



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

Decision

Matter of: Color Dynamics, Inc.

File: B-250398

Date: January 22, 1993

Lawrence W. Luecking for the protester,
Leif T. Erickson for Holmes & Narver Services, Inc., an
interested party,
Paul M. Fisher, Esq., Diane D. Hayden, Esq., and Jan E.
Takamine, Esq., Department of Navy, for the agency,
Margie Armen, Esq., and John F. Mitchell, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Contention that agency awarded contract in anticipation of not enforcing certain solicitation requirements is denied where record shows that awardee's contract was not modified to change requirements which were in solicitation and awardee did, in fact, perform the questioned requirements.
2. Whether lower-priced bidder understands solicitation requirements and can successfully perform them at its bid price are questions of bidder responsibility which the contracting agency resolved in the affirmative and which the General Accounting Office will not review absent circumstances not present in this protest.
3. Speculative assertion that awardee may increase its contract price through post-award mistake-in-bid claims because agency allegedly failed to obtain an unequivocal waiver of all such claims is dismissed because it concerns a matter of contract administration not for review by the General Accounting Office under its bid protest function.

DECISION

Color Dynamics, Inc., protests the Department of the Navy's award of a contract under invitation for bids (IFB) No. N62755-92-B-2743 to Holmes & Narver Services, Inc., for exterior painting of military family housing in Oahu, Hawaii. Specifically, the protester claims that neither the Navy nor the awardee intends that the contract be performed as specified in the solicitation, resulting in a material change in the terms and conditions on which bids were solicited, to the detriment of competition. The protester also claims that the awardee lacks experience necessary to

satisfactorily perform the contract and that the Navy failed to obtain from the awardee an unequivocal waiver of any and all future claims for any mistake in bid.

We deny the protest.

A major component of the contract work is testing for the presence of lead-based paint on the dwellings and removing any lead-based paint found. In performing this aspect of the work, the contractor must observe federal regulations applicable to the handling of this hazardous material. The solicitation and its seven amendments incorporated those regulatory requirements and also required the awardee: (1) to remove all lead containing coatings completely (2) to retain the services of a Certified Industrial Hygienist and to have the hygienist attend any preconstruction conferences and (3) to prepare and submit for approval a detailed work plan and a hazardous waste management plan.

The protester was third low bidder, and its price of \$31 million was approximately \$5 million higher than the awardee's.¹ After bid opening and prior to award, the protester's local representative in Hawaii corresponded with the Naval Public Works Center in Pearl Harbor, suggesting that the two lower bidders did not intend to perform all the contract requirements for the price bid. The protester expressed particular concern over whether Holmes & Narver understood the contract requirement to remove completely all lead paint found. Thereafter, prior to award, the Center made an inquiry of Holmes & Narver and received assurances that its bid included total removal of all lead paint, to the point of exposing bare substrate.

At about the same time, the Navy brought to Holmes & Narver's attention apparent errors in the extension of its unit prices. These errors were corrected, raising the total contract price slightly more than \$1 million to \$26,443,614. Holmes & Narver expressly confirmed this price was its total bid and waived any further claims resulting from pricing errors. During this period, the contracting officer also conducted a preaward survey and made an affirmative determination that Holmes & Narver was responsible. The contract was then awarded to Holmes & Narver on August 27, 1992. This protest followed.²

¹The low bid was rejected by the Navy.

²The agency argued that the protest should be dismissed as untimely, because, according to the agency, Color Dynamics learned the information which formed the basis for its protest 11 working days prior to the filing of the protest.
(continued...)

The protester's principal claim is that, despite the solicitation's requirement to strip all lead paint from the dwellings, Holmes & Narver will not remove (and in fact never intended to remove), all lead paint down to the original surface, and that the Navy will not enforce the requirements associated with the removal of lead-based paint. Assuming that the relaxation of these requirements was agreed to by the Navy when it made the award to Holmes & Narver, the protester argues that the terms and conditions of the contract with Holmes & Narver have so changed that the contract should be terminated and appropriate remedial action taken.

In this regard, the protester refers to decisions of our Office holding that changing conditions of performance known to or discovered by the procuring agency prior to award should be addressed by amending the solicitation so that all bidders can compete on the known requirements. Moore Service, Inc., B-200718, Aug. 17, 1981, 81-2 CPD ¶ 145, aff'd sub nom., A. J. Fowler Corp., B-200718.2, Sept. 21, 1981, 81-2 CPD ¶ 260, and 61 Comp. Gen. 238 (1982), 82-1 CPD ¶ 102. In another application of similar facts, we held that if a procuring entity knows before award of changes in material requirements that will necessitate modification of a contract soon after its award, it should amend the solicitation rather than modify the awarded contract. Mantech Field Eng. Corp., B-218542, Aug. 8, 1985, 85-2 CPD ¶ 147. In these decisions we found that material changes in the government's needs or expectations which are not communicated to bidders through the solicitation undermine competition and deprive the government of the opportunity to acquire goods and services at the lowest possible price.

The protester's reliance on these decisions is misplaced. The decisions mentioned above concern contract modifications made by the government soon after award. The contention in each case was that the circumstances necessitating the modification were known to the government prior to award and that the government awarded the contract with the intention of significantly modifying it thereafter. Here, however,

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See 4 C.F.R. § 21.2(a)(2) (1992). Color Dynamics disputes the agency's position, noting that it is based on the earlier of two telephone conversations between Color Dynamics and the Navy concerning the award made to Holmes & Narver. Since neither party has produced conclusive evidence supporting its position, and because it is our practice to resolve doubts over the timeliness of the protest in the protester's favor, we decline to dismiss the protest as untimely. See Honeywell, Inc., B-244555, Oct. 29, 1991, 91-2 CPD ¶ 390.

the Navy has not modified the terms and conditions of this contract concerning the degree of lead paint removal. Holmes & Narver's contract does not include performance specifications at variance from those originally outlined in the solicitation. In addition, we note that before award, the contracting officer's representative contacted Holmes & Narver to confirm that its bid included complete lead paint removal down to bare substrate, as the solicitation required, and that the Navy made the award with Holmes & Narver's specific assurance that 100 percent removal was planned.

The protester points to supposed nonperformance at the preconstruction conference on September 4, 1992, as evidence that the contract has been materially changed. Specifically, the protester states Holmes & Narver failed to bring a Certified Industrial Hygienist and did not present its detailed work plan at the conference, as required by the contract. That allegation by the protester is apparently correct, but its information is incomplete.

The Navy advises that the awardee's Certified Industrial Hygienist did attend a second preconstruction conference held on October 13, and that its detailed work plan was submitted on September 16, and approved by the Navy on October 21. Thus, it appears from this additional information that the awardee has in fact performed as required. Moreover, the Navy correctly points out that matters such as the scheduling of preconstruction conferences and the review of a contractor's work plans are questions of contract administration, which are not generally reviewable in a bid protest. Stoneridge Development Corp., B-244975, Dec. 3, 1991, 91-2 CPD ¶ 501.

The protester's second ground for protest is that the awardee lacks the experience necessary to perform the contract satisfactorily, i.e., that it is nonresponsible. Before awarding the contract to Holmes & Narver the contracting officer conducted a preaward survey and made an affirmative determination of responsibility.

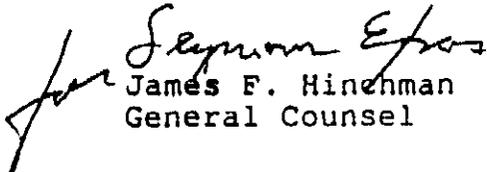
An agency's affirmative determination of responsibility will not be reviewed by our Office absent a showing of possible fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation may have been misapplied. 4 C.F.R. § 21.3(m)(5). Since there are no definitive responsibility criteria in this solicitation, and since the protester has made no allegation of fraud or bad faith, we have no basis to review the contracting officer's determination.

Finally, in comments on the agency report, the protester asserts that the Navy failed to obtain from the awardee an

unqualified waiver of any and all future mistake-in-bid claims.³ This is significant, the protester argues, principally because the Navy has not foreclosed the awardee from raising its price through post-award mistake-in-bid claims.

From our review of the correspondence between the Navy and Holmes & Narver, we question the protester's assertion that the awardee failed to waive any and all future mistake-in-bid claims. We need not decide this issue, however, since the protester's speculative assertion that Holmes & Narver may later assert, and the Navy permit, such claims is a matter of contract administration which is not for our review under our bid protest function.⁴

The protest is denied.


James F. Hinchman
General Counsel

³The protester does not challenge the Navy's decision to permit Holmes & Narver to correct its bid, nor does it dispute the corrected amount.

⁴We note that the regulations applicable to correction of a mistake in bid discovered after award permits reformation of the contract only in tightly controlled circumstances. Federal Acquisition Regulation § 14.406-4. In no case is a mistake correctable after award if it would raise the contract price above the next lowest acceptable bid.