

Timmerman



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: UXB International, Inc.

File: B-241028

Date: January 16, 1991

Anna P. Clarke, Esq., Smith, Pachter, McWorther & D'Ambrosio, for the protester.

Jeffrey I. Kessler, Esq., Department of the Army, for the agency.

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DIGEST

Protest that procurement for construction site ordnance detection and other general site work should have been conducted by soliciting competitive proposals instead of sealed bids is denied where agency reasonably determined all factors specified in the Competition in Contracting Act of 1984, 10 U.S.C. § 2304(a)(2)(A) (1988), for the use are present.

DECISION

UXB International, Inc. protests the Department of the Army's use of sealed bid procedures to procure construction site surveys to detect unexploded ordnance under invitation for bids (IFB) No. DAAA21-90-B-1024. UXB contends that the Army is required to procure the surveys using competitive negotiation.

We deny the protest.

The IFB, issued on June 27, 1990, requested unit prices for various methods of ordnance detection and types of site work. Prior to the initial bid opening date of July 30, UXB filed an agency level protest against the Army's use of sealed bid procedures. The agency level protest was denied. UXB subsequently filed its protest here. UXB essentially contends that because of the complexity of the procurement and the need for strict safety precautions, the use of sealed bid procedures, which provide for award to lowest bidder without technical evaluation, is improper.

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UXB contends that the solicitation violates the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a)(2)(A) (1988), which provides that 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 UXB, the Army is required to use negotiated procedures in this procurement because technical considerations should be considered more important than price and because discussions are necessary. Specifically, UXB states that failure to identify unexploded ordnance could cause irreparable injury or death and therefore safety in the surveying and exposure of unexploded ordnance is far more important than price and should be considered in making award. The protester asserts that the IFB process penalizes the safety conscious contractor because of the greater expense of state of the art equipment and a thorough approach.

UXB also contends that discussions are required to ensure that offerors are bidding on the same basis. According to UXB, without the opportunity to submit technical proposals, the Army is unaware of the assumptions that offerors used to determine their price. Further, the protester asserts that discussions are called for since the work is highly technical and complex, and there are uncertainties in the performance of work.

The Army responds that it has specifically looked at the nature of the work effort and determined sealed bid procedures are appropriate. According to the Army, since the IFB contains detailed specifications concerning the methods of work, specific personnel qualifications, and contractor experience requirements, discussions are unnecessary. The agency maintains that these specifications and requirements are sufficient to ensure that it receives quality work performed by qualified personnel. Additionally, the agency states that the qualifications of the low bidder can be adequately verified with a pre-award survey. Based on the foregoing, the Army made the business judgment that award should be made on the basis of price rather than technical factors. The agency asserts that since all of the four CICA conditions are present here, it is required to solicit sealed bids.

CICA, 10 U.S.C. § 2304(a), eliminated the previous statutory preference for a sealed bid procurement. Negotiated procedures are only authorized, however, if sealed bids are not appropriate under 10 U.S.C. § 2304(a)(2)(A). See 10 U.S.C. § 2304(a)(2)(B); Racal Filter Technologies, Inc., B-240579, Dec. 4, 1990, 69 Comp. Gen. _____, 90-2 CPD ¶ _____. Based on our review of the record, we find that the agency's business decision to use sealed bid procedures was reasonable.

First, we agree with the Army that UXB's concerns that the lowest-priced offeror may not have the equipment, personnel, quality control, and safety programs or capability to perform according to the specifications required by the IFB can be properly addressed in a pre-award survey. See Racal Filter Technologies, Inc., B-240579, supra.

UXB also argues that the agency's specifications are inadequate to allow for sealed bid procedures. For example, UXB claims the specifications fail to specify the use of high grade magnetometers, and do not require contractor personnel with sufficient experience. In issuing the solicitation, the agency made a determination that the need for safety was adequately addressed by detailed requirements concerning skill requirements and by conducting a pre-award survey to ensure the offeror's capability. While the protester disagrees with the agency regarding the proper emphasis to be placed on technical considerations versus price, the record does not, in our view, show that the agency's determination is unreasonable.

For instance, the IFB clearly states the minimum personnel qualifications required: operations personnel must be graduates of the U.S. Naval School for Explosives Ordnance Disposal and be fully certified, and have 4 years experience in explosive ordnance disposal in a military disposal operational position with no more than 3 years since the last ordnance disposal experience. The protester states that these qualifications may not ensure that personnel have continuous explosive ordnance experience. While it may be that continuous experience may be more desirable, this does not show that the qualifications stated are inadequate; instead, it merely reflects a value judgment by the protester regarding minimum needs that differs from the agency's. UXB's mere disagreement with the agency's determination does not render that determination unreasonable. Aaron Refrigeration Servs., B-230833.2, Aug. 17, 1988, 88-2 CPD ¶ 153. Indeed, to the extent that UXB argues that stricter and more restrictive specifications should be used in the solicitation, be it sealed bid or negotiated procedures, we generally will not

consider such contentions, since our role in reviewing bid protests is to assure the statutory requirements for full and open competition are met, not to protect any interests a protester may have in more restrictive specifications. See Petchem Inc., B-228093, Sept. 8, 1987, 87-2 CPD ¶ 228. Similarly, the protester's concern that some offerors may propose a less expensive, lower grade magnetometer reflects mere disagreement with the agency's judgment and an apparent request for more restrictive specifications, and does not indicate sealed bid procedures are inappropriate.

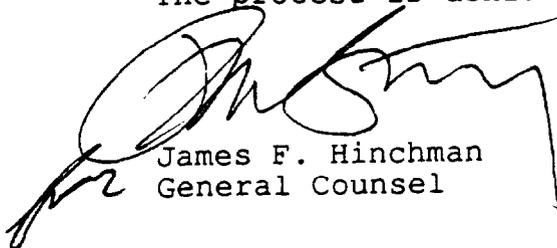
The protester also contends that the IFB requirement for unit pricing of the four methods of ordnance removal--metal detection, magnetometry, ground penetrating radar and electromagnetics--indicates that negotiated procedures should be utilized. The protester states that ground penetrating radar and electromagnetics are not suitable for locating ordnance smaller than 155 millimeters and, therefore, the bidder who correctly assumes that these procedures should not be used will bid \$0 and risk being found nonresponsive or being asked by the Army to perform work using inappropriate methods. We think this reasoning assumes that the agency will ask for incorrect actions to be taken under the contract. First, we note that such actions could be taken whether or not this procurement were awarded under sealed bid or negotiated procedures. Moreover, while the agency has asked in the IFB for unit prices for four methods, it does not indicate that any methods will be used where inappropriate or that any particular method will be used in a given project. Since this is a work order type of procurement, it is reasonable to assume that the agency wanted flexibility concerning the method to be used for any particular job and intended to order the appropriate methods of ordnance removal.

The protester also expresses concern that other firms will "underbid" UXB with unrealistic prices without being aware of all of the risks and burdens involved in safely completing ordnance surveys at this site. UXB is aware of the risks as a result of having performed similar work at the site. We think UXB has not shown that any responsible company experienced in this work would be misled concerning the nature and amount of the effort involved here.^{1/} Nor are we persuaded that offerors cannot reasonably estimate the cost involved given the apparent risks.

^{1/} No other protests of this procurement have been filed.

Under the circumstances, we conclude that the Army's use of sealed bid procedures in this procurement is proper.

The protest is denied.



James F. Hinchman
General Counsel