



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Northeast Construction Company  
**File:** B-234323; B-234406  
**Date:** April 24, 1989

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### DIGEST

Where all elements enumerated in the Competition in Contracting Act, 10 U.S.C. § 2304(a)(2) (Supp. IV 1986), for the use of sealed bidding procedures are present, agencies are required to use those procedures and do not have discretion to employ negotiated procedures.

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### DECISION

Northeast Construction Company protests the Department of the Air Force's use of competitive negotiation rather than sealed bidding procedures to procure repair and construction work under request for proposals (RFP) Nos. F04626-89-R-0003 (RFP -0003) and F07603-89-R-8202 (RFP -8202). Northeast argues that the Air Force is required to employ sealed bidding procedures for these acquisitions.<sup>1/</sup>

We sustain the protests.

Both RFPs contemplate the award of firm-fixed-price contracts for the performance of various repair and improvement construction to military family housing units. Principal items of work include replacing roofs and windows, and painting of new and existing areas. RFP -0003 is for the performance of the work at Travis Air Force Base, and RFP -8202 is for performance at Dover Air Force Base. The latter RFP provides for various additive items in addition to a stated basic requirement, and both RFPs contain stated "per unit" cost limitations. Additionally, both RFPs provide for contract award on the basis of "price only," and

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<sup>1/</sup> Northeast has been joined in this protest by eight other potential offerors as interested parties who also urge the use of sealed bidding procedures here.

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neither RFP requires the submission of technical proposals. These protests were filed prior to the closing dates for receipt of initial proposals; the closing dates for both RFPs have been extended indefinitely.

Northeast argues that both RFPs violate the provision of the Competition in Contracting Act (CICA), 10 U.S.C. § 2304(a)(2) (Supp. IV 1986), which provides that, in determining which competitive procedure is appropriate to a given circumstance, an agency:

"shall 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 discussions with the responding sources about their bids; and

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

According to Northeast, all of the enumerated criteria for the use of sealed bids are met by the acquisitions in question and, consequently, the Air Force is required to use sealed bidding procedures.

The Air Force responds that it is justified in using negotiated procurement procedures because it expects there to be a need for discussions. Specifically, the Air Force argues that, because of the "complexity" of the projects, it concluded that negotiations might be required. With respect to RFP -0003, the Air Force argues that cost limitations associated with the project might require discussions should any or all of the offerors exceed the cost limitations. In short, the Air Force argues that it employed negotiation procedures in order to avoid solicitation cancellations in the event of pricing in excess of the cost limitations as well as to ensure through discussions that the offering firms fully understand the nature and complexity of the required services.

Our Office has previously held that the use of sealed bidding procedures is required where the conditions specified in CICA, 10 U.S.C. § 2304(a)(2), are present.

See ARO Corp., B-227055, Aug. 17, 1987, 87-2 CPD ¶ 165, aff'd, The Defense Logistics Agency--Request for Reconsideration, 67 Comp. Gen. 16 (1987), 87-2 CPD ¶ 365. Our decision in that case was based upon the mandatory nature of the language found in 10 U.S.C. § 2304(a)(2) as well as the supporting legislative history of that provision.<sup>2/</sup> Simply stated, an agency is required to use sealed bids where: (1) time permits; (2) award will be based on price and price-related factors; (3) discussions are not necessary; and (4) more than one bid is expected to be received. Here, we think that the acquisitions in question fit squarely into the terms of the statute's requirements and that, consequently, the Air Force was required to employ sealed bidding procedures.

First, the Air Force has not alleged that insufficient time exists to permit using sealed bid procedures or that there is not a reasonable expectation of receiving more than one bid. Second, the award in both procurements will be based upon price alone without consideration of technical evaluation criteria; indeed, the RFPs do not even contemplate the submission of technical proposals. Third, we do not think that the Air Force has demonstrated that discussions will be necessary. In this regard, we note that while the Air Force alleges that discussions may be necessary to insure that all firms have a complete understanding of the specifications, we fail to understand how responding offerors will be evaluated for understanding given the absence of a requirement for the submission of technical proposals. Compare Essex Electro Engineers, Inc., 65 Comp. Gen. 242 (1986), 86-1 CPD ¶ 92, where technical proposals, to be evaluated against specific criteria, were required. Stated differently, we fail to see how the Air Force will discover technical deficiencies in submissions which are comprised only of a price schedule and a blanket statement of compliance with all specifications.<sup>3/</sup> We also

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<sup>2/</sup> See S. Rep. No. 98-50, 98th Cong. 2nd Sess., reprinted in 1984 U.S. Code Cong. & Admin. News 2191; H.R. Rep. No. 98-861, 98th Cong. 2nd Sess., reprinted in 1984 U.S. Code Cong. & Admin. News 2110.

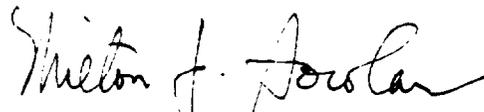
<sup>3/</sup> To the extent that the Air Force wishes to give consideration to a responding firm's ability to perform in accordance with its agreement to comply with the specifications, we think that an investigation of the firm's responsibility is the appropriate vehicle for this purpose.

note that the Air Force has failed to provide any explanation of why the projects are complex or are other than routine construction work. The Air Force has also failed to state what the subject of any discussions would be.

In addition, we note that the acquisitions' cost limitations are stated in both RFPs. Under such circumstances, we are unpersuaded that firms wishing to prepare a responsive submission will knowingly exceed the clearly disclosed cost limitations. In any event, should all responding firms ultimately submit above-cost bids, the Federal Acquisition Regulation (FAR) provides an adequate mechanism for converting a solicitation from a sealed bidding format to a negotiated format without the need for solicitation cancellation. FAR § 15.103 (FAC 84-5).

Accordingly, by separate letter of today, we are recommending that the RFPs in question be canceled and reissued using sealed bidding procedures. In addition, we find Northeast to be entitled to the costs of filing and pursuing its protests, including attorneys' fees.

The protests are sustained.



for Comptroller General  
of the United States