



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Inca Engineers, Inc.

File: B-236406

Date: October 23, 1989

DIGEST

1. Protest that in procuring architect-engineer services under the Brooks Act contracting agency improperly terminated negotiations with protester is denied where record clearly shows that agency and protester could not come to a mutually acceptable agreement.
2. Protest that after accepting the price breakdown in protester's proposal the contracting agency reversed its decision to protester's prejudice because protester would not have proceeded with further negotiations if it had known the breakdown was unacceptable is denied since at the time the agency did not have complete pricing data and the protester should have been aware that negotiations would be terminated if no agreement could be reached.
3. Protest that statement of work in architect-engineer contract was inadequate is untimely when not filed within 10 working days of the date protester received a draft copy of the contract in preparation for price negotiations.

DECISION

Inca Engineers, Inc., protests the decision by the Forest Service to terminate negotiations with the firm under request for proposals No. R6-3-89-11s for design and construction services for the Mount St. Helens National Volcanic Monument. The solicitation was issued under the Brooks Act, 40 U.S.C. §§ 541-544 (Supp. IV 1986), which prescribes procedures for acquiring architect-engineer (A-E) services.

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

Generally, under the solicitation procedures set forth in the Brooks Act, which govern the procurement of A-E services, and in the implementing regulations in Federal

Acquisition Regulation (FAR) subpart 36.6, the contracting agency must publicly announce requirements for A-E services. An A-E evaluation board set up by the agency evaluates the A-E performance data and statements of qualifications of firms already on file, as well as those submitted in response to the announcement of a particular project. The board must then conduct "discussions with no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required service." 40 U.S.C. § 543. The firms selected for discussions should include "at least three of the most highly qualified firms." FAR § 36.602-3. Thereafter, the board recommends to the selection official, in order of preference, no less than three firms deemed most highly qualified.

The selection official, with the advice of appropriate technical and staff representatives, then lists, in the order of preference, the firms most qualified to perform the required work. FAR § 36.602-4. Negotiations are held with the firm ranked first. If the agency is unable to agree with that firm as to a fair and reasonable price, negotiations are terminated and the second ranked firm is invited to submit its proposed fee. FAR § 36.606.

Here, on October 12, 1988, the Forest Service announced in the Commerce Business Daily its requirement for services for design and contract document preparation for a hydroelectric project and primary power distribution system. The services were required to assist in planning the development of the Mount St. Helens National Volcanic Monument. In response, eight firms submitted qualifications statements. The evaluation board evaluated the qualifications of these firms, and after interviews with the top three firms, selected Inca as the top rated firm. The selection official agreed with this determination and on April 7, 1989, notified Inca that it had been selected as the top rated firm.

Subsequently, the Forest Service commenced fee negotiations with Inca. Pursuant to the proposed contract Inca was required to submit a lump-sum price to perform design services and a lump-sum price to provide construction assistance and an operations and maintenance (O/M) manual. Two of Inca's initial price proposals were rejected as too high. On June 30, Inca submitted a revised offer of \$690,000 (\$620,000, design services; \$70,000, construction assistance and O/M manual), to match the Forest Service's upper price limit. The offer, however, did not include any cost or pricing data. On July 7, the Forest Service informed Inca that the overall price appeared acceptable,

but that cost and pricing data were required to be submitted.

Inca subsequently submitted its complete revised price proposal with cost and pricing data on July 18, and in reviewing it, the contracting officer became concerned with some of the technical aspects of the proposal. Specifically, the Forest Service found that Inca based its price proposal on a number of design assumptions and proposal clarifications which were unacceptable. For example, Inca offered to prepare only three contract packages, while the Forest Service anticipated that the number would be determined during the preliminary analysis phase of the contract and would probably involve six contract packages. Inca also limited the penstock crossing to two minor stream crossings which the Forest Service found unacceptable given that the penstock is between 13,000 and 15,000 feet long.^{1/}

On July 19, the Forest Service discussed with Inca the technical and cost portions of its proposal with which the agency was concerned. The Forest Service informed Inca that the assumptions and proposal clarifications were unacceptable. The Forest Service also requested Inca to breakdown the proposed construction assistance rate, and to shift some work hours from the design work to the construction assistance and O/M manual portions of the contract. In the revised proposal which Inca submitted on July 20, Inca did shift some dollars from design to construction, but refused to change the design assumptions in its technical proposal without a price increase. As a result, the Forest Service determined that Inca's proposal remained technically unacceptable and was unreasonable in price.

Concerning price unreasonableness, the Forest Service found that the amount proposed for construction assistance was inadequate for even minimum contract administration; Inca's proposal was based on a construction cost estimate of \$6.3 million compared to the government estimate of \$4.6 million; Inca's and its subcontractor's engineering drawings averaged \$4,800 and \$10,000 per drawing, respectively, compared to an average of \$2,400 to \$3,000 for Forest Service projects and \$5,000 for Corps of Engineers projects; Inca's average cost per engineering report was \$40,348, while the Forest Service historically paid approximately \$30,000 per report; and because Inca proposed to use two-thirds of its work hours in the preliminary analyses and schematic design phases, when in fact a

^{1/} A penstock is a conduit for conveying water to a water wheel or turbine.

substantial portion of the work would be required during the later design development and construction documents phases, Inca's proposal was unbalanced. As a result of these findings, the Forest Service terminated negotiations with Inca and commenced negotiations with the second ranked firm.

Inca's primary complaint is that, according to Inca, on July 7 the Forest Service accepted Inca's best and final offer of \$690,000, including the breakdown of \$620,000 for design services and \$70,000 to provide construction assistance and an O/M manual, but later reversed its decision and tried to persuade Inca to maintain the total price while shifting costs from the design services to the construction assistance portion of the proposal. Inca asserts that if it had known on July 7 that the \$620,000/\$70,000 breakdown was not acceptable, it would not have proceeded with the additional 2 weeks of negotiations.

Inca further argues that its offer is fair and reasonable. Inca contends that its price is not unbalanced because the preliminary and schematic analyses involve considerable time and effort; it based its proposal on the government's \$4.6 million estimate for construction costs; and its average cost per drawing is \$4,340, which compares favorably to the Corps' experience of \$5,000 per drawing. Inca also agrees, however, that it made certain design assumptions that were unacceptable to the Forest Service, for example, that it would provide only three contract packages and two minor penstock crossings. Finally, Inca complains that the government provided an inadequate statement of work in the draft contract and that Inca was required to spend a considerable amount of time and money to develop an adequate statement of work.

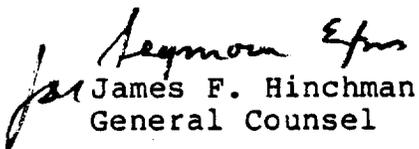
Inca's argument that it would not have continued negotiations if it had been informed that its \$620,000 (design services)/\$70,000 (construction assistance) breakdown was unacceptable does not provide a basis for us to question the Forest Service's decision to terminate negotiations with Inca. There is no indication that at the time the Forest Service told Inca its price was acceptable the agency had accepted the offer or was acting in bad faith or attempting to mislead Inca. Rather, at that time, the Forest Service did not have a complete cost proposal from Inca and it was only after receiving the complete proposal that the Forest Service determined that the breakdown was unacceptable. Since the Brooks Act procedures, of which Inca was aware, provide for the most qualified firm and the agency to negotiate a price and for the agency to terminate negotiations if no agreement is reached, by participating in the

procurement, Inca was required to accept the risk that negotiations might fail.

Nor do we find that the Forest Service improperly terminated negotiations with Inca. As noted above, the Brooks Act procedures specifically provide for the termination of negotiations if the contractor and the agency cannot agree on a fair and reasonable price. Here, Inca argues that its proposed price was reasonable and disagrees with certain of the Forest Service's conclusions, specifically, its proposed cost for drawings and whether the proposal was unbalanced. Inca concedes, however, that it made certain technical and design assumptions which are unacceptable to the Forest Service and which Inca is not willing to change. Given this factor, it is clear that the parties could not reach an agreement and thus that negotiations were properly terminated.

Finally, insofar as Inca argues that the statement of work was inadequate, its protest is untimely. Under our Bid Protest Regulations, a protest that concerns other than an alleged solicitation impropriety must be filed within 10 working days after the protester knows or should know the basis of protest. 4 C.F.R. § 21.2(a)(2) (1989). Here, the Forest service submitted a draft of the proposed contract to Inca on April 20, 1989, and Inca thus was required to protest that the statement of work was inadequate within 10 working days of April 20. Since Inca did not file its protest until August 2, it is clearly untimely on this ground.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel