



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Claude E. Atkins Enterprises, Inc.
File: B-241047
Date: January 15, 1991

R.D. Corona, Esq., Corona, Balistreri & Ramseyer, for the protester.
Paul M. Fisher, Esq., Department of the Navy, 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

Use of competitive negotiation procedures was appropriate where contracting officer reasonably determined that discussions were necessary to gauge offeror understanding of complex specifications on two renovation projects which were combined into a single procurement just prior to the issuance of the solicitation and to obtain offeror input to ensure that the specifications would accurately reflect the agency's needs.

DECISION

Claude E. Atkins Enterprises, Inc. protests the Department of the Navy's use of competitive negotiation in soliciting offers for the renovation of Bachelor Enlisted Quarters (BEQs) at the Naval Amphibious Base in San Diego, California, under request for proposals (RFP) No. N68711-90-R-6724. Atkins contends that the Navy was required to use sealed bidding procedures.

We deny the protest.

The RFP, issued on August 10, 1990, required offerors to furnish lump-sum-fixed prices for the renovation of BEQ buildings 302 and 303, and provided that award was to be made to the low responsible offeror. The renovation work, the specification for which had been developed by an architect/engineering (A/E) firm, was described in more than 500 pages of text and 185 detailed drawings, and was to be completed in eight phases over 690 days to minimize the disruption of the buildings' occupants; the first four phases pertained to building 302 and lasted 345 days; the second four phases covered the balance of the delivery schedule and pertained to building 303. Liquidated damages for each day's

delay in the completion of a phase were set at \$2,100. Prior to the submission of initial offers on September 10, Atkins filed this protest, arguing that the use of competitive negotiation procedures was not warranted and in violation of the Competition in Contracting Act of 1984 (CICA).

Under CICA, contracting agencies are required to obtain full and open competition and, in doing so, are required to use competitive procedures--negotiation or sealed bids--that they determine to be best suited to the circumstances of a given procurement. 10 U.S.C. § 2304(a)(1) (1988); Military Base Mgmt., Inc., 66 Comp. Gen. 179 (1986), 86-2 CPD ¶ 720. CICA further provides that, in determining which competitive procedure is appropriate, an agency "shall solicit sealed bids if" (1) time permits; (2) award will be based on price; (3) discussions are not necessary; and (4) more than one bid is expected. 10 U.S.C. § 2304(a)(2). Because of this language, the use of sealed bidding procedure is required where the four specified conditions are present. Northeast Constr. Co., 68 Comp. Gen. 406 (1989), 89-1 CPD ¶ 402. Negotiated procedures are authorized only if sealed bids are not appropriate under 10 U.S.C. § 2304(a)(2)(A). See 10 U.S.C. § 2304(a)(2)(B). While the decision whether to employ negotiated procedures involves the exercise business judgment, such decision must be reasonable. Racal Corp., B-240579, Dec. 4, 1990, 90-2 CPD ¶ ____.

The Navy does not dispute that three of the four factors which would require the use of sealed bidding have been met but states that it was necessary to conduct discussions (and permit the submission of price breakdowns) to insure that offerors understood the complex specifications and to determine appropriate clarification and refinement of the specifications. In making the decision to use negotiated procedures, the contracting officer cited problems that occurred in a prior similar construction contract which was awarded pursuant to sealed bidding. In that instance, the IFB had to be amended six times and the subsequent contract was still subject to several change orders which according to the agency resulted from the firm's misunderstanding of the solicitation requirements.

The contracting officer also stated that significant changes to the specifications could be expected as a result of possible mistakes made by the A/E firm in developing the plans which were prompted by a late decision to combine the renovation of the two buildings into one procurement, and she noted further that the complex requirements and strict scheduling were likely to result in offerors having many inquiries and difficulties as they sought to arrive at fixed prices which were realistic and reasonable.

A group of offers was received on September 10, ranging in price from 26.7 to 63.2 percent higher than the government estimate.^{1/} At this stage in the procurement, the agency reports that it received two technical inquiries from offerors which necessitated resolution either through discussions or amendment to the RFP. Further, on October 17, the contracting officer determined that the wide range of prices was indicative of a likely misunderstanding of the technical requirements. As a result, offerors were, in a round of written discussions,^{2/} requested to provide detailed cost breakdowns to allow the government to assess the offers for possible misunderstandings in regard to the technical requirements. Offerors were also requested to evaluate the technical requirements and provide suggestions for cost efficiencies such as specification and scheduling changes.

The cost breakdowns and efficiency suggestions were presented to the agency engineering staff who recommended a number of changes which were subsequently incorporated into the RFP by amendment. The principal change adopted as a result of this process was a scheduling modification which consolidated the eight phases of renovation into two 330-day phases--one for each building--with a middle phase of 30 days to vacate building 303 before work began; liquidated damages were changed from \$2,100 per day for eight phases to \$16,800 per day for delays in each of the two major work phases.

It is Atkins' basic contention that since the solicitation here did not request technical proposals there was no mechanism for gauging whether an offeror had any technical misunderstandings and therefore the Navy had no reasonable basis for holding discussions to insure that offerors understood the specifications. In Atkins' view, the use of negotiation in this case was simply an effort by the Navy to limit competition and avoid using established procedures for handling unanticipated specification changes--such as post-award modifications--to which, the protester argues, contractors are entitled. Finally, the protester argues that the specification revision process as conducted in this

^{1/} Because the agency is withholding award pending the outcome of this decision, we are unable to disclose the precise number of offers or the prices received; therefore, we will only use general or comparative descriptions of these factors.

^{2/} The record indicates that oral discussions were also conducted on October 19.

procurement has essentially resulted in a new requirement which should be competed under a new solicitation.

We agree with the protester that generally in the absence of a requirement for the submission of technical proposals, discussions are not a viable method of insuring that firms have an understanding of an agency's requirements and, in fact, we have sustained protests where agencies have attempted to justify the use of negotiated procedures on this basis. See Racal Corp., B-240579, supra; Northeast Constr. Co., 68 Comp. Gen. 406 (1989), 89-1 CPD ¶ 402. Nevertheless, there are situations where discussions serve a legitimate purpose even though technical proposals are not requested. See, e.g., Military Base Mgmt., Inc., 66 Comp. Gen. 179, supra, involving the offerors' submission of a level-of-effort breakdown (manning chart), and Carter Chevrolet Agency, Inc., B-229679, Feb. 3, 1988, 88-1 CPD ¶ 107, involving a complex procurement in which discussions were used to foster refinement of the specifications.

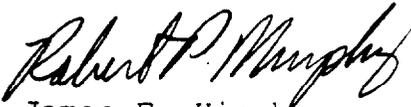
For the reasons set forth below, we find discussions are appropriate here. The agency was faced with a complex procurement in which it anticipated possible problems in its specifications. It is clear from the record that one problem was whether the specifications reflected the agency's actual needs. Another was whether offerors could be expected to fully understand what the specifications required. Under these circumstances, we think the contracting officer had a reasonable basis for believing that discussions would be necessary prior to award so that offeror understanding could be gauged (we see no reason why price breakdowns alone, without technical proposals, could not be used for that purpose) and offeror input could be obtained for improving the specifications.

In fact, the record shows that helpful changes to the project requirements, such as modifications to the phasing of the construction, were developed as the result of the discussions. When this is considered against the backdrop of the contracting officer's expected difficulty in receiving accurate pricing from offerors, the past performance problems which arose from misunderstandings about the technical requirements in a sealed bid procurement for a similar project and the problems with the A/E firm's specification development efforts, we cannot conclude that the agency's judgment in choosing to use competitive negotiation here was unreasonable.

Atkins also argues that the RFP changes resulting from the negotiation process--most notably the schedule changes--were so substantial as to warrant a complete revision to the solicitation and, thus, its cancellation and the issuance of a

new solicitation. See Federal Acquisition Regulation § 15.606(b)(4). The scope of changes to an RFP which may be permissible without requiring a new solicitation is broad and we will not disturb an agency's determination not to cancel an RFP unless it is without a reasonable basis. See Cardion Elecs., 58 Comp. Gen. 591 (1979), 79-1 CPD ¶ 406. Notwithstanding the protester's opinion that such changes as the alteration of a 690-day performance schedule consisting of eight separate construction phases to a 630-day schedule consisting of only two construction phases, we find that the basic nature of the renovation work for the two BEQ buildings remained substantially the same and that the time in which a contractor was expected to perform was, likewise, not appreciably changed as a result of the contract amendments issued following discussions. Thus, we have no basis to conclude that the agency acted unreasonably in not canceling the RFP as a result of the several expected changes that were made to its requirements. Cardion Elecs., 58 Comp. Gen. 591, supra (changes in quantity, delivery schedule and contract type not sufficient to require a new solicitation).

The protest is denied.

for 
James F. Hinchman
General Counsel