



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: I.T.S. Corporation

File: B-243223

Date: July 15, 1991

Bruce H. Crothers for the protester.
Maj. R. Van Saggi and George N. Brezna, Esq., U.S. Marine Corps, for the agency.
Jeanne White Isrin, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Cancellation of invitation for bids after opening was unobjectionable where agency's requirement for specific counseling services not enumerated in the solicitation arose due to the deployment of large numbers of service personnel overseas into a hostile zone of operations; it was necessary to both revise the specifications to reflect the changed requirements, and convert from sealed bidding to negotiated procedures to permit consideration of quality and other non-price factors in selecting a contractor.
2. Use of negotiation rather than sealed bidding procedures was unobjectionable in procurement for military counseling services where the contracting officer reasonably determined that the substantial deployment of service personnel to a hostile area of operations enhanced the importance of obtaining the highest quality counseling services, and thus required consideration of technical factors as well as price and rendered discussions likely.

DECISION

I.T.S. Corporation (ITS) protests the Marine Corps' cancellation of invitation for bids (IFB) No. M67001-90-B-0026, for information, referral, and counseling services at the Family Service Center (FSC), Marine Corps Air Station, Jacksonville, North Carolina, and resolicitation of the requirement under request for proposals (RFP) No. M67001-91-R-0011.

We deny the protest.

Two bids were received by the October 22, 1990, opening date, one submitted by the incumbent contractor and the other by the protester. ITS was the apparent low bidder and the contracting officer requested a preaward survey of the firm. While the preaward survey was pending, approximately 40,000 Marines were deployed in support of Operation Desert Shield. Contracting officials determined at that point that, due to the deployment itself and the potential for hostilities, the specifications of the IFB no longer adequately described the needs of the government and thus required revision. More specifically, while the work required under the IFB included personal counseling, financial counseling, referral to military and civilian supporting agencies, and assistance to new arrivals, the agency determined that additional specific services were required, including death and grief counseling and support for the families of service members deployed overseas (deployment-related stress counseling). Concluding that award under the IFB would not serve the agency's needs and thus would not be in the best interest of the government, the contracting officer canceled the IFB in accordance with Federal Acquisition Regulation (FAR) § 14.404-1(c)(2), which permits cancellation after bid opening where the specifications need to be revised.

By letters dated November 14, both ITS and the incumbent contractor were notified that the IFB was canceled in order to revise the specifications. Following the commencement of Operation Desert Storm in January and, again, in consideration of the potential for hostilities, the contracting officer determined that the quality of the services received, not price, should be the principal consideration in selecting the contractor, and that it therefore would be appropriate to use negotiated procedures rather than sealed bidding in resoliciting the requirement; technical discussions could be held with offerors and award could be based on technical factors as well as price. The new RFP was issued on February 7; on February 27, prior to the March 11 closing date, ITS filed an agency-level protest challenging the cancellation of the IFB, the resolicitation of the procurement using negotiated procedures, and the terms of the RFP. The contracting officer denied ITS' agency-level protest, and ITS then filed this protest with our Office.

CANCELLATION OF THE IFB

ITS objects to the cancellation of the IFB on the basis that the original specifications were sufficiently broad so as to encompass the specific counseling with respect to death, grief and deployment-related stress and crisis, spelled out in the RFP, and that the original specifications thus did not require modification.

As an initial matter, the Corps argues that ITS' protest of the cancellation is untimely since the firm's agency-level protest was filed more than 10 working days after ITS was notified of the cancellation (by letter dated November 14). Under our Bid Protest Regulations, such protests must be filed with the agency or our Office not later than 10 days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2). ITS states, and the Corps does not dispute, that prior to receipt of the November 14 notice of cancellation the agency notified it by telephone that reduced service personnel levels due to the deployment had rendered the IFB staffing level excessive and required correction in a new solicitation. As issued, however, the RFP called for the same level of effort specified in the IFB. As ITS is protesting on the basis that the changes reflected in the RFP did not warrant cancellation of the IFB, and it was not aware of the basis of this argument from the Corps' incorrect explanation of the nature of the changes immediately following the cancellation, ITS could not protest on this ground before it received the RFP. The protest against the cancellation, based on the terms of the RFP, therefore is timely.

Preservation of the integrity of the competitive bid system dictates that after bids have been opened award must be made to that responsible bidder which submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation. FAR § 14.404-1(a)(1); Zwick Energy Research Organization, Inc., B-237520.3, Jan. 25, 1991, 91-1 CPD ¶ 72. However, IFBs may be canceled after bid opening and all bids rejected where award under the solicitation would not serve the government's actual minimum needs, and the specifications therefore need to be revised. FAR § 14.404-1(c)(1) and (2).

The cancellation here was proper. The Corps' decision that the IFB requirements did not meet the actual needs of its personnel was based on its finding that additional services not specifically required by the IFB would be required due to the Operation Desert Storm deployment. We find that this determination was reasonable. As discussed above, the agency now attached greater importance to assuring adequate counseling for children of deployed service members--including counseling related to death and grief, prisoners of war/missing in action, and post traumatic stress disorders, services not specified in the IFB--and for families generally, due to the likelihood of adjustment problems from both the deployment and from reuniting service members with their spouses and children. The IFB contained broad requirements that, as ITS argues, appear to encompass these areas--e.g., personal counseling--but we see nothing improper in the Corps' determination that the significance of the additional services warranted canceling the IFB to specifically include them in

the solicitation to assure that they would be available when needed.

The Corps' further concern with obtaining high quality services, and its resulting conclusion that negotiated procedures should be used for the requirement to allow for consideration of technical factors, not only price, also warranted canceling the IFB. Accordingly, the RFP includes more stringent technical requirements and evaluation factors intended to enable the agency to determine the offeror proposing the most experienced and best-trained and -qualified professional staff. For example, each contractor employee now must have prior experience dealing with military families concerning problems such as those related to deployments and exposure to hostilities. We conclude that, given the need to specify the additional Operation Desert Storm deployment-related services, and the subsequent additional determination that negotiated procedures should be used, the cancellation was proper under FAR § 14.404. See generally Control Concepts, Inc., B-233354.3, Apr. 6, 1989, 89-1 CPD ¶ 358; Kings Point Mfg. Co., Inc., B-210757, Sept. 19, 1983, 83-2 CPD ¶ 342.

USE OF NEGOTIATED PROCEDURES

Noting that this requirement previously was solicited through sealed bidding, ITS maintains that the agency in fact had no valid reason for resoliciting using negotiated procedures instead of sealed bidding. It believes the negotiated format affords the incumbent an unfair competitive advantage.

Under the Competition in Contracting Act (CICA) of 1984, sealed bidding is required only where time permits, award will be based on price, discussions are not necessary, and more than one bid is expected. 10 U.S.C. § 2304(a)(2) (1988). The determination as to whether circumstances support the use of negotiated procedures is largely a discretionary matter within the purview of the contracting officer. FAR § 6.401; Military Base Management, Inc., 66 Comp. Gen. ¶ 179 (1986), 86-2 CPD ¶ 720. If the contracting officer decides that competitive proposals are necessary, it is required to explain briefly which of the four requirements for sealed bidding are not met. Id.

The record, discussed above, fully explains the basis for the Corps' determination that only negotiated procedures will meet its needs; due to the focus on high quality services, award must be based on other than price factors alone, and discussions may be necessary. As is clear from our prior conclusion, we think the Corps' underlying concerns are legitimate. Similarly, we think it is clear that the agency reasonably concluded that the only means of measuring the relative

quality of the offerors, which also could include discussions aimed at improving areas of proposals, was through the use of negotiated procedures. Negotiated procedures have been used to procure Family Center services in similar prior procurements. See, e.g., H. David Faltoon, B-232418, Jan. 5, 1989, 89-1 CPD ¶ 10; Americorp, B-231644, Oct. 6, 1988, 88-2 CPD ¶ 331. ITS has NOT shown that the agency's judgment here was unreasonable; indeed, ITS did not comment at all on the agency's position in its response to the agency's report. That the procurement previously was solicited using sealed bidding procedures is not material to the reasonableness of using negotiated procedures. An agency's past practice is not a basis for questioning its application of otherwise correct procurement procedures. Victor Graphics, Inc., B-238290, Apr. 20, 1990, 90-1 CPD ¶ 407. Finally, the incumbent's alleged advantage in the competition is not one the agency must neutralize. See Sabreliner Corp., B-242023 et al., Mar. 25, 1991, 91-1 CPD ¶ 326.


Corporate Experience Requirement

ITS objects to the requirement in the RFP for a minimum of 2 years corporate experience in providing Family Service functions, claiming that such experience was never required by the Corps previously, and that it unnecessarily restricts competition.

The question of necessary contractor qualifications is a matter dictated in large part by the minimum needs of the government; we will not question an agency's determination of its minimum needs absent a clear showing that the determination was unreasonable. Scientific Indus., Inc., B-208307, Apr. 5, 1983, 83-1 CPD ¶ 361. The requirement here was reasonable. The Corps imposed the requirement pursuant to its determination that the circumstances surrounding the Operation Desert Storm deployment warranted measures to insure that high quality services would be available. As part of this determination, the Corps decided that prior experience furnishing specialized counseling services to military personnel and their families would insure that the contractor would be familiar with the unique aspects of military life. This determination is reasonable on its face and, again, ITS has not attempted to rebut the agency's position. We previously have upheld 2-year corporate experience requirements considered necessary to support health and human well-being. See Ameriko Maintenance Co., Inc., B-216406, Mar. 1, 1985, 85-1 CPD ¶ 225; Scientific Indus., Inc., B-208307, supra. An otherwise legitimate requirement is not unduly restrictive simply because a potential offeror cannot meet it. Target Financial Corp., B-228131, Nov. 23, 1987, 87-2 CPD ¶ 506.

ITS alleges bad faith by the Corps with respect to all its allegations. It claims that the Corps was reluctant to make award to ITS, and that the Corps' actions with respect to this procurement are no more than subterfuge designed to restrict competition and ensure award to the incumbent. However, agency procuring officials are presumed to act in good faith and, in order for our Office to conclude otherwise, the record must convincingly show that procuring officials had a specific and malicious intent to harm the protester. Advanced Support Systems Management, Inc., B-241528 et al., Feb. 14, 1991, 70 Comp. Gen. ___, 91-1 CPD ¶ 170. No such evidence exists in this case.

The protest is denied.


for James F. Hinchman
General Counsel