



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: F&H Manufacturing Corporation

File: B-244997

Date: December 6, 1991

John S. Pachter, Esq., Smith, Pachter, McWhorter & D'Ambrosio, for the protester.
Michael Trovarelli, Esq., Defense Logistics Agency, for the agency.
Stephen Gary, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Use of competitive negotiation in procurement for tent frames is appropriate where contracting agency has reasonably determined that technical factors related to timely delivery and high quality are more important than price; since award decision will not be based primarily on price, agency is not required to use sealed bidding.
2. Technical evaluation scheme that incorporates responsibility-type evaluation criteria does not improperly circumvent Small Business Administration's role of ultimately determining a small business firm's responsibility where use of such criteria is warranted by agency's need for a comparative evaluation of offerors' technical ability to make timely delivery of a fully satisfactory product.

DECISION

F&H Manufacturing Corporation protests the use by the Defense Logistics Agency (DLA) of competitive negotiation in soliciting offers for military tent frames under request for proposals (RFP) No. DLA100-91-R-0408. F&H argues that the agency is required to use sealed bidding procedures.

We deny the protest.

The RFP, issued as a small business set-aside in June 1991, provides for award of a firm, fixed-price contract for approximately 65,000 tent frames of various types, to be

used in a number of different tent configurations.¹ The RFP provides that award will be made to the responsible offeror whose proposal, conforming to the solicitation, is most advantageous to the government, technical quality, price, and other factors considered. The solicitation states that technical quality is more important than price, and lists the technical evaluation factors--production capability, corporate experience, and quality program--(and their subfactors) in descending order of importance. The solicitation further states that technical proposals will be used to assess the efficiency of offerors' production methods and the effectiveness of their quality control procedures, and that those offerors who consistently demonstrate an ability to deliver on time while consistently improving the quality of the products they produce will receive more favorable consideration.²

F&H asserts that DLA is acting improperly in issuing the RFP because the use of sealed bidding for this procurement is required by the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a)(2)(A) (1988), which provides that sealed bidding shall be used if: (1) time permits; (2) award will be based on price; (3) discussions are not necessary; and (4) more than one bid is expected. According to F&H, all four conditions are present here, so the agency is required to use sealed bidding. In particular, F&H argues that the award decision can and should be based on price because the agency has procured the same items previously using sealed bidding and has no reason to expect substantial differences in technical proposals, except to the extent of a prospective contractor's ability to perform; since ability to perform is a matter of responsibility (ultimately for review by the Small Business Administration

¹After F&H filed this protest, DLA amended the solicitation to extend the proposal submission date indefinitely, pending resolution of the protest.

²The RFP also contains detailed instructions concerning the required contents of technical proposals. For example, under the production capability criterion, offerors are asked to provide, among other things, information on production work force levels for the 3-year period from 1988 to 1990, showing: numbers of full-time employees engaged in producing the same or similar items; numbers of units produced each month; a narrative description of employee experience and skill levels; type of equipment, including information on maintenance and downtime; and a detailed production plan, including a narrative description of the planned production flow and its relation to the required delivery schedule.

(SBA)), price is the proper basis for award in this procurement. Similarly, F&H asserts that, based on what the RFP calls for, proposals will contain only limited technical information and therefore will not require discussions.

The agency concedes that two of the conditions requiring sealed bidding are present here: time permits the use of sealed bidding, and there is a reasonable expectation of adequate competition. DLA states, however, that the other two conditions are not present: the award decision cannot be based on price and price-related factors, and discussions with offerors regarding their proposals may be necessary.

DLA explains that all tent frames are delivered to the Department of Defense Depot at Ogden, Utah, where the frames and other tent components, such as canvas fabric, are assembled into a complete tent package for shipment to ultimate users, including field hospital units. Because of this centralized assembly process, the agency asserts, it must be able to evaluate an offeror's technical ability to make timely delivery of a fully satisfactory product; late delivery of one component, or timely delivery of a faulty component, would disrupt the entire packaging process and result in late shipment of the completed tent package to the ultimate user. DLA further reports that many of its prior acquisitions for tent frame assemblies, conducted under sealed bidding procedures, resulted in serious contractor delinquencies and severe shortages during Operation Desert Storm which required it to use special procedures to purchase tents from foreign sources due to domestic non-availability; these shortages were due in large part to untimely deliveries and unsatisfactory quality control on the part of many producers of tent components, including tent frames. In light of this history, DLA believes that it must evaluate capability and quality of production, as well as price, in order to ensure that it will be able to meet the needs of the ultimate users of the tent assemblies.

CICA directs contracting agencies to use the competitive procedure that is best suited to the circumstances of the procurement. 10 U.S.C. § 2304(a)(1)(B). CICA does, however, require agencies to use sealed bidding when the conditions enumerated above are present. If any one of the conditions is not present, sealed bidding may not be used; in such instances, negotiation procedures (competitive proposals) are to be utilized. 10 U.S.C. § 2304(a)(2)(B). Agency determinations that the conditions requiring the use of sealed bidding are not present must be reasonable. The Defense Logistics Agency--Recon., 67 Comp. Gen. 16 (1987), 87-2 CPD ¶ 365, affirming ARO Corp., B-227055, Aug. 17, 1987, 87-2 CPD ¶ 165.

Here, DLA has determined that it cannot use sealed bidding primarily because it must evaluate factors other than price in determining an awardee. The determination of an agency's minimum needs and the selection of evaluation criteria to be used to measure how well offerors will meet those needs are essentially matters of agency discretion, again subject to the test of reasonableness. See I.T.S. Corp., B-243223, July 15, 1991, 91-2 ¶ 55; see also Hydro Research Science, Inc., B-230208, May 31, 1988, 88-1 CPD ¶ 517.

As noted above, DLA buys tent components separately and then assembles them into complete packages; delivery delays or quality deficiencies with regard to any of the components results in the delayed availability or unavailability of the complete tent packages. In this respect, DLA had encountered difficulties in procuring tent components under sealed bidding procedures in the past, including in connection with Operation Desert Storm, which were due primarily to delays in delivery caused by poor manufacturer performance. We think, based on this experience, that DLA could reasonably determine that its minimum requirements necessitated a comparative evaluation of offeror production techniques and approaches and overall performance record as well as price and, therefore, that negotiation rather than sealed bidding was necessary. See Essex Electro Eng'rs, Inc., 65 Comp. Gen. 242 (1986), 86-1 CPD ¶ 92 (agency may use responsibility-type evaluation factors and use negotiation to obtain promised method of production); I.T.S. Corp., supra (use of negotiation rather than sealed bidding unobjectionable in procurement for military counseling services, where agency reasonably determined that substantial deployment of service personnel to 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).

In so concluding, we disagree with the protester's argument that DLA's technical evaluation scheme, by relying on responsibility-type factors, improperly circumvents the SBA's role of ultimately determining a small business firm's responsibility under its certificate of competency procedure. The Small Business Act, 15 U.S.C. § 637(b)(7) (1988), provides that it is the exclusive responsibility of the Small Business Administration (SBA) to:

"certify to Government procurement officers . . . with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity, of any small business concern . . . to receive and perform a specific Government contract. A Government procurement officer . . .

may not, for any reason specified in the preceding sentence preclude any small business concern . . . from being awarded such contract without referring the matter for a final disposition to the [SBA]."

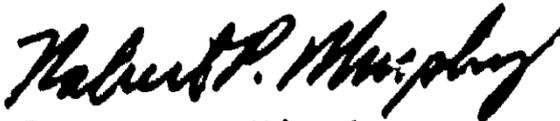
The Act provides that when a procuring agency believes a small business concern will be unable to satisfactorily perform a given contract due to questions regarding the qualities or characteristics listed, the procuring agency must refer the matter to the SBA for a final determination in that regard. See PHE/Maser, Inc., B-238367.5, Aug. 28, 1991, 70 Comp. Gen. _____, 91-2 CPD ¶ 210; Sanford and Sons Co., 67 Comp. Gen. 612 (1988), 88-2 CPD ¶ 266. On the other hand, under the procurement statutes and regulations, contracting agencies are responsible for awarding contracts on the basis of proposals that are "most advantageous to the United States," 10 U.S.C. § 2305(b)(4)(B), and to sources "whose performance is expected to best meet stated Government requirements." Federal Acquisition Regulation (FAR) § 15.603(d). Procuring agencies are responsible for including in solicitations the evaluation factors necessary to determine which proposals are most advantageous to the government, 10 U.S.C. § 2305(a)(2) (Supp. II 1990); these evaluation factors often include offeror experience, management, and other matters that traditionally have been regarded as bearing on responsibility.³ See 41 U.S.C. § 403(7) (1988); FAR § 9.104-1; SBD Computer Servs. Corp., B-186950, Dec. 21, 1976, 76-2 CPD ¶ 511; Design Concepts, Inc., B-184754, Dec. 24, 1975, 75-2 CPD ¶ 410.

In light of the obvious overlap between the Small Business Act and the procurement statutes, we have recognized that, while procuring agencies may use responsibility-type factors for the technical evaluation of proposals, they may do so only if the agency's needs warrant a relative assessment comparing offerors in those areas. This means that an agency may not avoid the requirements of the Small Business Act by determining offeror responsibility in the guise of a technical evaluation that finds offerors acceptable or unacceptable with regard to traditional responsibility criteria. Flight International Group, Inc., B-238953, Sept. 28, 1990, 90-2 CPD ¶ 257; Sanford and Sons Co., *supra*. Here, the record establishes that DLA is reasonably assessing offerors' relative production capability (including personnel, machinery, and a production plan),

³10 U.S.C.A. § 2305(a)(3) (Supp. II 1990) provides for evaluation factors to include the quality of the product or services to be provided, including technical capability, management capability, and prior experience of the offeror.

experience, and quality control. Accordingly, we do not view the RFP evaluation scheme as inconsistent with the Small Business Act.

The protest is denied.


for James F. Hinchman
General Counsel