

GILHOOLY



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Cemco Products, Inc.

File: B-234147; B-234147.2

Date: May 23, 1989

DIGEST

Protest is sustained where contracting officer, after determining all bidders nonresponsive for submitting nonconforming bid samples, requested resubmittal of bid samples only and awarded contract to initial low bidder, based on satisfactory test results on new sample, without affording other bidder a reasonable opportunity to negotiate.

DECISION

Cemco Products, Inc., protests the rejection of its bid as nonresponsive and the award of a contract to Smithway Company, Inc., under invitation for bids (IFB) No. 243-IFB-89-0001, issued by the Department of Health and Human Services (HHS) for insulated pipe and fittings to be used in providing water and sewer services. HHS rejected Cemco's bid because its required bid sample was found to be nonconforming to the IFB's specifications.

We sustain the protest.

The IFB stated that bid samples were to be furnished as part of the bid, that the samples would be tested to determine compliance with all the characteristics listed in the solicitation, and that failure of the samples to conform to the listed characteristics would result in rejection of the bid. Bidders were required to furnish a 5-foot section of the pipe as a bid sample for laboratory testing.

Two bids were received by the IFB's December 14, 1988, opening date. Smithway bid \$321,157 and Cemco bid \$345,989. The contracting officer informed Smithway that its bid sample would be tested. On December 19, the testing laboratory informed the contracting officer that preliminary inspection and preparation of the Smithway bid sample had revealed obvious non-conforming aspects. The contracting officer visited the laboratory, concluded that the Smithway

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sample did not conform to the IFB specifications, and instructed the laboratory to test the Cemco sample. On December 30, the laboratory informed the contracting officer that the Cemco sample had failed the thermal conductivity, or "K-factor," test of the insulating urethane foam. Cemco's sample had a K-factor of .15, whereas the maximum allowable K-factor was .13. The laboratory ran a control test on a sample with a known K-factor immediately after the bid sample testing to verify that the equipment and procedures were correct.

The contracting officer notified both bidders by letter dated January 4, 1989, that their samples had failed the testing. The letters also stated that new samples should be submitted by January 9, and indicated that no other changes to the bid would be permitted. Cemco requested and was granted an extension of the due date to January 13. Smithway submitted a new sample which passed the test. Cemco filed a protest with our Office on January 13 in lieu of submitting a bid sample. We have been advised that, pursuant to 31 U.S.C. § 3553(c)(2) (Supp. IV 1986), notwithstanding the pending protest, a contract was awarded to Smithway on February 7 because of urgent and compelling circumstances.^{1/}

Cemco protests that the testing of its original sample was improperly performed and that the agency's request for submittal of new samples was not in accordance with the Federal Acquisition Regulation.

We have reviewed the record and conclude that the testing of CEMCO's original sample was properly conducted. However, we sustain the protest for the following reasons.

Cemco argues that even if its bid was nonresponsive, HHS' request for resubmittal of bid samples only was improper. Cemco argues that if both bids were nonresponsive, the agency should have canceled the IFB and resolicited, or formally converted the solicitation to a negotiated procurement in accordance with Federal Acquisition Regulation (FAR) §§ 14.404(e) and 15.103.

^{1/} The protester challenges HHS' factual basis for its determination to proceed with award. Since the agency has informed us of its written determination to go forward with the award, it has complied with its statutory obligations. National Medical Diagnostics, Inc., B-232238, Dec. 2, 1988, 88-2 CPD ¶ 553.

HHS responds that the contracting officer, faced with two nonresponsive bids and insufficient time to cancel and reprocure, 2/ chose, in effect, to convert the procurement to a negotiated one. HHS states that the contracting officer committed a procedural error in failing to secure a determination from the agency head before negotiating, as required by FAR § 14.424-1(c), but that the error did not prejudice Cemco. HHS argues that the contracting officer's actions were reasonable and had the effect of preserving the integrity of the procurement process, since a new procurement, after bids had been revealed, would have given the appearance of an auction.

We think that what HHS did here does not meet the test for conversion from sealed bidding to negotiation.3/ FAR §§ 14.404-1(c)(6) and (e) and 15.103 provide that where no responsive bids are received from responsible bidders, an IFB may be canceled and the procurement completed through the use of negotiations, so long as all responsible bidders under the original IFB are given prior notice and a reasonable opportunity to negotiate. In our view, the protester was not given a reasonable chance to negotiate.

Negotiation normally involves the submission of proposals and the opportunity to revise those proposals. FAR § 15.102. When an agency converts a sealed bid procurement to a negotiated one, the bidders are given an opportunity to revise the offers (bids) they submitted initially. In the usual negotiated procurement, revisions may be made to any or all aspects of a proposal. See SETAC, Inc., 62 Comp. Gen. 577 (1983), 83-2 CPD ¶ 120; Systems Group Assocs., Inc., B-198889, May 6, 1981, 81-1 CPD ¶ 349. While in an appropriate case an agency may restrict the subject matter

2/ HHS states that it needed the pipe for construction scheduled to begin in 1989 during the short Alaskan construction season.

3/ This procurement could not be completed through sealed bidding because the bids received were nonresponsive and bidders may not be permitted to make their nonresponsive bids responsive after bid opening since that would allow the firms to accept or reject the contract after bids have been exposed by correcting or refusing to correct the deficiency in the bids. See Heritage Medical Products, Inc., B-223214, Aug. 5, 1986, 86-2 CPD ¶ 159; Loral Packaging, Inc., B-221341, Apr. 8, 1986, 86-1 CPD ¶ 347.

of proposal revisions, see DynaLantic Corp., B-234035, May 3, 1989, 89-1 CPD ¶ _____ (involving a reprocurement), the opportunity to revise all aspects of a proposal generally is viewed as "a basic tenet of negotiated procurements." See American Nucleonics Corp., B-193546, Mar. 2, 1979, 79-1 CPD ¶ 197.

Here, the bidders were not given the opportunity to revise their proposals as they saw fit. HHS asked only for new bid samples, and made it clear that no other changes to the initial offers, including price changes, were to be submitted. This is inconsistent both with the "basic tenet" of negotiation and with FAR § 15.103(b), which envisions that upon conversion to negotiation from sealed bidding there will be a "negotiated price." Moreover, HHS' approach clearly benefited Smithway and was prejudicial to Cemco. The record shows that the agency, while giving both vendors the opportunity to submit revised samples, intended to test Smithway's sample first, and to award a contract to Smithway if the sample passed the test. Thus, Cemco, even if it provided an acceptable sample, would not have been considered for award if Smithway's sample passed the test because Cemco would not have had the opportunity to revise its price. In other words, because HHS did not permit the relative standing of the offerors to change vis-a-vis cost, the offerors were not on an equal footing once the procurement was converted to negotiation--Smithway was given the first opportunity to make itself the successful offeror, and only if Smithway failed to do so would Cemco have had that opportunity.

This is not what competitive negotiations are supposed to be. To the contrary, except for the special procedures used for the award of architect-engineer (A-E) contracts, under which the agency attempts to negotiate a contract with the highest rated firm and negotiates with others only if it cannot reach agreement with the first firm, see FAR part 36.6, agencies are expected to provide all offerors in the zone of competition the opportunity to submit full proposals and, in most cases, to revise them in whatever manner they choose. What the agency did here simply was more akin to using the A-E contract approach than the full and open competitive negotiation approach. Using A-E procedures for anything other than the acquisition of A-E services is improper. EME National Health Services, Inc., 65 Comp. Gen. 1 (1985), 85-1 CPD ¶ 362.

Although the agency seems to suggest that allowing price revisions would have produced an auction atmosphere, we have previously held that converting to a negotiated procurement after cancellation of an IFB and the exposure of bid prices

does not create an impermissible auction where the cancellation is in accord with governing legal requirements. See Hygrade Painting, Inc., B-232564, Dec. 19, 1988, 88-2 CPD ¶ 601.

The protest is sustained. Since significant performance has occurred under the contract, we do not recommend that the award be disturbed. We find however, that Cemco is entitled to bid preparation costs and to the costs of filing and pursuing the protest, including reasonable attorneys' fees. See 4 C.F.R. § 21.6(d); Huntington Construction, Inc., B-230604, June 30, 1988, 88-1 CPD ¶ 619. Cemco should submit its claim for such costs directly to the agency.

Milton J. Fowler
for Comptroller General
of the United States