The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Allen-Sherman-Hoff Company

File: B-231552

Date: August 4, 1988

DIGEST

1. Protest that bid was improperly rejected is dismissed as untimely when filed more than 10 working days after protester was notified of the rejection and provided with sufficient information to know its basis for protest.

2. Protest against conversion from sealed bid to negotiated procedures is untimely when filed after the closing date for receipt of proposals.

3. General Accounting Office will not consider the merits of untimely protest issues under the significant issue exception to our timeliness requirements where the issues are not unique and of widespread interest to the procurement community.

4. Agency reasonably determined that offeror met a definitive responsibility criterion for experience in constructing a specific type of facility where record shows that the offeror submitted evidence that its proposed subcontractor satisfies the experience requirement, and the solicitation does not prohibit consideration of subcontractor's experience in fulfilling this requirement.

DECISION

The Allen-Sherman-Hoff Company (ASH) protests the award of a contract to the joint venture of United Conveyor Corporation and United Service Conveyor Corporation (UCC), for the construction of a dry fly ash collection facility at the Colbert Fossil Plant, under request for proposals (RFP) No. GL-06298A, issued by the Tennessee Valley Authority (TVA). ASH asserts that TVA improperly rejected its bid for the construction of the same facility under a predecessor invitation for bids (IFB), improperly converted the procurement from sealed bid to negotiated procedures, and awarded the contract to a firm which does not meet a definitive responsibility criterion contained in the solicitation.

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

Bid opening under the predecessor IFB took place on April 11, 1988, at which time TVA received three bids. ASH bid $18,600,000 under Schedule I, which called for a turnkey facility. The government estimate was $15,300,000, and UCC's bid, which was low and was determined to be technically sound but nonresponsive, was $16,426,233. ASH's bid under Schedule II, a reduced alternative for equipment only, was $5,792,000. On April 15, TVA advised all three bidders by telephone that it had determined to reject all bids. Separate meetings were held with each of the three bidders on April 20, at which time TVA delivered each bidder a letter which provided the basis for rejection of its bid, stated that the procurement was changed from sealed bids to negotiated, amended the specifications, and requested the submission of a best and final offer by April 25.

TVA's letter to ASH indicated that the reasons its bid was rejected were detailed in enclosure 1. Enclosure 1 contained a number of comments, including one which stated that "price offered for Schedule I is considered excessive," and another which stated, with respect to Schedule II, the "vacuum pump/motor combination is undersized and unacceptable." The letter also contained another enclosure which amended the specifications by specifically requiring that ("the minimum acceptable motor horsepower for units 1-4 shall be 75.") Without protesting this action by TVA, ASH submitted an offer by the April 25 deadline. On May 9, ASH sent TVA a telex asking for an explanation of how TVA had arrived at the excessive price determination, to which TVA replied on May 20, advising that ASH's price was 21.6 percent greater than the price estimated and budgeted by TVA and 13.2 percent greater than the price of the lowest technically acceptable bidder.

On May 26, after ASH learned that TVA was planning to award to UCC, but prior to award, ASH filed the instant protest with our Office. Subsequently, on June 3, TVA determined to award Schedule II to UCC at a price of $5,386,000, on the basis of urgent and compelling circumstances which significantly affect the government's interest. At that time, TVA reserved the option to change the award to one for Schedule I. Thereafter, on June 23, TVA determined to make an award to UCC for Schedule I at a price of $15,979,000.

As a threshold matter, TVA asserts that ASH's protest against the rejection of its bid and the conversion from sealed bid procedures to negotiation is untimely. We agree.

Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1988), a protest must be filed within 10 days after the basis for protest is known or should have been known. ASH was notified on April 15 that its bid was rejected and on

April 20 it was specifically advised that its price for Schedule I was determined to be excessive, and that its bid under Schedule II was considered nonresponsive because of the technical nonconformance of its vacuum pump motor. ASH's initial protest was filed in our Office on May 26, more than 10 working days later.

Since ASH was expressly notified on April 20 that its bid of $18,600,000 for Schedule I had been determined to be excessive, ASH knew its basis for protest in this regard on April 20. The fact that ASH subsequently requested additional explanation and engaged in correspondence with TVA without filing a protest, after it knew its basis for protest, does not toll the filing requirements under our timeliness rules. Fairey Microfiltrex Division, B-227086, July 30, 1987, 87-2 CPD ¶ 117.

Similarly, ASH's objection to TVA's determination that its bid under Schedule II was nonresponsive is untimely because it was filed more than 10 days after ASH knew its basis for protest. TVA determined, based on the descriptive literature submitted by ASH with its bid, that ASH was bidding a 50 horsepower vacuum pump motor which would not fulfill the specified 18 tons per hour minimum ash conveyance requirement under the solicitation. TVA's April 20 notice stated that ASH's bid was technically deficient in this regard, and ASH indicates that it disputed this determination with TVA officials, but did not protest the determination. Accordingly, ASH's protest of this determination, filed in our Office more than 10 days thereafter, is untimely and not for consideration.

ASH's protest concerning the change from a sealed bid procurement to a negotiated procurement is a protest against an alleged solicitation impropriety which, under our regulations, must be filed prior to the date for receipt of proposals. 4 C.F.R. § 21.2(a)(1). Under the TVA Act, 16 U.S.C. § 831h(b) (1982), TVA is generally required to procure supplies and services "after advertising." The act waives this requirement when an emergency need exists. TVA determined that an emergency existed because TVA was required to complete the facility construction in time to meet a deadline for changed statutory emission standards set by the state of Alabama. TVA determined that having rejected all bids, and in view of the construction and sequencing lead times, there was insufficient time to permit recompetition after advertising and still meet the ultimate January 1, 1991, stated deadline; hence there was an emergency warranting negotiation. ASH contends that this situation does not provide the basis for a determination

that an emergency need existed. However, ASH submitted its proposal under the negotiated procurement without first protesting this issue and, accordingly, its subsequent protest in this regard to our Office is untimely.

ASH contends that we should consider these issues as part of its overall protest, taking into consideration the entire situation surrounding the procurement. However, each different protest issue must independently satisfy our timeliness requirements. See P-B Engineering Co., B-229739, Jan. 25, 1988, 88-1 CPD ¶ 71. We find no basis for considering these essentially unrelated protest issues as linked with the one timely issue raised concerning UCC's responsibility.

Alternatively, ASH argues that if these issues are untimely filed, we should consider them under the significant issue exception in our Bid Protest Regulations 4 C.F.R. § 21.2(c). However, we consider untimely protests under the significant issue exception only when the matter raised is one of widespread interest to the procurement community and has not been considered on the merits in previous decisions. Leo Moran Construction Co., B-229676, Mar. 11, 1988, 88-1 CPD ¶ 254. We have previously addressed each of these three issues and have denied arguments similar to those raised by ASH in this protest. See Nootka Environmental Systems, Inc., B-229837, Apr. 25, 1988, 88-1 CPD ¶ 396 (Determination of price rea-sonableness may properly be based on comparison with govern-ment estimate); JoaQuin Manufacturing Corp., B-228515, Jan. 11, 1988, 88-1 CPD ¶ 15 (bid properly may be rejected as nonresponsive where required descriptive literature submitted by bidder demonstrates nonconformance with solicitation requirement, notwithstanding blanket statement of compliance); and Ben M. White Co., B-230033, May 19, 1988, 88-1 CPD ¶ 476; Moore Special Tool Co., Inc., B-228498, Jan. 29, 1988, 88-1 CPD ¶ 89 (cancellation of IFB and conversion from sealed bid to negotiated procurement with the extant bidders is permissible where all bids received are rejected as nonresponsive or price unreasonable). Further, ASH's allegation that TVA's conversion to a negotiated procurement on the basis of emergency, as required under the TVA Act, without an appropriate showing that an emergency existed, is not of widespread interest. Accordingly, there is no basis to consider these issues under our significant issue exception.

ASH's final protest basis is that the awardee, UCC, does not meet a definitive responsibility criterion contained in the RFP. The RFP states that:

"Experience. Consideration will be given only to the bids of those bidders who, in TVA's sole judgment, have successfully (1) designed, supplied, delivered, and had in successful operation in one or more coal-fired central electric generating stations for a period of at least two years, a dry fly ash collection facility of similar capacity, type, and design as that specified herein, and (2) successfully erected, tested, and started up a facility of similar magnitude and approximate dollar value as the facility specified herein."

"The requirements contained in item(1) of the preceding paragraph cannot be met through the experience of the bidder's proposed subcontractors."

"Each bidder shall provide information as to such experience on the sheets entitled, 'Experience Data.' Bids that do not include this information may not be considered."

ASH concedes that UCC meets the "design" requirement (item No. 1), but argues that the four projects listed by UCC in its offer do not establish that UCC meets the "erection" requirement (item No. 2). ASH asserts that one of these listed projects has not been completed, and one is too small in dollar value to be considered, and that while UCC was the contractor for the other two comparable projects, the actual erection of those projects was performed by UCC's subcontractor, Midwesco. Under the current solicitation, UCC has also proposed to use Midwesco as a subcontractor.

The above clause prohibits satisfying the design requirement through the experience of the offeror's subcontractor, but does not prohibit satisfying the erection requirement through the experience of the offeror's subcontractor. The clear implication is that the erection experience requirement can be met by the subcontractor's experience, and ASH concedes that UCC's proposed subcontractor, Midwesco, does have the requisite experience to satisfy the solicitation criterion. Moreover, in general, such an experience requirement can be satisfied by the proposed subcontractor's

experience. See BBC Brown Boveri, Inc., B-227903, Sept. 28, 1987, 87-2 CPD ¶ 309. Accordingly, TVA had a reasonable basis to conclude that UCC met the definitive responsibility criterion for erection experience under the solicitation.

The protest is dismissed in part and denied in part.

for Seymour Efros
James F. Hinchman
General Counsel