



Comptroller General
of the United States

Washington, D.C. 20548

Arsenoff

Decision

Matter of: Dallas Times Herald

File: B-238197

Date: May 4, 1990

Charles L. Babcock, Esq., Jackson & Walker, for the protester.

Stan Hinton, Esq., Doke & Riley, for The Dallas Morning News, an interested party.

Carolyn B. Lieberman, Esq., Office of General Counsel, Department of Housing and Urban Development, for the agency. Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where initial oral solicitation was properly canceled because among other things it provided no common basis for evaluating offers, agency is not later precluded from conducting a separate competitively negotiated procurement in which price is subordinated to technical considerations, even though price may have been a more significant evaluation factor during the initial competition.

2. Agency seeking to obtain creative contractor-provided advertising services to publicly market real property acted reasonably in subordinating price to technical merit by using competitive negotiation format in lieu of sealed bidding procedures.

3. Evaluation method which subordinates price to technical considerations is not per se defective because price is not weighted or scored with other factors.

DECISION

The Dallas Times Herald protests the terms of request for proposals (RFP) No. 65-90-113, issued by the Department of Housing and Urban Development (HUD) for advertising services in the Dallas area. The protester alleges that the agency improperly converted a sealed bid procurement into a

048460/141324

negotiated one, that the use of negotiated procedures is not justified, and that the RFP evaluation criteria are defective.

We deny the protest.

This protest involves HUD's efforts beginning in July 1989 to award a single contract for newspaper advertising services to publicize primarily single-family properties which the agency has for sale in the Dallas metropolitan area as the result of the assignment or foreclosure of government-insured mortgages. HUD has listed its properties in the Times Herald and The Dallas Morning News under separate contracts, each of which results in billings of about \$1 million annually.

During August and September 1989, HUD officials met separately with representatives of each newspaper to discuss the agency's anticipated new approach to fulfilling its advertising requirements. What emerged from these meetings was an orally-conducted competition in which each newspaper made a brief technical presentation and submitted a price in confidence to the agency during the week of September 25. The protester states that HUD had indicated at the various meetings that price would be the determinative factor in any award decision. The agency and the Morning News dispute this characterization of the procurement action and HUD states that, during the meetings, it outlined six factors in which price was ranked second in importance. Although the Times Herald submitted the lower price, on October 11 HUD announced that it intended to award a contract to the Morning News based upon the agency's view that the Morning News "presented a superior product."

On October 13, the Times Herald filed an agency-level protest against the proposed award, questioning among other things HUD's authority to contract for services of the magnitude and duration contemplated on the basis of an oral solicitation. On October 19, HUD responded by informing the Times Herald that it had concluded that the oral solicitation could not legally support an award because it failed to comply with basic requirements of the Federal Acquisition Regulation (FAR). In the same response, HUD informed the protester that it intended "to issue a formal request for proposals, following the [FAR]," and promised the newspaper an opportunity to compete.

The solicitation was issued on November 17, with a December 18 closing date. Among other things, the RFP's statement of work (SOW) calls for the contractor to produce

a weekly 24-page tabloid devoted to HUD properties, containing the same basic format and creative concept (i.e., articles, information, material, pictures and graphics) as a tabloid from the Denver Post, which was included as an exhibit to the RFP. The SOW also states that the tabloid "must provide a visual concept that will extend to and capture the consumer's attention, as well as real estate professionals." Finally, the SOW requires the contractor to designate a team to work on the tabloid consisting of an advertising sales representative, an alternate representative, and technical staff such as artists, photographers and writers.

Pursuant to the RFP's method of award clause, an award is to be made to the offeror submitting the proposal determined to be most advantageous to the government based on an evaluation of technical and management factors (to be scored on a 100-point scale)^{1/} and price, which is not to be scored, but which is described as being "secondary" to the other evaluation factors. The RFP also provides that price will be the deciding factor in the event of substantially equal technical proposals.

The Times Herald filed a second agency-level protest challenging the negotiated format on December 14, and received a letter denying that protest on December 20. The current protest was filed on January 3, 1990. HUD reports that it is presently evaluating offers under the RFP and has extended each newspaper's existing contract for property listings pending resolution of the matter by our Office.

The Times Herald's protest places considerable emphasis on the protester's own characterization of the relationship between the initial procurement attempted by oral solicitation and the present RFP. The protester essentially contends that the present negotiated procurement is merely an improper corrective action taken to remedy certain defects in the first competition--which the protester characterizes as a "sealed bid" procurement intended to be awarded to the low "bidder." In this regard, the Times Herald suggests that, in light of the alleged disclosure of its "bid price," it is now prejudiced by the subsequent "conversion" of the procurement to a negotiated format, and

^{1/} Understanding and approach (25 points), creative graphics and design concepts (25 points), experience and capabilities (20 points), key personnel (20 points), and circulation (10 points).

the protester argues, in effect, that HUD should be estopped from "changing" the format from one in which price was controlling to one in which price is a secondary consideration to technical concerns.

Even if we accept the protester's view that the initial oral competition constituted a "sealed bid" procurement--which we think is clearly wrong since there was no public opening of bids as required by 41 U.S.C. § 253b(c) (Supp. IV 1986)--we believe that HUD properly canceled it for cogent and compelling reasons as required by FAR § 14.401-1(a)(1). Contracting officers have broad discretion to decide whether or not compelling circumstances for cancellation exist, and our role is to consider the reasonableness of the exercise of that discretion. Phillip C. Clarke Elec. Contractor, Inc., B-226506 et al., June 25, 1987, 87-1 CPD ¶ 629.

Here, the apparently vague statements of what constituted the agency's requirements, as reflected in the varying recollections of the competitors as to what was required and how an award would be made under the oral solicitation, indicate that there simply was no common basis for evaluating "bids"--a circumstance which has long been recognized as supporting cancellation, even after bid prices have been exposed.^{2/} See North-East Imaging, Inc., B-216734, Aug. 28, 1985, 85-2 CPD ¶ 237. Moreover, we believe the contracting officer properly exercised her discretion in concluding that the oral solicitation simply was not authorized by the FAR for a contract of the magnitude and type contemplated--a conclusion which the protester apparently does not dispute, since it questioned HUD's authority to make an award on the basis of such a solicitation in October 1989, when it filed its first agency-level protest.

Once HUD had properly canceled the oral solicitation, it was not estopped, as the Times Herald suggests, from using any particular solicitation format. The protester's argument that HUD improperly converted an alleged sealed bid procurement to a negotiated one is inapposite because FAR § 14.404-1(e)(1), which governs such conversions, is limited to circumstances where a sealed bidding procurement fails

^{2/} The record does not support the protester's contention that it was prejudiced by any exposure of its initial "bid" price as a result of agency action. There was no public bid opening, and so far as the record reflects, until the protester disclosed its own price when this protest was filed, only the Morning News' price had been disclosed by HUD.

because of the lack of reasonably priced acceptable bids or because the bids received were not independently arrived at, were collusive or submitted in bad faith. As the record clearly shows, this was not the case here.

Since the protester has failed to present any persuasive arguments as to why, after the original solicitation was properly canceled, HUD was not free to develop specifications and a contract format best suited to filling its requirements, we continue the remainder of our analysis of the alleged defects in the RFP without regard to the terms or results of the initial competition.

As to the RFP itself, the Times Herald principally argues that HUD has presented no justification, as required by FAR § 6.401, to conduct a negotiated procurement rather than a sealed bid procurement.^{3/} In this regard, the protester primarily asserts that, in simply seeking to determine whether a potential contractor is able to prepare something like the Denver Post tabloid format, HUD has not established that the procurement will involve complex technical issues of the type that would require discussions and, thus, support the use of negotiation.

In response, HUD notes that the RFP informs offerors that the tabloid it seeks is to be more than just a listing of properties; rather, it is to be a creative effort prepared by the contractor's staff to attract public attention. Thus, the agency reports that the contracting officer determined that technical expertise, including approach, creativity, experience in real estate marketing, qualifications of personnel, and circulation were more important than price in the procurement, and that it would be necessary to conduct discussions concerning these factors.

The Competition in Contracting Act of 1984 (CICA), at 41 U.S.C. § 253(a)(2), provides in pertinent part that sealed bidding is to be used if the contract award will be based on price and other price related factors and it is not necessary to conduct discussions with offerors. Conversely,

^{3/} The protester also argues that there was no contemporaneous documentation supporting the use of negotiation at the time the RFP was issued. We view this as insignificant since our concern is whether HUD's decision to negotiate has a legally supportable basis and not whether the decision was properly documented at the time it was made. See Saxon Corp., B-216148, Jan. 23, 1985, 85-1 CPD ¶ 87.

if such elements are not present, competitive negotiation may be used. The determination as to whether to use sealed bidding or negotiated procedures, however, ultimately involves the exercise of business judgment by the contracting officer, which we will question only when the record shows that the contracting officer acted unreasonably. W.B. Jolley, 68 Comp. Gen. 443 (1989), 89-1 CPD ¶ 512.

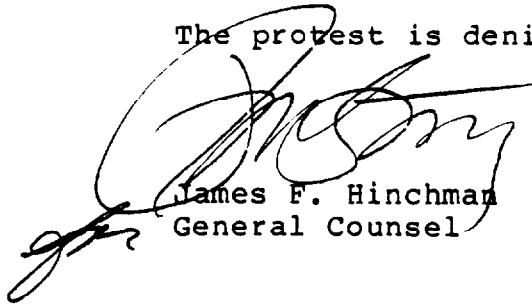
The Times Herald's characterization of the solicitation as merely requiring the contractor to have the technical composing and printing capability to produce a 24-page tabloid is, in our view, simplistic since it fails to take into account the statements in the SOW which, as the agency reports, clearly indicate that HUD was interested in evaluating an offeror's creative approach and real estate marketing ability. In this regard, then, we are presented with no basis to disturb the contracting officer's determination that discussions concerning such factors would be necessary, and that such factors themselves were more important to the agency than price in its attempt to change its advertising approach from mere newspaper listings to a more comprehensive marketing approach which would rely considerably on contractor-provided marketing talent. Thus, we deny this ground of protest since it appears from the record that HUD acted reasonably in selecting a competitively negotiated format to achieve these purposes. W.B. Jolley, 68 Comp. Gen. 443, supra.

Finally, the protester criticizes what it considers to be overly limited consideration given to price as an evaluation factor in the RFP. According to the Times Herald, merely making price an unscored "secondary" consideration to technical evaluation factors which are scored is improper because it does not sufficiently apprise offerors of how important price will be in any award decision and because it provides an insufficient basis for the agency to make rational cost/technical tradeoff decisions.

The RFP clause governing the consideration of price clearly provides that it "will be considered" in the overall award analysis, and that it is "secondary" in importance to technical considerations unless proposals are found to be technically equal. Although an RFP must advise offerors of the broad scheme of scoring to be employed and give reasonably definite information concerning the relative importance of price, precise numerical weights need not be disclosed. Descriptive terms like those used in this RFP are sufficient. East, Inc.--Reconsideration, B-235687.3, Mar. 27, 1990, 90-1 CPD ¶ ____.

We also disagree with the protester's contention that the method of evaluation contained in the RFP does not provide a sufficient basis upon which to make a rational cost/technical tradeoff. [The evaluation scheme states that price is secondary to technical considerations but will be the deciding factor in the event that proposals are substantially equal technically.] We see no reason why an appropriate cost/technical tradeoff cannot be made pursuant to such evaluation criteria. See Kunkel-Wiese, Inc., B-233133, Jan. 31, 1989, 89-1 CPD ¶ 98 (upholding a cost/technical tradeoff under a virtually identical evaluation approach).

The protest is denied.



James F. Hinchman
General Counsel