Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: D. M. & E. of Las Vegas, Inc.

File: B-270288

Date: February 23, 1996

Jeffrey Taraby for the protester.
Robert C. Miller, Esq., Department of the Army, Corps of Engineers, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Completion of acquisition through negotiation after cancellation of invitation for bids (IFB) was improper where agency revised material solicitation requirement (delivery schedule), which could have influenced the scope of original competition, at the time it converted acquisition from IFB to request for proposals.

DECISION

D. M. & E. of Las Vegas, Inc. protests the award of a contract for two radial drilling machines to NATCO/Carlton under request for proposals (RFP) No. DACW62-95-R-0047, issued by the Department of the Army, Corps of Engineers. Award to NATCO/Carlton was made after the solicitation was converted from an invitation for bids (IFB) to an RFP. D. M. & E. contends that rather than converting the IFB to an RFP and negotiating with NATCO/Carlton, the Corps of Engineers should have proceeded with a new acquisition.

We sustain the protest.

BACKGROUND

IFB No. DACW62-95-B-0026, which was issued on July 21, 1995, sought bids for one floor mounted radial drilling machine, with an option, exercisable by the government at the time of award, for a second machine. The solicitation defined the required characteristics of the machine(s) and instructed bidders to submit descriptive literature with their bids to enable the agency to verify compliance with the enumerated requirements. The IFB called for delivery of the radial drill(s) within 120 days after award.

D. M. & E. and NATCO/Carlton were the only bidders to respond to the IFB. Both indicated that they would furnish drills manufactured by NATCO/Carlton. NATCO/Carlton's bid was $197,000 and D. M. & E.'s bid was $257,990.

In a cover letter accompanying its bid, NATCO/Carlton took exception to the IFB's delivery requirement, stating that it would require 240 days for delivery of the optional unit. The contracting officer accordingly rejected NATCO/Carlton's bid as nonresponsive. The contracting specialist then contacted D. M. & E. to begin gathering pre-award information. After she had explained to D. M. & E.'s representative her basis for rejecting NATCO/Carlton's bid as nonresponsive, the protester's representative stated that D. M. & E. could not meet the delivery schedule either. The contracting specialist asked D. M. & E. to confirm this in writing, which it did by letter dated August 30. Upon receipt of this letter, the contracting officer determined, in accordance with Federal Acquisition Regulation (FAR) § 9.104-1(b), that D. M. & E. was nonresponsible because it could not comply with the required delivery schedule. Because D. M. & E. is a small business, she then referred the matter to the Small Business Administration (SBA) pursuant to FAR § 19.602-1. By letter dated September 20, the SBA informed the contracting officer that the protester had declined to file an application for a certificate of competency and that the SBA was closing its file on the matter.

Because the government had failed to receive a responsive bid from a responsible bidder, the contracting officer determined that cancellation of the IFB and conversion to negotiation was appropriate. See FAR §§ 15.103, 14.404-1(c)(8) and (e)(1). By amendment dated September 26, she converted the IFB to RFP No. DACW62-95-R-0047. The amendment also changed the delivery period for the second drill from 120 days to 240 days.

Since FAR § 15.103 refers to negotiation with responsible bidders only and D. M. & E. had been determined nonresponsible under the IFB, the contracting officer transmitted a copy of the amendment to NATCO/Carlton only. NATCO/Carlton proposed a price of $197,000--the same price that it had bid under the IFB--and on September 29, the Corps of Engineers awarded it a contract. D. M. & E. learned of the award to NATCO/Carlton on October 23 and protested to our Office the following day.

D. M. & E. protests the award to NATCO/Carlton, arguing that rather than converting from sealed bidding to negotiated procedures and changing the delivery period, the agency should have conducted a new acquisition. The protester argues that it could have offered a drill other than NATCO/Carlton's meeting the agency's technical requirements had the agency given it the opportunity to respond to a solicitation providing for a longer delivery period than the one specified in the original IFB.

The contracting officer reports that upon receipt of D. M. & E.'s protest, she reexamined her decision to convert to negotiated procedures and decided that the better course of action would have been to cancel the IFB and readvertise with a solicitation providing for a longer delivery period. In this regard, she noted that it appeared incongruous for one of the bidders to have been eligible for award under the RFP and the other ineligible when both had been rejected for the same reason (i.e., inability to comply with the required delivery schedule). The contracting officer further observed that canceling and recompeting would have been more protective of the competitive bidding system by possibly increasing the number of bidders due to the longer delivery schedule. She therefore considered taking corrective action to resolve the protest.

On October 24, a member of the contracting officer's staff contacted NATCO/Carlton to determine the status of contract performance and was informed that the first drill was 90 percent complete and that the second drill was 30 percent complete. Based on this information, the contracting officer concluded that termination of the contract for the first drill was not feasible. The contracting officer further determined that termination of the optional drill was not a reasonable option either since the government would be required to pay for preparation of the small castings and for the mold fabrication of the large castings, as well as for a portion of the tooling costs for machining the castings--an amount that represented approximately 50 percent of the cost of the second machine. Since termination did not appear to be a viable option, the contracting officer contacted D. M. & E. on October 30 and offered to pay its bid preparation and protest costs in resolution of the protest. D. M. & E. refused to accept the proposed resolution.

INTERESTED PARTY STATUS

The agency reports that while attempting to resolve this protest, the contracting officer learned that D. M. & E.'s corporate charter had been revoked by the state of Nevada on April 1, 1995, and had not been reinstated as of the date of her report to our Office, i.e., November 21, 1995, meaning that D. M. & E. lacked a charter on the date that it submitted a bid in response to the IFB and on the date that the IFB was converted to an RFP. Thus, the agency contends, D. M. & E. was not eligible for award while the procurement was ongoing and therefore is not an interested party to maintain the protest before our Office.

D. M. & E. responds that it first learned of the revocation of its corporate charter in the contracting officer's report and that the revocation was attributable to its failure to comply with a Nevada statute requiring each corporation organized under the laws of that state to file with the secretary of state a list of its officers and directors and a designation of its resident agent in the state. The protester explains that the secretary of state's office erred in recording the address of its resident agent at the time of its initial application for a charter in 1994, and that the agent therefore never received either the forms on which the officers and directors were to be listed or the notice of revocation. D. M. & E. further states that upon learning of the revocation, it took the steps necessary to have the charter reinstated retroactive to the date of revocation, and that its corporate charter is in good standing. Under these circumstances, it is not clear that D. M. & E. would not have been eligible for award and we see no basis to dismiss the protest on the ground that D. M. & E. is not an interested party.

CONVERSION TO NEGOTIATION

After finding NATCO/Carlton's bid nonresponsive to the delivery schedule requirement, and subsequently finding D. M. & E., the only other bidder, to be nonresponsible, the contracting officer converted the IFB into an RFP, which then was furnished to NATCO/Carlton only. Before negotiating with NATCO/Carlton, however, the contracting officer relaxed the delivery schedule for the second drill to accommodate NATCO/Carlton, which in its bid had taken exception to the requirement for delivery of the second drill within 120 days.

While, under certain circumstances, the FAR permits completion of an acquisition through negotiation after an IFB has been canceled, see FAR §§ 14.404-1(e); 15.103, we conclude that the agency could not properly do so here in light of the material relaxation of the delivery schedule. The Competition in Contracting Act of 1984 requires agencies to meet their needs through full and open competition, which is obtained where all responsible sources are given the opportunity to compete. See 10 U.S.C. § 2304(a)(1)(A) (1994); 41 U.S.C. § 403(6) (1994). The agency here failed to carry out that mandate by limiting its negotiations to NATCO/Carlton, even after it relaxed the delivery schedule for the second drill--the very requirement which neither of the two original bidders could meet. Although it is unclear whether D. M. & E. would have submitted a responsive bid for a NATCO/Carlton drill under the relaxed delivery schedule (since the schedule still required delivery of the first drill within 120 days and D. M. & E. stated in its letter of August 30 that it could deliver the first machine in "120-150 days"), the protester states that it could submit a responsive bid for a different drill meeting the solicitation's specifications had the delivery schedule been longer.[1] Indeed, the agency acknowledges that relaxation of the delivery schedule could have allowed other bidders, in addition to D. M. & E. and NATCO/Carlton, to compete. By limiting negotiation to NATCO/Carlton, the agency prevented D. M. & E. and other potential bidders who could meet the relaxed delivery schedule from competing. Under these circumstances, we think that, to be consistent with the statutory mandate for full and open competition, the

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[1]It also appears possible that the agency, which was willing to extend the delivery period for the second drill by 120 days to accommodate NATCO/Carlton, might have been willing to extend the delivery period for the first drill by 30 days to accommodate D. M. & E.

agency was required to recompete based on a revised solicitation reflecting the relaxed delivery schedule.[2]

RECOMMENDATION

Since we agree that termination of the contract awarded to NATCO/Carlton is not feasible due to the status of performance, we recommend that the agency pay the protester the costs of filing and pursuing its protest. See Bid Protest Regulations, section 21.8(d)(1), 60 Fed. Reg. 40,737, 40,743 (Aug. 10, 1995) (to be codified at 4 C.F.R.§ 21.8(d)(1). The protester is not entitled to its bid preparation costs because it was properly determined nonresponsible under the IFB and therefore could not have received the award. See Maintenance and Repair, B-251223, Mar. 19, 1993, 93-1 CPD ¶ 247, request for mod. of rec. denied, B-251223.2, July 20, 1993, 93-2 CPD ¶ 39. D. M. & E.'s certified claim for protest costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 90 days after receipt of this decision.

The protest is sustained.

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[2]Even if conversion to negotiated procedures had been appropriate here, we do not think that the contracting officer would have been required to exclude the protester from negotiations since the basis for the determination of nonresponsibility might have been remedied by the amendment to the delivery schedule. See Dutra/AmClyde Joint Venture, B-249364.2, Dec. 30, 1992, 92-2 CPD ¶ 453.