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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

88-1 CPD 396

Matter of: Nootka Environmental Systems, Inc.

File: B-229837

Date: April 25, 1988

DIGEST

Cancellation, after bid opening, of solicitation for cleanup of contaminated materials was not unreasonable where solicitation was so generally worded as to prompt inquiries from bidders as to the permissible method of disposal; apparently conflicting, and in some cases, erroneous advice was given; there was a wide disparity in bid prices; and even the protester's low bid was 20 percent higher than the government estimate, which has not been shown to be invalid as to the protester's proposed method of disposal.

DECISION

Nootka Environmental Systems, Inc., protests the cancellation of invitation for bids (IFB) No. SB-87-0031, issued by the Department of the Interior, Bureau of Indian Affairs (BIA). Nootka, the low bidder, seeks award under the solicitation or, alternatively, the costs of preparing its bid and of pursuing the protest, inclusive of attorneys' fees.

We deny the protest.

The IFB called for the cleanup at two sites in Arizona of 3,600 square feet of polychlorinated biphenyl (PCB)-contaminated storage and equipment areas, a number of PCB soil tests, and the extraction, loading, removal and disposal of six 55-gallon barrels of PCB-contaminated oil and other material and 3,000 cubic yards of contaminated soil. At the time of bid opening, 19 bids were received, ranging in price from Nootka's low bid of $438,845 to $14,157,084. After the BIA determined that all bids were at least 20 percent higher than the government estimate ($331,755), it canceled the IFB on the basis that "[a]ll bid prices received were excessively higher than the estimated amount to complete the services as specified in the statement of work."

In its response to the protest, the BIA also asserts that it canceled the IFB because it was ambiguous in that it failed to specify the method of disposal.1/ Noting that some bids were based on disposal by burial while others were based on disposal by incineration, the agency expresses the view that the disparity in bid prices was the result of the IFB's ambiguity as to the disposal method to be used. The contracting officials further state that to make award under the solicitation would be unfair to some bidders because, prior to bid opening, some of the prospective bidders inquired as to the disposal method to be used and were orally advised that the contaminated material was to be incinerated.

The protester maintains the agency had no compelling reason to cancel the IFB. Denying that its bid price was "excessive," Nootka contends that cancellation on the basis that bid prices were higher than the government estimate was unreasonable since, the protester states, the agency has characterized its own estimate as "unreasonable." Nootka, whose bid was based on disposal by burial, also disputes the agency's determination that the IFB was ambiguous as to the method of disposal. It is the protester's position that the IFB properly did not specify the method of disposal to be used and, thus, left that choice to the individual bidders. The protester further states that the IFB would have been overly restrictive if it had specified the disposal method since either burial or incineration will meet the agency's needs, and the question as to which is the less costly method depends upon the amount of contaminated material involved, the distance from the cleanup site to the place of disposal, and the contractor's resources.

Contracting officers have broad discretion in determining when it is appropriate to cancel an IFB. However, the preservation of the integrity of the competitive bidding system requires that the decision to cancel an IFB after bid opening be supported by a cogent and compelling reason. Federal Acquisition Regulation (FAR) § 14.404-1(a)(1); Harrison Western Corp., B-225581, May 1, 1987, 87-1 CPD ¶ 457. A solicitation may be canceled after bid opening if the prices of all otherwise acceptable bids are unreasonable. FAR § 14.404(c)(6); Airborne Services, Inc., B-221894, et al., June 4, 1986, 86-1 CPD ¶ 523.

A determination of price reasonableness is, however, a matter of administrative discretion, and we will not

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1/ The record indicates there are two approved methods of PCB disposal--incineration or burial in a landfill approved by the Environmental Protection Agency.

question that determination unless it is clearly unreasonable or the protester demonstrates fraud or bad faith on the part of the contracting officials. A.T.F. Construction Co., Inc., B-228060, B-228061, Oct. 30, 1987, 87-2 CPD ¶ 436. The agency's determination of price reasonableness may properly be based upon comparison with government estimates and any other relevant factors. Harrison Western Corp., B-225581, supra.

Although Nootka refers to the prices of other bids received (all of which were higher than its own) as evidence that its bid was not unreasonable and that the agency's estimate is below market prices, it fails to clearly establish that its bid was not unreasonably high for disposal by burial. While the protester argues that the agency determined its own estimate was unreasonable, the actual statement in the agency report is that "the engineer's estimate does not seem to be reasonable for the cost of incineration" (emphasis added), the disposal method the BIA says it contemplated under the solicitation. In our judgment, the agency's determination that its estimate was unreasonable for incineration (which the record indicates is generally more expensive than disposal by burial) does not render that estimate invalid with respect to disposal by burial. Nootka's bid was 20 percent higher than the government estimate, and on this record we find that the protester has not demonstrated that the agency's determination regarding its bid was unreasonable.

Here we have, therefore, a procurement in which (1) a solicitation was so generally worded that it prompted inquiries from several bidders as to what method of disposal was intended; (2) conflicting and, in some cases, erroneous advice was given; (3) an extremely wide range of bid prices was received and (4) even the protester's low bid was 20 percent higher than the government estimate. Under these circumstances, we think there is merit to the contract specialist's conclusion that a "fair and equal competition for all bidders" was not conducted. Accordingly, we do not think it unreasonable for the agency to cancel the solicitation for the purpose of readvertising the work under terms in which the government's requirements are clearly understood by all. The protest is denied.

for James F. Hinchman
General Counsel

The Comptroller General
of the United States

Washington, D.C. 20548

88-2 CPD 581
PR

Decision

Matter of: California Properties, Incorporated ✓

File: B-232323

Date: December 12, 1988

DIGEST

Protest concerning agency's failure to solicit protester for appraisal services procured under small purchase procedures is sustained, where record shows that agency failed to obtain maximum practicable competition by not disclosing basic procurement information to protester and other solicited appraisers, and then proceeding with an expedited award based on single price quote received.

DECISION

California Properties, Incorporated (CPI), protests the award of a contract under an oral request for quotations issued by the Department of Housing and Urban Development (HUD) for appraisal services for the Geneva Towers Apartment building in San Francisco. CPI contends that HUD acted unreasonably in failing to allow CPI to compete for the appraisal contract.

We sustain the protest.

The facts according to HUD are as follows. On July 28, a HUD official conducted an oral request for quotes for an appraisal of the Geneva Towers complex using small purchase procedures, calling six appraisers from a list of known capable appraisers. HUD received a quote from a Ms. Farkas ($5,000) and left messages for the other appraisers, including Rosenbusch. One of the firms with which HUD spoke was CPI, which had performed appraisal services for HUD previously, and recently had advised HUD by letter that it was interested in performing future appraisals for the agency. During the conversation, CPI requested information on the property (e.g., any physical defects, or whether the appraisal should be made as is), and reportedly stated that

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it would not give a quote without "written specifications." The HUD official advised that no written specifications would be issued for this appraisal; rather, interested appraisers would have to come to the HUD offices or make a site inspection to obtain information on the project.

On the next day, July 29, Rosenbusch called in response to HUD's message and expressed interest in the project. Later that day, Rosenbusch came to the HUD offices and was given the general requirements for the appraisal; he stated that he would be interested in the project. On August 1, Ms. Farkas withdrew her quote. On August 4, the HUD's chief appraiser called CPI to determine if CPI wanted to submit a quote. CPI once more expressed interest, but repeated that it would need written specifications. The chief appraiser stated that CPI would have to come to the HUD offices for any information.

On August 5, after being advised by another HUD official that there were "compelling circumstances" requiring a prompt award, HUD's chief appraiser called Rosenbusch to get his quote for the appraisal; he quoted a price of $7,250, and the chief appraiser proceeded to make an oral award. Rosenbusch then submitted a written acceptance of the contract on August 8. (Subsequently, the chief appraiser learned that he lacked authority to make award, and thus sought ratification of the contract by letters of August 19 and 26. A contracting officer subsequently ratified the contract.)

CPI's account of the facts is different from HUD's in several material respects. CPI states, for example, that it was first contacted by the HUD official on July 22 as to whether CPI was interested in quoting on the Geneva Towers appraisal. CPI expressed interest, but asked several questions about the project that the official could not answer; the official told CPI to call the chief appraiser. CPI called the chief appraiser on July 26, and was told that the information CPI wanted would be provided in the event HUD decided to use a private, rather than an internal HUD, appraiser. HUD's account of the facts does not mention this conversation.

CPI agrees that it spoke with the HUD official again on July 28, but its account of the conversation is different from HUD's: CPI repeated its July 22 request for answers to specific questions on the appraisal and the HUD official agreed to call CPI after obtaining the answers; he never called back with the answers. CPI's account of its August 4 conversation with HUD's chief appraiser also is different from HUD's: the chief appraiser advised CPI that HUD had not

yet decided whether to use a private appraiser, and that he would call CPI if HUD decided to use a private appraiser. CPI maintains it was never invited to the HUD offices for the information it wanted. CPI phoned HUD on August 11 and was advised that the award had been made to Rosenbusch. This protest ensued.

Small purchase procedures require agencies to promote competition to the "maximum extent practicable." 41 U.S.C. § 253(g)(4) (Supp. IV 1986). The regulations provide that, generally, the solicitation of three suppliers may be considered to promote competition to the maximum extent practicable. Federal Acquisition Regulation § 13.106; Gateway Cable Co., B-223157, et al., Sept. 22, 1986, 86-2 CPD ¶ 333.

The solicitation of three or more suppliers, however, does not automatically mean that the maximum practicable competition standard has been met. In procurements expected to exceed $10,000 but where less than two offerors are otherwise expected to respond to a solicitation, an agency is required to publish notice of the intended procurement in the Commerce Business Daily and make available a completed solicitation package to any business concern requesting it. 41 U.S.C. § 416 (Supp. IV 1986). This provision obviously requires an agency to do more than simply solicit a single known supplier. Further, the Small Business Act, as amended, 15 U.S.C. § 637b (1982), expressly requires that contracting agencies provide a copy of a solicitation to any small business concern upon request, and CPI apparently is a small business. While the publication requirement does not apply to the protested small purchase since it involves an amount under $10,000, the point is that the procurement statutes and the Small Business Act obviously contemplate that, regardless of whether three suppliers are solicited, responsible sources requesting the opportunity to compete should be afforded a reasonable opportunity to do so. Gateway Cable Co., B-223157, supra.

In short, we view the requirement for maximum practicable competition to mean that an agency must make reasonable efforts, consistent with efficiency and economy, to give a responsible source the opportunity to compete, and cannot, therefore, unreasonably exclude a vendor from competing for an award. As we read the record, HUD did not meet the above standard.

The thrust of HUD's position is that it was aware of CPI's interest in the project, but understood CPI to have refused to give a quote without written specifications; since HUD did not plan on issuing written specifications, there was no

point in soliciting CPI again immediately before making the expedited award to Rosenbusch. CPI maintains, on the other hand, that it only requested answers, written or oral, to certain general questions, such as whether the appraisal was to be on an as is basis, and the schedule for completion. CPI states that it had recently completed four other HUD appraisals without written specifications, and thus would have had no reason to expect anything different on this project.

While it is not clear which party's understanding of the facts is the correct one, we think the record supports CPI's position that HUD failed to take reasonable, simple steps to maximize competition for this contract. We find particularly persuasive in this regard a July 28 memorandum (included in the HUD report), prepared to respond to the questions CPI posed during its July 28 conversation with the HUD official. The memorandum provides answers to eight questions, including the purpose of the appraisal; any relevant financing terms; whether the appraisal was to be made subject to repairs; a property description; the due date for the appraisal report; and the number of reports and copies required. (The memorandum stated that appraisers should conduct a site visit and research project records to get a current property description.)

This memorandum suggests to us that CPI had, as it contends here, merely asked for answers to these basic questions to determine if it would or could perform the job, and did not condition its giving a quote on the receipt of more detailed written specifications. In any case, even if HUD correctly understood CPI as requesting written specifications, the memorandum evidences the agency's understanding that CPI also desired answers to more basic questions. This being the case, it is unclear to us why the answers in the memorandum apparently were never transmitted to CPI; in this regard, there is no statement by HUD that CPI was given the answers, and CPI firmly denies ever receiving the information.

HUD's approach of giving no written or telephone information on the project to interested appraisers clearly did not serve to promote the maximum practicable competition. The questions CPI presented during the July 28 conversation (and later answered in the memorandum) generally were basic, not expansive, and we agree with the view CPI apparently expressed to HUD at the time that this information would be helpful, if not essential, to the firm in deciding whether to compete, and in preparing a price quote. Indeed, had this same information been furnished to all six of the

solicited appraisers at the outset, it is possible that HUD would have had more than one quote from which to choose when it made the award.

While the small purchase procedures do not require "full and open competition," as indicated above, they do require reasonable efforts to permit a responsible source to compete. Whether or not HUD understood that CPI had requested more information in writing, we do not think HUD met this requirement when it proceeded with an expedited award to Rosenbusch without first furnishing CPI with the answers it had requested (and which the HUD official apparently had agreed to furnish), and then giving the firm an opportunity to quote a price based on that information. Following such a course of action could have increased competition; would have imposed no significant administrative burden on HUD (it could have been done with a single phone call); and would not have prevented HUD from proceeding promptly with the award.

Although we therefore sustain the protest, corrective action is not practicable; HUD proceeded with performance of the Geneva appraisal notwithstanding CPI's protest, based on a determination that continued performance was dictated by urgent and compelling circumstances, see Bid Protest Regulations, 4 C.F.R. § 21.4 (1988), and the contract has been completed. By separate letter, however, we are advising the Secretary of our decision. We also find CPI entitled to recover its costs of filing and pursuing this protest. See 4 C.F.R. § 21.6(e). 1/

The protest is sustained.

for Milton J. Socolar
Comptroller General
of the United States

1/ CPI also requests recovery of unidentified "actual damages," presumably representing anticipated profits. It is well established, however, that anticipated profits are not recoverable even in the presence of wrongful agency action. Sonic, Inc., B-225462.2, May 21, 1987, 87-1 CPD ¶ 531.

GAO

United States
General Accounting Office
Washington, D.C. 20548

Office of the General Counsel

B-241744

May 31, 1991

E. M. Keeling
Director of Accounting
Federal Aviation Administration
U.S. Department of Transportation
800 Independence Avenue, S.W.
Washington, D.C. 20591

Dear Mr. Keeling:

This is in response to your letter of October 1, 1990, requesting our opinion as to the proper disposition of funds in your custody that belonged to a now inactive FAA employee club.

According to your letter, the Federal Aviation Club (Club) was established in the early 1960's as a non-profit organization to promote the welfare of, and goodfellowship among, Federal Aviation Administration (FAA) employees. During the mid-1980's Club activities declined; the Club currently has no active members and has, effectively, ceased operations. Your staff has been unable to locate any documentation reflecting the creation of the Club, e.g., charter or bylaws, or its dissolution.

In 1990 the FAA Office of the Inspector General (OIG) received a hotline complaint alleging that the Club's internal controls over funds received were inadequate. A subsequent OIG audit concluded that controls were indeed inadequate but that no funds were mismanaged or diverted. During the course of the audit, the OIG discovered a bank account in the Club's name with the local credit union. The account balance is $10,000 consisting mainly of revenues received from Guest Services, Incorporated (GSI). GSI operates a beauty parlor and barber shop at the FAA headquarters building (Federal Building 10-A) which is operated by the General Services Administration (GSA).1/ A purported letter agreement, dated June 17, 1965,

1/ Your letter seems to question the absence of any provision for the payment of any rent or concession fees by GSI in the GSA-GSI contract. GSI's current contract was entered into on July 21, 1971. It does not have an expiration date but can be cancelled by either party on 196 days notice. Our Office has stated that such an agreement is not unlawful, improper or contrary to public policy. See generally LCD-78-316, May 5, 1978; See also 64 Comp. Gen. 217,220 (1985).

between GSI and the Club provides for quarterly payments representing 6.5 percent of the receipts from GSI's beauty/barbershop operations.2/ It is not known why this agreement was entered into or what it provided since no copy of the alleged agreement can be found by GSI or FAA. Nevertheless, we understand that GSI continues to make payments to the Club. The Club's account balance was deposited by your office into a trust account in Riggs National Bank pending a resolution of this matter.

DISCUSSION

Typically, any money an agency receives from whatever source outside the government must be deposited into the General Fund of the Treasury as miscellaneous receipts. 31 U.S.C. § 3302(b); see, e.g., 64 Comp. Gen. 431 (1985). By its terms, however, § 3302(b) applies only to funds received for the use of the government. Funds are considered received for the "use of the government" only if they are to be used to bear the expenses of the government or to pay the obligations of the United States. B-205901, May 19, 1982. Funds that are not received for the use of the United States need not be deposited into miscellaneous receipts. Id.

Thus, we have held that proceeds from the sale of diesel fuel furnished to the Federal Bureau of Investigation by a railroad to assist in an undercover investigation were not for the use of the government and could be returned to the railroad. See also B-205901, May 19, 1982; B-192035, Aug. 25, 1978 (balance of funds provided by cooperating country for overseas staff houses must revert to cooperating country upon termination of program).

Clearly, in this case, the defunct Club's account balance is not for the use of the government nor does the FAA have an identifiable interest in the moneys except that it presently has custody of the moneys. In the diesel fuel case, however, the FBI and the railroad had agreed that after the conclusion of the investigation the railroad would get back either the fuel or its sales proceeds. Here we have not been advised that the Club's charter or bylaws provided for any particular disposition of Club funds upon dissolution. We think it fair to infer, however, that GSI's voluntary agreement to donate 6.5 percent of its receipts to the Club was intended to

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2/ In the late 1980's, the Club's fundraising activities also included the sponsoring of vendors to sell merchandise in FAA headquarters. The vendors agreed to pay the Club 10 percent of any profits. In 1988 two FAA employees continued to sponsor vendors in the name of the Club and voluntarily contributed the funds to the FAA's Day Care Center.

finance the Clubs' morale enhancing purposes. That being the case, we would have no objection to the disposition of such funds for such purposes either to a successor employee morale organization or independently thereof. Naturally, any successor employee morale organization or reorganized Club must comply with Department of Transportation internal regulations.

However, should no successor organization step forward, under 31 U.S.C. § 3322, amounts held in trust for more than 1 year and representing moneys deemed unclaimed must be transferred to the Treasury trust receipt account "unclaimed moneys of individuals whose whereabouts are unknown." See Treasury Fiscal Manual, 6-3000.

Sincerely yours,

Gary L. Kepplinger
Associate General Counsel

COMPTROLLER GENERAL OF THE [illegible]
WASHINGTON, D.C. [illegible]

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B-133394

Dear Mr. Macy:

Reference is made to your letter of October 17, 1967, enclosing a copy of the October 1967 Opinion of the General Counsel of the Civil Service Commission regarding the legality of personal contracts at Goddard Space Flight Center, National Aeronautics and Space Administration.

I feel certain this document will be of significant value to agencies in ascertaining the propriety of technical support, or similar, service contracts. The General Accounting Office has not had nor does it now have any disagreement with the Civil Service Commission as to the standards to be applied in determining whether a contract creates a relationship with the Government tantamount to that of an employer-employee relationship. I believe further that the elements required by your General Counsel's Opinion to be used in determining whether a contract, by its terms, or in its performance, constitutes the procurement of personal services proscribed by the personnel laws will be most useful to my staff in our reviews in this area. The application of the general criteria and elements to the two Goddard Space Flight Center contracts and the view expressed in the Opinion that orderly termination or conversion is required is consistent with the position taken by the Commission in 1965 in connection with the contract technicians at the Fuchu Air Force Base, Japan. The General Accounting Office concurred in the action taken at that time and it concurs in the action now indicated.

I recognize that differences of opinion may sometimes exist as to the relationship created under the terms or operation of particular support service contracts because of differing conclusions as to the application of the general criteria and elements to specific situations. We think it is clear from the Opinion, however, that no single provision of a contract, such as the task assignment or technical direction requirement, may constitute the basis for a determination that the contract is or is not proscribed by the personnel laws. Rather, the Opinion requires, before an adverse determination, (1) a realistic consideration of the provisions of the entire contract and the overall substance of the operations thereunder, and (2) a conclusion that each of the stated elements is involved therein to a substantial degree.

My view is that the Civil Service Commission and the General Accounting Office have a continuing responsibility to assure that applicable laws are

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not bypassed. To that end determinations must of necessity be made that will assure such compliance. Accordingly, as such matters come to our attention during our audit activities, we will continue to consult with representatives of the Commission regarding technical support service and similar contracts which do not appear to meet the general criteria and elements set forth in the Opinion.

The General Accounting Office in the exercise of its responsibilities in this area also will continue to undertake to determine whether agencies are operating in an economical and efficient manner in carrying out their functions.

Sincerely yours,

(SIGNED) ELMER B. STAATS

Comptroller General
of the United States

The Honorable John W. Macy, Jr., Chairman
United States Civil Service Commission

of a [illegible] in Portland, Oregon, for reimbursement of expenses incurred at her official duty station under the following circumstances.

[illegible] Portland, Oregon area, on the

[illegible]

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