DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

95297

50592

FILE: B-181642 DATE: February 28, 1975

MATTER OF: Informatics, Incorporated

DIGEST:

1. Cancellation of IFB based on determination that requirements contained therein no longer meet needs of agency is proper since contracting officials have discretion in determining whether invitation should be canceled and a reasonable basis exists to conclude that the work originally specified no longer adequately reflects the agency's current needs.

2. Fact that two affiliated firms may have jointly prepared and submitted bids in response to same IFB containing a 50 percent set-aside provision does not constitute collusive bidding since there is no evidence of attempt to eliminate competition from other companies. Even where only one contract is contemplated, multiple bids by a single interest need not be rejected.

3. Authority in 41 U.S.C. 252(c)(14) (1970), which permits negotiation if bid prices have not been independently arrived at in open competition or if bid prices are unreasonable, is not applicable where procuring agency considers it desirable to cancel invitation and reprocure on basis of new solicitation because of change in Government's needs.

4. Use of negotiation authority in 41 U.S.C. 252(c)(1) by agency to assure that two sources be available does not appear to be authorized pursuant to FPR 1-3.201.

This matter was initially referred to our Office by the Department of Commerce pursuant to section 1-2.407-8(b)(3) of the Federal Procurement Regulations (FPR) (1964 ed.) requesting our views as to the responsiveness and eligibility of the two lowest bids received under invitation for bids No. 4-36995, issued on January 21, 1974.

The solicitation called for bids for the extraction of information from approved patent applications and conversion of such information into machine language or computer magnetic tape for use as a patent data base and for use in page composition for printing of patents and other Patent Office publications for one year and two 12-month option periods. The solicitation also

included a 50 percent set-aside with first preference for labor surplus area concerns, and provided for separate awards to two different firms in order to avoid reliance on a single contractor for performance of the total requirement. Four bids were received and opened on March 6, 1974, and, as evaluated, were as follows:

| | | |
|---|---|---|
| Informatics | $10,140,086 | NET |
| Informatics Tisco | 10,469,542 | NET |
| BNA Research | 11,143,654 | LESS DISCOUNT |
| International Computaprint | 12,002,854 | LESS DISCOUNT |

Both Informatics, Incorporated (Informatics), and Informatics Tisco (Tisco) were advised by letter dated April 22, 1974, from the contracting officer that their bids were rejected as nonresponsive. The bases for this action were stated as (1) the indefiniteness of certain of the bid prices and (2) tne violation of the Independent Price Determination clause of the solicitation. In connection with the latter point, the Department believed that the bid prices of Informatics and Tisco, its wholly owned subsidiary, had been disclosed to each other prior to bid opening. It was also stated that in view of Tisco's knowledge of Informatics' bid prices, Tisco's slightly higher prices were intended, in effect, as a bid on the set-aside quantity. The Department concluded that the Informatics and Tisco bids were submitted by a single interest and their consideration for award would be contrary to the stated intent to award two separate contracts.

Both firms protested the rejection of their bids to the agency. Because of the issues involved and large dollar value of the procurement, the matter was referred to our Office and all bidders on the procurement have been afforded an opportunity to submit their views.

By letter dated October 25, 1974, and prior to a decision by this Office, the Department advised that it had canceled the solicitation because the requirements as stated therein no longer represented the current needs of the using agency and that a new solicitation would be issued for the current needs of the Government.

Subsequently, BNA protested to this Office. It is the position of BNA that the Department's reasons for canceling the solicitation do not legally support such action. BNA believes that the current "sole source" procurement from the incumbent contractor should not be prolonged since competition is available. It contends that it is prepared to perform the contract services notwithstanding any modification of the Government's needs arising from contemplated improvements concerning the use of Linotron photocomposing equipment. In addition, BNA contends that the two low bidders are

ineligible for award because of collusive bidding practices and that the Department should negotiate with the remaining eligible bidders pursuant to 41 U.S.C. 252(c)(14) (1970), as implemented by FPR 1-3.214 (1964 ed.). Under this regulation purchases and contracts may be negotiated without formal advertising "for property or services as to which the agency head determines that bid prices after advertising therefor are not reasonable * * * or have not been independently arrived at in open competition."

The Department states that as a consequence of the delay in bringing this procurement to fruition together with ensuing administrative problems, the requirements as stated in the original solicitation no longer represent its current needs. Advanced techniques covering the nonmandatory portion of the original solicitation have been developed and a major revision to the solicitation is necessary to realize the full benefit of these technical advances and to incorporate this work as a part of the mandatory requirements of the solicitation. The Department also has an added requirement for the production of weekly and annual patentee indices which resulted from the delayed phasing-in of a new contractor pursuant to the agency's planned conversion to a 100 percent data base or photocomposition method of printing patents. In addition, the Government Printing Office (GPO) is effecting a modernization plan which will greatly enhance the capability of the Linotron photocomposing equipment. This improvement will make obsolete the grid character generation system on which the requirement of the original solicitation was based. In this connection the Department believes award under the original solicitation would not realize the full capabilities of the new electronic components being acquired by GPO. Finally, other new requirements not contained in the original solicitation are reported to be as follows:

"1. Change in specification for procurement Item 2. A recent decision by the Commissioner of Patents required publication of Claims in lieu of Abstracts in the Patent Official Gazette.

* * * * *

"3. Production of Linotron tapes for Weekly Issues of Patent Drawings. Drawing Headings for each sheet of drawings of issuing patents.

"4. Data Preparation and production of Linotron tapes for Reissue, Plant Patents, and Defensive Publications."

The authority to cancel an invitation after bids are opened is contained in FPR § 1-2.404-1, in pertinent part, as follows:

> "(a) Preservation of the integrity of the competitive bid system dictates that, after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation. * * *
>
> "(b) Invitation for bids may be canceled after opening but prior to award, and all bids rejected, where such action is consistent with /(a) above/ and the contracting officer determines in writing that the cancellation is in the best interest of the Government * * *."

We recognize that the contracting officer is afforded broad authority to reject all bids and readvertise. Although a revision of specifications is a "compelling reason" for rejecting all bids and readvertising a procurement, cancellation of an invitation should be limited to instances in which an award under the original specifications would not serve the Government's actual needs. 49 Comp. Gen. 211, 215 (1969). In the circumstances of this case it does not appear that award on the initial invitation, even with a new procurement for additional requirements, would satisfy the Government's needs. We are satisfied that there is a reasonable basis to support the conclusion that the work as originally specified no longer adequately reflects the Government's current needs.

BNA also contends that Informatics and Tisco are ineligible for any award at this time because of collusive bidding practices under the original invitation and urges that debarment action be taken against them. The fact that Informatics and Tisco, its wholly owned subsidiary, may have jointly prepared and submitted two bids does not constitute collusive bidding since there is no evidence of an attempt by these bidders to eliminate competition from other companies. See 51 Comp. Gen. 403, 405 (1972). Rather, their actions represented an attempt by a single interest to submit more than one bid for the Government's requirements. Even in cases where only one contract is contemplated for all of the Government's requirements, multiple bids by a single interest, such as Informatics and Tisco, are not required to be rejected, as long as the bidding was not prejudicial to the United States. 52 Comp. Gen. 886, 898 (1973). Finally, while BNA argues that, pursuant to 41 U.S.C. 252(c)(14) (1970), negotiations should be conducted with all bidders other than Informatics and Tisco, we do not believe the cited negotiation authority is applicable where, as here, the procuring agency

considers it desirable to cancel an invitation and reprocure on the basis of a new solicitation because of a change in the Government's requirements. For the reasons discussed above, reprocurement on the basis of a new solicitation is appropriate in this case.

Finally, in reviewing the canceled solicitation we note that an essentially equal portion of the entire requirement had been set-aside under 41 U.S.C. 252(c)(1) (1970) in order to assure that two different sources would be available for furnishing these vital services. The applicable procurement regulation provides, however, that the negotiation authority of 41 U.S.C. 252(c)(1) shall only be used to assist labor surplus areas, small business concerns and to further the Balance of Payment Program. FPR 1-3.201 (1964 ed.). Therefore, it does not appear that 41 U.S.C. 252(c)(1) authorizes the use of negotiation to assure the availability of two sources.

In view of the protracted length of time during which this procurement has been in process, of the fact that the incumbent contractor has had its contract periodically extended during this timespan without benefit to the Government of competition, and further, in light of the contentions raised by the protesters, we are initiating a detailed investigation of the circumstances surrounding the procurement to ascertain whether corrective measures are warranted notwithstanding the conclusions necessarily reached herein in consideration of the protests filed.

R. F. Keller

Deputy Comptroller General
of the United States