



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

Decision

Matter of: Air Masters Corporation

File: B-249240

Date: November 2, 1992

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Samuel E. Skare, Esq., General Services Administration, for the agency.

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DIGEST

1. Where a canceled invitation for bids (IFB) has been converted to a request for proposals (RFP), protest that offeror whose bid was nonresponsive to the IFB should not be permitted to compete under the RFP is denied, since the applicable regulation only precludes the participation of nonresponsive bidders and the firm in question was considered responsible.

2. Protest that cancellation of the IFB and the subsequent conversion to negotiation after disclosure of bid prices creates the potential for an auction is denied, because where, as here, the cancellation is in accord with governing legal requirements, the agency has not created an impermissible auction.

3. A protest issue raised in comments to the agency report almost 2 months after the protester was notified of the rejection of its bid is untimely since the protester failed to diligently pursue information disclosing the basis for the rejection.

DECISION

Air Masters Corporation protests the General Services Administration's (GSA) conversion of invitation for bids (IFB) No. GS-06P-92-GXC-0016, to a request for proposals (RFP). The protester also objects to the participation under the RFP of a firm whose bid was considered nonresponsive under the IFB.

We deny the protest in part and dismiss it in part.

On February 18, 1992, GSA issued the IFB for operation, maintenance and repair of mechanical equipment at the Federal Center Complex, St. Louis, Missouri. Two bids were received by the April 10 bid opening date; one from Air Masters at a total price of \$8,565,577 and one from NVT Technologies, Inc. at a total price of \$5,309,851. The apparent low bidder, NVT failed to submit a signed certificate of procurement integrity, and therefore its bid was rejected as nonresponsive.

GSA then concluded that it could not make an affirmative determination that the total price submitted by Air Masters was fair and reasonable because of the significant disparity between some of NVT's and Air Masters' line item prices and disparities between some of the line item prices included in Air Masters' bid and the prices in the government estimate. Therefore the contracting officer determined, in accordance with Federal Acquisition Regulation (FAR) § 14.404-1(c)(6), to cancel the solicitation and reject the bid from the responsive bidder, Air Masters, and in accordance with FAR §§ 14.404-1(e)(1) and 15.103, to complete the acquisition by negotiation.

On May 22, NVT received a notice from GSA stating that its bid was rejected and that the solicitation was converted from sealed bidding to negotiation. The agency sent letters dated May 27, to both Air Masters and NVT announcing that discussions would be held during the period between June 8 and June 12 and that best and final offers (BAFO) would be solicited at a later date. According to Air Masters, the incumbent contractor, it first became aware that NVT was participating in the converted solicitation when on June 17 a NVT representative viewed the site. On June 22 the agency held discussions with Air Masters, and on July 1, the firm was notified that the closing date for BAFOs was July 16. Air Masters filed this protest on June 26.

Air Masters argues in its initial protest that NVT should not be allowed to participate in the converted solicitation because its bid had been found nonresponsive under the canceled IFB. Further in this connection the protester argues in its comments on the agency protest report that the cancellation of the IFB was improper. Additionally, the protester argues that the cancellation of the IFB after bid opening and the subsequent conversion to negotiation would result in an "unfair bidding process."

FAR § 15.103 provides that where an IFB is canceled and negotiation is to be used, the only conditions on pursuit of negotiation are that prior responsible bidders to the original IFB be given notice and a reasonable opportunity to negotiate; that any negotiated price be the lowest offered by any responsible bidder; and the price must be lower than

the lowest rejected bid of a responsible bidder under the original IFB. Thus, FAR § 15.103 only precludes nonresponsible bidders from participating under an RFP. Sylvan Serv. Corp., B-222482, July 22, 1986, 86-2 CPD ¶ 89; M.C. Dean Electrical Contracting, Inc., B-228542, Dec. 21, 1987, 87-2 CPD ¶ 613. Since GSA found NVT to be responsible that the agency properly allowed NVT to compete under the RFP.

Further Air Masters argues for the first time in its comments on the GSA report that the agency's conclusion that it could not make an "affirmative determination" that Air Master's prices were "fair and reasonable" was not sufficient to support the cancellation. It is the protester's view that the regulations require that the agency actually conclude that its prices were "unreasonable" before the solicitation could be canceled. Further, in this regard, Air Masters argues that the record simply does not support the agency's conclusion that it could not determine the reasonableness of the firm's prices because: (1) the agency improperly used the prices in NVT's nonresponsive bid as a basis of comparison, (2) the pricing history of the requirement does not support the agency's conclusion, and (3) the agency's estimate supports the protester's view that its prices are reasonable.

Air Masters states that these arguments are timely raised because the rejection notice that it received on May 22 did not fully explain the agency's basis for the rejection of its bid. According to Air Masters that ground of protest did not become known until it received the agency report.

Our Bid Protest Regulations require that protests such as this which question the rejection of a bid and the resulting solicitation cancellation be filed within 10 days after the protester knew or should have known of the protest basis. 4 C.F.R. § 21.2(a)(2) (1992); Moran Constr. Co., B-241474, Jan. 7, 1991, 91-1 CPD ¶ 16. To ensure that long-standing timeliness requirements such as this one are met, we require protesters to diligently pursue information that forms the basis for a protest. Continental Airlines, Inc., B-246897.3, Jan. 22, 1992, 92-1 CPD ¶ 105.

Air Masters' comments do not show that the firm took any steps after learning of the rejection of its bid on May 22 to obtain a full explanation from the agency concerning the rejection. Rather, Air Masters acted on the rejection of its bid only after it received the agency report on August 3. To the extent that Air Masters desired a fuller explanation concerning the basis upon which its bid was rejected, it should have contacted the agency after it received the bid rejection notice on May 22. Instead, Air

Masters waited for approximately 2 months and ascertained the full explanation from the agency report.

Based upon the record, we find that Air Masters failed to satisfy the requirement for diligent pursuit. The protest issues concerning the validity of the cancellation are therefore untimely and will not be considered. Singer Hosiery Mills, Inc., B-244908, Oct. 30, 1991, 91-2 CPD ¶ 408.

Air Masters also argues that the cancellation of the IFB after bid opening and the subsequent conversion to negotiation would result in an "unfair bidding process." The basis for Air Masters' argument is that the cancellation of the IFB and subsequent conversion to negotiation after disclosure of its bid prices creates the potential for an auction.

Where there is no legal basis to object to the cancellation, which is the case here, the agency has not created an impermissible auction. Metric Constructors, Inc./ H.B. Zachry Co., B-229947; B-229947.2, Mar. 25, 1988, 88-1 CPD ¶ 311. Moreover, we do not find that Air Masters--which had not submitted the low bid--has been prejudiced by the disclosure of its bid price. Although cancellation and conversion to negotiation may result in NVT having another chance to compete with the knowledge of the prior bid prices, the competition the second time also provides Air Masters an opportunity to offer a reasonable price and be considered for award.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel