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DECISION

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

FILE: B-220091 **DATE:** January 22, 1986

MATTER OF: Industrial Refrigeration Service Corporation

DIGEST:

1. Agency's use of noncompetitive procedures (provided for under the Competition in Contracting Act) on a procurement for the completion of a terminated contract at a medical center is unobjectionable where the agency reasonably determined that conditions at the worksite were dangerous and threatened the well-being of the patients, so that there was no time to conduct a full competition.

2. Where agency properly determined due to urgent circumstances that it must use noncompetitive procedures provided for under the Competition in Contracting Act, agency properly may limit the number of sources to those firms it reasonably believes can promptly and properly perform the work, and is not required to solicit all firms which express interest in performing work.

Industrial Refrigeration Service Corporation (Industrial) protests the award of a contract to South Texas Mechanical Services, Inc. (South Texas) by the Veterans Administration (VA) to complete the work which had been partially performed under Industrial's previously terminated contract No. V580C-674-84, for the replacement of two water chillers in the VA Medical Center in Houston, Texas. Industrial contends that it was improperly excluded from competing for the reprocurement.

We deny the protest.

The VA awarded contract No. V580C-674-84 to Industrial on June 25, 1984. Performance on the contract was suspended on February 22, 1985, however, because of perceived deficiencies in Industrial's work associated with asbestos removal. After the VA performed an inspection, the VA terminated Industrial's contract for default on February 27, 1985. In order to have the terminated work completed, the

VA executed a surety takeover agreement whereby a third party was permitted by the parties to perform the work on behalf of the surety.

Industrial appealed the default termination of its contract to the VA Board of Contract Appeals. On or about August 5, 1985, the VA agreed to convert the default termination to a termination for the convenience of the government. On August 29, Industrial's surety advised the VA that it would provide no further performance and on September 4, the VA formally rescinded the surety takeover agreement.

According to the VA, on September 5, a meeting was held by the VA medical center's supply and engineering officials. It was determined that the failure of the contractor to complete the project had created an extremely hazardous situation that had to be resolved immediately. South Texas and Neva Corporation, two firms with recent satisfactory performance records on VA work were contacted on September 6 to determine if they would submit prices for the completion of the project. Prices were submitted and award was made to South Texas on September 16 based on unusual and compelling urgency as authorized by 41 U.S.C.A. § 253(c)(2) (West Supp. 1985).

Industrial states that by letter dated September 6, it notified VA contracting personnel of its desire to bid on the remaining work under the contract but was refused the opportunity. Industrial contends that the VA's refusal to permit it to submit an offer for the completion contract violated both the Competition in Contracting Act of 1984 (CICA) and provisions of the Small Business Act as amended, specifically, 15 U.S.C. § 637(b)(7)(A) (1982), dealing with bidder responsibility.

As indicated above, the VA relied on 41 U.S.C.A. § 253(c)(2) (West Supp. 1985) to justify award to South Texas with competition limited to the two firms solicited. That provision authorizes an executive agency to use noncompetitive procedures when:

> "the executive agency's need for the property or services is of such an unusual and compelling urgency that the government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals."

In using noncompetitive procedures, however, the executive agency must request offers from "as many potential sources as is practicable under the circumstances." 41 U.S.C.A. § 253(e) (West Supp. 1985).

We believe the VA's decision that there was sufficient urgency to use noncompetitive procedures and to exclude the protester under these procedures was reasonable. The justification states that due to the lack of progress and the abandonment of the project by the surety's subcontractor, two surgery suites had to be shut down, and continued delays jeopardized the well-being of the patients. In addition, debris left behind created a hazardous condition. Moreover, the justification states that the surety's subcontractor left uncovered piping which was sweating and dripping to the extent that equipment, controls, electrical panels and the electrical distribution system were in jeopardy of being destroyed.

The VA states that it did not solicit a proposal from Industrial due to the urgency of the situation and the determination, made by the Chief of Supply Service of the Medical Center, that Industrial was not a responsible contractor to perform the work. The VA states that the determination was based on Industrial's unsatisfactory performance under two recent medical center construction contracts, the subject water chiller replacement contract which was terminated (initially for default, then converted to convenience of the government) and an energy management system contract under which Industrial had been issued 5 cure notices and is currently being considered for default termination. The VA states that in accordance with the Federal Acquisition Regulation (FAR), 48 C.F.R. § 36.2 (1984), an unsatisfactory performance evaluation is being prepared for Industrial's performance under these two contracts.

The VA concluded that because the well-being of the patients was being jeopardized, an exigent situation existed, and a limited competition was called for. The VA competition advocate concurred, and as a result the agency asked two firms known to have satisfactory work experience to submit offers and ultimately awarded a contract to the low offeror.

We think the VA's action was reasonable under the circumstances. It is clear that there was an urgency situation, and it is also clear that in light of the urgency the agency was not in a position to solicit a large number

of firms. We think what the VA did here, limiting the competition to firms with satisfactory work experience which, in the VA's view, could promptly and properly finish the work, was consistent with CICA and, in fact, we have already upheld the VA's action in limiting this procurement as it did. See Reliance Machine Works, Inc., B-220640, Dec. 18, 1985, 85-2 C.P.D. ¶ ___.

The protester refers to the VA's statement in its protest report that the reason Industrial was not solicited was because it was determined nonresponsible. The protester asserts that since it was a small business, the VA cannot preclude Industrial from competing because of its alleged nonresponsibility without first referring the matter to the Small Business Administration for a certificate of competency determination. 15 U.S.C. § 637(b)(7)(A). Although the agency states that it viewed Industrial as nonresponsible, we think that under the urgency justification for use of noncompetitive procedures under CICA, it properly could limit the sources solicited to those that it reasonably believed could perform the work and to which it could expect to make a prompt award. Accordingly, in view of Industrial's prior record of performance, we do not believe the VA was required to solicit Industrial.

The protest is denied.

Harry R. Van Cleve
General Counsel