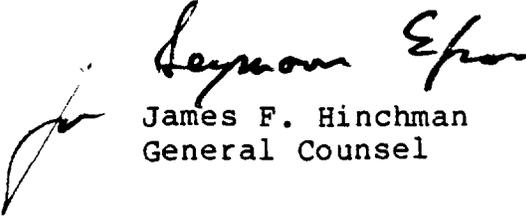
By letter dated September 9, 1987, the Small Business Administration (SBA) dismissed Fowler's charges concerning the small business status of one of the lower bidders. The SBA has conclusive authority to determine matters of small business status for federal procurements, 15 U.S.C. § 637 (1982), and our Office will not review size status determinations. Environmental Technology Corp., B-225479.3, June 18, 1987, 87-1 C.P.D. ¶ 610. Accordingly, Fowler would not be in line for award of the contract even if the remainder of the charges made in its second protest were sustained.

Our Bid Protest Regulations require that a protester be an "interested party" before we will consider its protest.

^{1/} Originally, Fowler was the fifth-low bidder. However, we understand that one of the firms submitting a lower bid has withdrawn, due to a mistake in its bid.

4 C.F.R. § 21.1(a)(1986). A protester is not an interested party where it would not be in line for award if its protest were upheld. Communications Facility Automation Systems International, B-2241181, Jan. 9, 1987, 87-1 C.P.D. ¶ 40. Since Fowler would not be in line for award of the contract here, it is not an interested party to challenge the Army's evaluation of other bids. The protest is dismissed.

Fowler's first protest is denied and its second protest is dismissed.



James F. Hinchman

James F. Hinchman
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