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DECISION



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

FILE: B-197348

DATE: July 14, 1980

MATTER OF: Dynal Associates, Inc.

DLG04923

DIGEST:

1. Although statutes and regulations governing competitive procurements are not strictly applicable to procurement for account of defaulted contractor, they may not be ignored if new competition for reprocurement is conducted.
2. Protest alleging procedural irregularities in conduct of negotiated procurement is denied where record shows that protester was not prejudiced in competition.
3. Mere speculation that agency improperly disclosed protester's price during negotiated procurement, which is denied by agency, does not meet protester's burden to affirmatively prove its case.
4. Whether requirement is completed in accordance with all specifications at contract price is matter of contract administration and thus not for consideration by GAO.

Dynal Associates, Inc. (Dynal) protests the award of a contract to Andrews & Parrish Co. (A&P) under request for proposals (RFP) No. DACA65-80-R-0001, issued by the U.S. Army Corps of Engineers (Corps) to reprocure the completion of the improvement of family housing units at Ft. Eustis, Virginia. The original contract for the work had been awarded to another firm and was terminated for default with 51 apartment units remaining uncompleted. Dynal contends that the Army violated various regulatory requirements in conducting the reprocurement; that Dynal's price

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Protest Alleging

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proposal improperly was disclosed to its competitors; and that A&P's offer may have been for less than the amount of work solicited. We find the protest to be without legal merit.

The RFP's Scope of Work section provided:

"All work is to be completed in accordance with the Contract Documents * * *. The list of items in the Bill of Work constitutes an approximate scope of the work remaining to be done and the Government-furnished materials stored on the site. The contractor is responsible for visiting the site and for verifying the remaining work to be done."

The referenced Bill of Work listed hundreds of work items in its 260 pages and provided spaces to enter a unit price for each apartment, and for certain electrical and civil/site work. The total cost proposed would be the total of those unit prices less the cost of the materials already on the site.

The only proposal received was from Dynal, in the amount of \$583,000, which substantially exceeded the Government estimate of \$406,923. Dynal advised the Army that its offer was predicated on the complete rehabilitation of the project in accordance with the original plans and specifications, rather than simply performing each item listed in the Bill of Work; by Dynal's estimate such a "total job" was somewhat more costly. The firm also reduced its offer to \$558,000. In view of the different bases for Dynal's proposal (total job) and the Government estimate (Bill of Work), the difference in the amounts, and the Army's obligation to minimize the defaulted contractor's damages (see 42 Comp. Gen. 493 (1963)), the contracting agency determined to solicit proposals from other construction firms.

On December 10, Dynal orally was requested to submit a proposal involving only the Bill of Work items; a similar request was made to the other interested firms, including A&P. Dynal was low at \$524,000, while A&P's proposed cost was \$609,400. The record shows that Dynal, assuming that these submissions ended the competition,

then initiated the exchange of pricing information with its competitors, thereby revealing its low offer. In this connection, it is not clear from the record whether the Corps advised Dynal of the identities of the other offerors, or whether Dynal learned them some other way.

However, by letter of December 20, the Corps requested the submission of best and final offers to complete the entire project, i.e., the offer was not to be limited to the Bill of Work items. That request also added a number of additional work requirements. Of the three offers received in response, A&P's was the lowest at \$542,000, while Dynal's was \$558,000 (the same amount as the firm's reduced initial offer). In the interim, the Government estimate had been revised to \$496,849.

Dynal first protests the "gross informality" with which the procurement was conducted. For example, Dynal contends that the Corps should have followed the December 10 oral request for a new offer with a formal written amendment confirming the basis on which the offer should be calculated and the date it would be due. Dynal argues that such action is prescribed by Defense Acquisition Regulation (DAR) § 3-805.3(d) and DAR § 3-805.4(a) (1976 ed.). The former requires that offerors be afforded "a reasonable opportunity" to revise their proposals. DAR § 3-805(a) requires that changes in an RFP's statement of requirements must be by written amendment, unless time does not permit such action, in which case oral advice may be given if "promptly confirmed" by written amendment. Again citing DAR § 3-805.4(a), Dynal argues that the request for best and final offers should have been accompanied by a formal amendment to reflect the additional work items.

Initially, we note that because the procurement was for the account of a defaulted contractor, regulations governing competitive procurements generally would not strictly apply, since the defaulted contractor would be liable for and ultimately would fund the reprocurement costs in excess of the defaulted contract price. PRB Uniforms, Inc., 56 Comp. Gen. 976, 977 (1977), 77-2 CPD 213; 42 Comp. Gen. supra.

Nevertheless, where, as here, a new competition in fact is conducted to reprocore, it has been held that the competitive procurement regulations may not be ignored. Skip Kirchdorfer, Inc., B-192843, February 15, 1979, 79-1 CPD 111. For example, in PRB Uniforms, Inc., supra, we restated the position of the Armed Services Board of Contract Appeals that where formal advertising procedures are used in connection with a reprocorement, the Government "has the obligation to maintain the integrity of the bidding system by applying the regulations relevant to that procedure." Royal-Pioneer Paper Box Manufacturing Co., Inc., ASBCA No. 13059, April 10, 1969, 69-1 BCA 7631. Similarly, we have recognized that the specifications on which a reprocorement is based should be sufficiently and adequately defined to insure that offerors are competing on a common basis. Charles Kent, B-180771, August 7, 1974, 74-2 CPD 84.

We cannot agree with Dynal that the conduct of the procurement was improper. The rationale behind the requirements at DAR § 3-805.3(d) and DAR § 3-805.4(a) is to insure that firms are clearly advised of the Government's needs so that offers can be prepared and evaluated on a common basis. Lawrence Johnson & Associates, Inc., B-196442, March 11, 1980, 80-1 CPD 188. In view thereof, we have recognized that the failure to follow the letter of the regulatory requirements to formalize in writing an RFP's amendments does not necessitate remedial action where the competition was not prejudiced thereby. Washington School of Psychiatry/The Metropolitan Educational Council for Staff Development, B-192756, March 14, 1979, 79-1 CPD 178.

Here, despite the fact that the Corps' December 10 request to Dynal for a revised offer was oral instead of written, the fact is that Dynal submitted a timely and acceptable response. We note here that in the Corps' view DAR § 3-805.4(a) was not even applicable to the December 10 communication on the basis that rather than amending the solicitation the Corps merely was affording Dynal, whose offer had been based on a total job, the chance to submit an offer conforming to the Corps' interpretation of the RFP as issued, i.e., Bill of Work items only. Similarly, the work items added by the Corps to the requirement during the course of the procurement in

fact were listed in the December 20 request to Dynal and its competitors for best and final offers.

Under the circumstances, we cannot say that Dynal was prejudiced by what the firm considers to have been an improperly informal competition, and thus the matters raised provide no basis to object to the award to A&P. Washington School of Psychiatry, supra.

Dynal next contends that the Corps improperly disclosed to A&P Dynal's initial revised offer of \$558,000 for a total job, so that A&P knew that to be successful in the final competition it probably would have to offer to complete the project for less than that amount. The bases for that contention are that Dynal has discovered that a number of people at the procuring activity were aware of the offer; that during the competition A&P had advised a prospective subcontractor that A&P had the "inside track" on the award; and that A&P's price of \$542,000 for a total job was over \$60,000 less than its price for just the Bill of Work items. In this respect, Dynal points out that the Government estimate of \$496,849 for a complete job was approximately \$90,000 more than the initial estimate for performance of just the Bill of Work items (\$406,923).

In response to the protest, the Corps conducted an investigation into the allegation of improper disclosure. The investigation involved questioning all procuring activity personnel who might have been privy to Dynal's offer, and requesting an explanation from A&P regarding the statement allegedly made to its potential subcontractor. All personnel questioned denied any improper disclosure of Dynal's price. In addition, A&P stated that if it did advise another firm as alleged, that action would have been done merely to secure the best subcontract price possible, which A&P asserts is a common practice.

In addition, the Corps advises that the \$90,000 increase in the Government estimate from the one for the original Bill of Work items involved approximately a \$78,000 upward revision in the Bill of Work estimate, and only \$12,000 of additional work for a total job.

Dynal simply has provided no concrete basis to support the allegation that its offer of \$558,000 for a total job improperly was disclosed. See Carol L. Bender, M.D.; National Health Services, Inc., B-196912, B-196287, April 1, 1980, 80-1 CPD 243. The firm only offers a number of factors from which it believes that a conclusion should be drawn. However, the protester has the burden to affirmatively prove its case. Reliable Maintenance Service, Inc.-- request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337. In view of the results of the Corps' investigation, Dynal's speculation on this issue does not satisfy that burden. National Presto Industries, Inc., B-195679, December 19, 1979, 79-2 CPD 418. The protest on this issue must be denied.

Finally, Dynal suggests as an alternative position that A&P mistakenly must have reversed its Bill of Work and total job proposals, since the latter logically should have been the higher one. On that basis, Dynal contends that the Corps should have compared Dynal's best and final offer of \$558,000 with A&P's initial offer of \$609,400, notwithstanding A&P's actual best and final offer of \$542,000, and thus that A&P in fact expects to perform only the Bill of Work items.

However, the record of the Corps' negotiations with A&P indicates that the firm was advised that a total job was contemplated; the request for best and final offers established the requirement; and A&P's best and final offer does not show any exception to that scope of work. In fact, the amount of A&P's offer is consistent with both the Government estimate for a complete job and Dynal's offer of \$558,000.

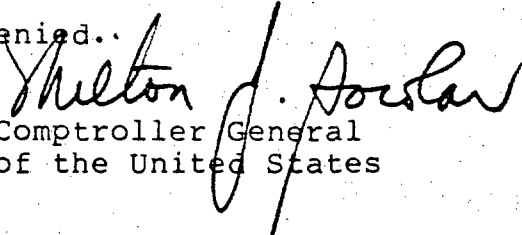
In any case, A&P has been found to be a responsible firm, i.e., in the Corps' judgment A&P has the apparent ability to perform in accordance with its contractual obligations at the contract price. We do not review such judgments except in circumstances not applicable here. Industrial Maintenance Services, Inc., B-195216, June 29, 1979, 79-1 CPD 476. Moreover, whether A&P performs as required is a matter of contract administration and thus

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also not for our consideration. Virginia-Maryland
Associates, B-191252, March 28, 1978, 78-1 CPD 238.

The protest is denied..


For the Comptroller General
of the United States