



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

Curcio

145550

Decision

Matter of: JT Construction Company, Inc.

File: B-244404.2

Date: January 2, 1992

Jaime Torres for the protester.
Millard F. Pippin, Department of the Air Force, for the agency.
Mary G. Curcio, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting agency's refusal to set aside a procurement for small disadvantaged business (SDB) concerns was proper where contracting officer reasonably concluded that the agency could not reasonably expect to receive offers from two responsible SDB concerns.
2. Definitive responsibility criteria establishing experience requirements contained in solicitation are not unduly restrictive of competition where, due to past problems on similar construction, the agency needed assurance that the awardee under the solicitation would be able to successfully perform renovation work.
3. Use of competitive negotiation procedures was appropriate where contracting officer reasonably determined that discussions were necessary to gauge offeror understanding of specifications on renovation project and to obtain offeror input to ensure that the specifications would accurately reflect the agency's needs.

DECISION

JT Construction Company, Inc., a small disadvantaged business (SDB), protests the terms of request for proposals (RFP) No. F41608-91-R-0309, issued by the Department of the Air Force for renovation of 79 family housing units located in 8 buildings at the Billy Mitchell Village Phase III, at Kelly Air Force Base, Texas.¹ The RFP required offerors to

¹The renovation work is being procured separately in three phases. Phases I and II have already been awarded. The contractor for Phase II is the protester.

furnish lump sum prices to renovate the housing units, which are approximately 30 years old. The specifications for the renovation work were comprised of approximately 70 detailed drawings and approximately 300 pages of detailed specifications. The protester contends that the procurement should be set aside exclusively for participation by SDBs; that certain terms of the RFP concerning experience are unduly restrictive of competition and exceed the government's minimum requirements; and that the services should be obtained using sealed bid rather than negotiated procedures.

We deny the protest.

SDB SET-ASIDE

The RFP was issued as an unrestricted solicitation (under the Small Business Competitiveness Demonstration Program, Federal Acquisition Regulation (FAR) subpart 19.10) on August 7, 1991, with an initial September 5 closing date.

The regulations implementing the Department of Defense (DOD) SDB program, set forth in the DOD FAR Supplement (DFARS), part 219, provide that a procurement shall be set aside for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that: (1) offers will be obtained from at least two responsible SDB concerns; and (2) award will be made at a price not exceeding the fair market price by more than 10 percent. DFARS § 219.502-72(a). The regulations also provide that the contracting officer should presume that these requirements are met if the acquisition history shows that: (1) within the past 12-month period a responsive offer from at least one responsible SDB concern was within 10 percent of the award price on a previous procurement of similar supplies or services; and (2) the contracting officer has reason to know (from the activity's relevant solicitation mailing list, response to presolicitation notices, or other sufficient factual information) that there is at least one other responsible SDB source of similar supplies or services. DFARS § 219.502-72(c).

JT Construction contends that under the DFARS, the contracting officer was required to set aside this procurement for SDBs because there was a reasonable expectation that offers would be obtained from at least two responsible SDB concerns. In this connection, JT Construction asserts that it is an SDB concern performing a virtually identical renovation contract (Billy Mitchell Village Phase II), and identifies two other SDB concerns (Beneco Enterprises and J&J Maintenance) which it alleges requested the solicitation and would have responded to the RFP if it were set aside for SDBs. Additionally, the protester lists several other firms

which it claims would have requested the RFP, but for the allegedly restrictive criteria included in the solicitation.

In response, the agency states that it properly determined not to set aside the procurement for SDBs because the contracting officer's research did not indicate that the agency could reasonably expect to receive offers from two responsible SDBs. The Air Force explains that in ascertaining whether it could expect to obtain offers from two responsible SDBs it conducted a market survey of the Phase I bidders, considered the mailing list for the Phase III project, and issued both a presolicitation notice and a synopsis in the Commerce Business Daily (CBD). The Air Force further states that the Phase I contract was awarded to the only SDB who submitted an offer for Phase I, but the contract was terminated for default. We find the agency's determination reasonable.

The record shows that of the 73 offerors on the Phase III mailing list, only two are SDB concerns, one of which is JT Construction. While JT Construction is the incumbent contractor for Phase II, due to the serious and substantial problems the firm is experiencing and the fact that the contract is more than 8 months behind schedule, the contracting officer did not consider JT Construction as a responsible offeror for Phase III. In this respect, while under the Phase II contract, each unit was supposed to cost \$38,605, with modifications, the final price of JT Construction's performance to the Air Force will be \$83,093 per unit, which is not within 10 percent of the Phase I cost of \$33,779. In addition, the record also shows that the agency did not receive any SDB interest in response to the presolicitation notice or the CBD synopsis.

Under these circumstances, we think the contracting officer reasonably determined that it was not necessary to set aside the procurement to SDBs because it could not expect offers from two responsible small business concerns. In this regard, while JT identified J&J Maintenance and Beneco Enterprises as SDBs who requested the solicitation, J&J Maintenance is not an SDB and Beneco did not bid on the solicitation. JT Construction also identified other alleged SDBs who could have responded to the solicitation. However, JT has not explained why the contracting officer should have been aware of these firms. Notably, none of these firms indicated any interest in the procurement despite the fact that the Air Force issued both a presolicitation notice and a solicitation synopsis.

UNDULY RESTRICTIVE CRITERIA

The RFP sets out specific criteria which offerors must meet in order to be considered for award. As relevant to this protest, paragraph 2.3.1 in section 01000 of the RFP, labeled "EXPERIENCE," requires that offerors submit evidence that they have completed "one multi-million dollar, multi-unit family housing renovation project within 90 days of contractual completion date, inclusive of excusable delays"; and paragraph 2.3.2 in that section, entitled "MANAGEMENT TEAM," in part states that "[t]he Project Manager/ Superintendent must have [5] years of experience in multi-million dollar, multi-unit family housing renovation projects; or [5] years of experience in similar type projects."²

According to the protester, the "EXPERIENCE" and "MANAGEMENT TEAM" requirements are unduly restrictive of competition because the likelihood that any contractor, particularly an SDB concern, meets these requirements is remote. Rather than including the allegedly restrictive requirements, the protester suggests that the agency should rely on the RFP's bonding requirement and liquidated damages clause. The protester argues that since performance bonds are obtained on the basis of the contractor's "track record," by awarding the contract only to a bonded offeror, the Air Force should be reasonably assured that the project will be successfully completed by a qualified contractor.

An agency may reasonably restrict competition through the use of definitive responsibility criteria so long as the definitive responsibility criteria are needed to meet the agency's minimum needs. See 37 Comp. Gen. 420 (1957); Software City, B-217542, Apr. 26, 1985, 85-1 CPD ¶ 475.

The Air Force explains that the definitive responsibility criteria were developed by its Engineering Planning Branch and are necessary to a determination of contractor responsibility on Phase III due to the problems in Phases I and II which resulted from contractor inexperience, inefficient financial management, inexperience of supervisory personnel and lack of subcontract administration. Also, the management team experience is needed to assure that management have experience in working in multiple units that have undergone extensive maintenance repairs. Based on these facts, we find that the agency has reasonably shown that the

²"Similar projects" are defined as housing renovation projects requiring the removal, storage, and reinstallation of installed equipment; shoring of the structure during removal of load bearing partitions; and sequential, multiple unit production construction.

requirements are necessary to meet its minimum needs. In this respect, JT Construction has not responded to the Air Force's explanation of why it established the definitive responsibility criteria. Instead, JT Construction merely argues that the criteria are unreasonable because no offeror can meet them. This argument, however, does not demonstrate that the requirement is unreasonable because it does not establish that in light of the past problems, the Air Force does not have a legitimate need to know that the awardee under the contract will be able to successfully complete the renovations and that the established criteria will meet this need. Accordingly, we have no basis to question the agency's use of the criteria as stated in the RFP.

Type of Procurement

The solicitation was issued using competitive negotiation but did not request technical proposals. JT Construction contends that the Air Force was required to use sealed bidding procedures because it was soliciting for standard construction.

Under the Competition in Contracting Act (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 procedures 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, 70 Comp. Gen. ___, 90-2 CPD ¶ 453.

The Air Force 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 to insure that offerors understood the complex specifications and to determine appropriate clarification and refinement of the specifications. The Air Force explains that due to the age of the buildings and the change in construction technique the project contains unique specialized renovation work from all disciplines, which generate

questions from contractors. In making the decision to use negotiated procedures, the contracting officer cited problems that occurred in two prior similar construction contracts, which were awarded. In both cases, the contractor experienced many difficulties. In response, JT Construction basically contends that the use of negotiation in this case was simply an effort by the Air Force to limit competition.

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 and offeror input could be obtained for improving the specifications. Claude & Atkins Enter., Inc., B-241097, Jan. 15, 1991, 91-1 CPD ¶ 42.

Consequently, we cannot conclude that the Air Force's judgment in choosing to use competitive negotiation here was unreasonable.

The protest is denied.


for James F. Hinchman
General Counsel