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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Nationwide HealthSearch
File: B-230130; B-230130.2
Date: May 13, 1988

DIGEST

1. Where protest of the cancellation of a solicitation is not filed within 10 working days of the time the protester is informed by the contracting agency that the solicitation is being canceled the protest is untimely. Fact that protester had filed a protest prior to the cancellation has no bearing since the protest grounds did not concern the cancellation and, in any event, were rendered academic by the cancellation.
2. Fact that bid prices were disclosed under a solicitation that was canceled after bid opening has no bearing on whether awards may be made on the resolicitation of the procurement if the cancellation is proper.
3. Protest of a requirement regarding the commencement of contract performance is academic where a solicitation amendment corrected problem.
4. Protest of a requirement that bidders guarantee permanent and stable employees is denied where solicitation reasonably required only that employees be bona fide and not employed solely for the purpose of obtaining specific government contract.
5. General Accounting Office will not review a contracting officer's affirmative responsibility determination absent a showing that it was made fraudulently or in bad faith or that affirmative responsibility criteria in the solicitation were not met.
6. Mere allegation that the contracting agency has acted fraudulently and in bad faith in conducting a procurement is insufficient to meet the protester's duty of affirmatively proving its case.

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DECISION

Nationwide HealthSearch protests the cancellation of invitation for bids (IFB) No. 3224-11-18-87 (IFB 87) and any award to B & B Associates under that solicitation or under the subsequent resolicitation of the requirements under IFB No. 3231-02-19-88 (IFB 88). Both solicitations were issued by the Indian Health Service for radiology services for various facilities in the Service's Aberdeen, South Dakota, area.

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

Two bids--one from Nationwide and one from B & B--were received on the November 18, 1987, opening date. The solicitation required the submission of prices for a base year and for 2 option years for each of 12 facilities. The IFB stated that a "Bidder must bid on a location by location basis as award will be made on a location by location basis or in the aggregate whichever is the most advantageous to the Government." Nationwide was the low bidder for eight of the locations. B & B was the low bidder for four of the locations.

By letter dated December 1 to the contracting officer, Nationwide protested any award to B & B based on an alleged agency investigation of collusion by B & B. The protester also argued that it should have received an aggregate award for all 12 facilities since its overall price was lower than B & B's overall price. By letter of December 23, the contracting officer advised Nationwide that IFB 87 had been canceled pursuant to Federal Acquisition Regulation (FAR) § 14.404-1(c), and that the procurement would be resolicited. According to the agency, the solicitation was canceled because it failed to include the required FAR clauses regarding multiple awards and the evaluation of options. On January 20, 1988, the agency issued IFB 88 which included the FAR clauses and which, according to the agency, made some changes concerning the performance location of some of the services. Nationwide protested the cancellation and the resolicitation to our Office on February 1.

Nationwide contends that IFB 88 contained substantially the same statement of work as did IFB 87 and therefore there existed no compelling reason to cancel IFB 87. In this regard, in a letter filed on February 26, the protester complained that B & B was able to see the prices bid under IFB 87 and use that information to underbid the protester on the current solicitation. In its initial protest, Nationwide also objected to two provisions in the

solicitation, one of which required the awardee to maintain a permanent and stable labor force and the other which required the awardee to commence performance on the date of award. Finally, the protester objected to any award to B & B under the new solicitation because of the alleged collusion investigation.

The record shows that the actual reason for the cancellation was the lack of the FAR clauses rather than an alleged change in the scope of work. Moreover, we agree with the agency's position that Nationwide's protest against the cancellation of the IFB is untimely. Our Bid Protest Regulations state that protests shall be filed not later than 10 working days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1988). While Nationwide was informed of the cancellation by letter dated December 23, 1987, it did not file its protest until February 1, 1988, more than 1 month later. The protester explains that it did not protest the cancellation until after it received the new solicitation because its pending agency-level protest had not been resolved. Further, it states that it did not know of the alleged misuse of its prices bid under IFB 87 until after bids were opened under IFB 88.

We find neither reason convincing. First, the issues raised in the agency-level protest filed under IFB 87 had nothing at all to do with the cancellation of that solicitation and were in fact rendered academic by that cancellation. Billings American Indian Council, B-228989, et al., Dec. 29, 1987, 87-2 CPD ¶ 639. Further, whenever a sealed bid solicitation is canceled after bid opening, the bidder's prices under that solicitation are publicly exposed and thus may be used by any bidder in a subsequent resolicitation. See AWD Mehle GmbH, B-225579, Apr. 16, 1987, 87-1 CPD ¶ 416. Thus, we see no basis for the protester's argument that it was required to wait until after bid opening under IFB 88 to complain about the use of its prices. The protest ground arose at the time of the cancellation. Accordingly, we dismiss the arguments concerning the cancellation as untimely raised. See J & J Maintenance, Inc., B-223355.2, Aug. 24, 1987, 87-2 CPD ¶ 197.

As far as Nationwide's objection to the solicitation provision which required the awardee to start performance on the award date is concerned, amendment No. 1 to the current solicitation changed that provision to require performance to begin 30 days after award. We therefore dismiss this contention as academic.

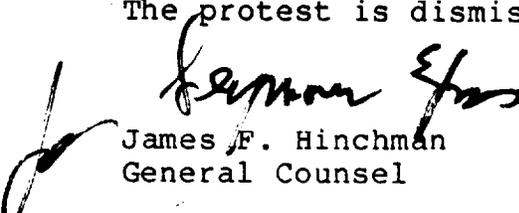
Further, the protester complains that it is not possible for any offeror to "guarantee" a stable and permanent staff as

required by IFB 88. The solicitation does not require such a "guarantee." The disputed clause merely provides that bidders are to submit employment agreements and proposed subcontracts with their bids to show that their staff will meet the contract requirements and has not been obtained just for the purpose of getting the award. The protester has not shown that this provision has affected the competition. In fact, both the protester and B & B have submitted acceptable bids under IFB 88 and each has received awards to perform the services at different locations.^{1/} We therefore find no basis upon which to object to the solicitation requirement.

Finally, Nationwide objects to any award to B & B because that firm is "under investigation for collusion and/or false certification" in obtaining prior contracts. First, there is nothing in the record to substantiate the protester's claim that there is in fact any such investigation. Further, the protester does not contend that B & B has been debarred or suspended from receiving contract awards. Consequently, the protester seems to be, in essence, contending that because of this alleged investigation, B & B is not a responsible prospective contractor and therefore is ineligible for award. Since B & B has been awarded a contract for some of the services under IFB 88, it has been determined to be a responsible prospective contractor. Universal Shipping Co., Inc., B-223905.2, Apr. 20, 1987, 87-1 CPD ¶ 424. We will not review an agency's affirmative responsibility determination absent a showing that it was made fraudulently or in bad faith, or that definitive responsibility criteria were not met. 4 C.F.R. § 21.3(m)(5). Definitive responsibility criteria are not involved here and the protester has made no showing of fraud or bad faith in connection with the responsibility determination on the part of agency personnel. Thus, we dismiss this contention.

Throughout this protest Nationwide has alleged that the agency has acted in bad faith and fraudulently. There is nothing at all in the record that substantiates these charges. We therefore dismiss these allegations.

The protest is dismissed in part and denied in part.


James F. Hinchman
General Counsel

^{1/} The agency made awards prior to the resolution of the protest pursuant to 31 U.S.C. § 3553(c)(2) (Supp. III 1985).