



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: A.J. Fowler Corporation

File: B-232367

Date: October 31, 1988

DIGEST

Agency decision to use negotiation procedures, in lieu of sealed bidding procedures, to acquire grounds maintenance services is justified where the contracting officer determines that discussions are necessary to ensure that offerors fully understand the performance methods, manning and equipment requirements necessary to adequately perform the contract.

DECISION

A.J. Fowler Corporation protests the use of negotiated procedures to procure grounds maintenance services under solicitation No. DAKF48-88-R-0198, issued by the Department of the Army, Fort Hood, Texas. Fowler contends that the use of a negotiated process rather than sealed bids is unduly restrictive of competition and subject to abuse in the selection of a contractor because of the discretion given to contracting officials.

We deny the protest.

The solicitation was issued as a total small business set-aside in contemplation of a firm-fixed-price contract with an initial contract period of 9 months and a 1-year option. The contractor is required to furnish all labor, supplies, and equipment necessary to perform maintenance of lawns and adjacent common areas at all family housing areas on the Fort Hood Military Reservation. Each offer was to include Technical, Management and Experience proposals in which the offeror was to describe its methodology for performing the work and the labor and material resources it would provide; its quality control plan; its organizational and staffing plan for the Fort Hood contract including resumes of key personnel; and a description of the offeror's experience in performing similar service contracts.

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Fowler's principal assertion is that because of the discretion afforded contracting officials and because "RFP procedures are actively performed in secret," proposals, once submitted, can be arbitrarily and capriciously rejected by the agency. Fowler also contends that this procurement does not necessitate negotiation since no special expertise of the contractor is required for satisfactory performance and in fact these services had in the past been procured through sealed bids. It suggests the government's interests would be adequately protected if it permitted low bidders to perform at the price they chose to bid unless they are found, as a result of a preaward survey, incapable of performing. It further contends that the use of requests for proposals (RFPs) not only on grounds maintenance but also on refuse collection contracts in general unfairly restricts competition because small businesses may not possess the level of sophistication necessary to write an acceptable technical proposal. By way of relief, the protester requests that we rule that all contracts for grounds maintenance, as well as for refuse collection, be let through sealed bids.

The Army states that in its judgment, in order to avoid management and performance problems during the contract term, it is necessary to obtain technical proposals and to have the opportunity for discussions, to assure that a prospective contractor has a clear understanding of the methods, manning and equipment needed to perform the contract. It concluded, therefore, that there were significant factors other than price which must be considered in the selection of a contractor. Moreover, the Army states that the proposal required by the solicitation need not be elaborate; that it has no knowledge of any RFP that has restricted competition; and that, in fact, it has in the past received acceptable proposals from small businesses, including the protester.

The criteria which now govern the selection of a procurement method are contained in the Competition in Contracting Act (CICA) of 1984, 10 U.S.C. § 2304(a)(2)(A) (Supp. IV 1986), which requires an agency to solicit sealed bids if:

- "(i) Time permits the solicitation, submission, and evaluation of sealed bids;
- (ii) the award will be made on the basis of price and other price-related factors;
- (iii) it is not necessary to conduct negotiations with the responding sources about their bids; and

(iv) there is reasonable expectation of receiving more than one sealed bid."

The enactment of CICA eliminated the statutory preference for sealed bids. Kime Plus, Inc., B-231906, Sept. 13, 1988, 88-2 CPD ¶ _____. CICA mandates the use of full and open competition and to achieve it agencies are required to use the competitive procedures or combination of competitive procedures that is best suited under the circumstances of the procurement. 10 U.S.C. § 2304(a)(1)(B). The determination regarding which competitive procedure is appropriate essentially involves the exercise of a business judgment by the contracting officer. Kime Plus, Inc., B-231906, supra. We will not question the determination that the need for offerors to describe their approach to, and for there to be an opportunity to discuss, non-price-related factors requires the use of negotiation, unless that determination is shown to be unreasonable. Essex Electro Engineers, Inc., 65 Comp. Gen. 242 (1986), 86-1 CPD ¶ 92.

Here, we do not think the protester has shown that the Army's use of negotiation is unreasonable. The Army states that its experience has shown the need for prospective contractors to explain the methodologies they intend to use in accomplishing the contract tasks and how they view the contract requirements in terms of the labor, material and equipment resources necessary to accomplish them, and for there to be an opportunity for discussion of these subjects prior to contract award. We have recognized concerns such as these as legitimate reasons for choosing to procure through negotiation. Kime Plus, Inc., B-231906, supra. In fact, where a small business' understanding of non-price-related factors is concerned, the use of technical proposals and discussions may be especially appropriate. See Essex Electro Engineers, Inc., supra. We do not think the protester's objections, which largely consist of speculation that the negotiation process, once chosen, may be subject to abuse, establish that the Army's choice of negotiation was unreasonable.

The protester's suggestion that the government's interests would be adequately protected by a preaward survey also was

considered in Kime-Plus, Inc., B-231906, supra, and for the reasons stated in that decision, we remain of the opinion that a preaward survey is not a substitute for negotiations.

The protest is denied.

for Seymour Epos
James F. Hinchman
General Counsel