Woods

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Southwest Marine, Inc.

File: B-225559; B-225559.2

Date: April 22, 1987

DIGEST

1. Protest of alleged sole-source award is without merit where the agency issued an invitation for bids (IFB) to six potential contractors, three of which submitted bids. The fact that only one bidder was able to satisfy a qualification requirement contained in the IFB prior to the planned award date did not render this a sole-source procurement.

2. There is no merit to protester's contention that the agency violated statutory requirements that an agency inform prospective bidders of what must be done to satisfy a qualification requirement and that it promptly furnish a firm seeking qualification with specific information why qualification was not obtained where the agency provided detailed information concerning the qualification requirement to a number of prospective bidders, including the protester, several months prior to issuance of a solicitation and provided the protester with a detailed list of reasons for the agency's determination that the protester had not satisfied the qualification requirement.

3. Protest of nonresponsibility determination is denied where the agency had a reasonable basis for concluding that there was a significant risk that the protester might not be able to perform the contract in a timely manner in accordance with the required performance schedule.

DECISION

Southwest Marine, Inc. protests the rejection of its low bid and the award of a contract to Continental Maritime of San Diego, Inc. under invitation for bids (IFB) No. N62791-87-B-0015, issued by the Navy's Supervisor of Shipbuilding, Conversion and Repair, San Diego, California. Southwest contends that the award to Continental was made improperly on a sole-source basis, that the agency did not provide Southwest a meaningful opportunity prior to award to satisfy

a prequalification requirement, and that the agency improperly determined that Southwest was not responsible. We deny the protest.

The solicitation, which was for repairs and alterations of the USS TRUXTUN, a nuclear-powered cruiser, contemplated the award of a job order under a Master Agreement for Repair and Alteration of Vessels.[1/] A significant portion of the work required involves the vessel's secondary propulsion plant system. The solicitation included a section entitled "Special Contract Provisions for Work On Board Nuclear-Powered Surface Vessels" (Attachment J-3) which contains detailed requirements concerning such matters as steam plant cleanliness, security, and training of personnel. Amendment No. 3 to the solicitation advised bidders that the contracting officer's determination of a bidder's responsibility would be based in part on whether the bidder had obtained prior to award a certification from the Naval Sea Systems Command (NAVSEA) to perform work on secondary propulsion plant systems on nuclear-powered surface vessels in accordance with both the requirements of Attachment J-3 and an August 21, 1986, letter to all Master Agreement contractors in San Diego. The amendment provided that a bidder not having such a certification prior to bid opening would be determined to be nonresponsible, unless there was sufficient time prior to award "to permit the proper assessment of the offeror's qualifications."

When the agency opened bids on December 1, the bid from Southwest was the lowest of three bids received. On December 3 and 4, the agency conducted a preaward survey of Southwest which resulted in a recommendation that award not be made to the firm. The contracting officer determined that Southwest was not responsible and so informed the firm by letter dated December 12. The contracting officer stated in the letter that while the solicitation required that some of the repair work be accomplished in a certified mercury-free environment, the certified facility Southwest planned to use was for sale. The contracting officer said that if the facility were to be sold without providing for Southwest to

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[1/] A Master Agreement for Repair and Alteration of Vessels, commonly known as a Master Ship Repair Contract, see Carolina Drydocks, Inc., B-218186.2, June 3, 1985, 85-1 CPD ¶ 629, establishes the terms under which a contractor will perform work on vessels pursuant to subsequently issued job orders. See generally Fairburn Marine Aviation, B-187062, Dec. 22, 1976, 76-2 CPD ¶ 523.

retain use of the facility until work under this contract was complete, relocating to another certified facility could cause a delay in contract performance. In addition, the contracting officer noted that when agency personnel contacted some of Southwest's proposed subcontractors and suppliers of critical items, they were informed that Southwest had not contacted the proposed subcontractors regarding either prices or delivery terms.

In further support of the nonresponsibility determination the contracting officer said that the work schedule Southwest submitted did not include all of the propulsion plant work items and did not allow time for performance by subcontractors. With respect to staffing levels, the contracting officer noted that Southwest could have difficulty in providing a sufficient number of personnel with both the security clearance and training required under the solicitation by the date scheduled for start of production. Further, Southwest had indicated that a significant number of repair parts would not arrive until midway through the contract production period. Southwest's failure to provide some written procedures as required, as well as the unacceptability of some of the procedures that were submitted, were also cited as reasons for finding the firm to be nonresponsible.

Finally, the contracting officer noted that Southwest had not been certified by NAVSEA to perform work on secondary propulsion plant systems on nuclear-powered surface vessels, as the solicitation required. The contracting officer stated there was no longer sufficient time prior to the scheduled award date to determine whether Southwest met the requirements for certification.2/

Southwest filed its first protest with this Office on December 12 (B-225559), objecting to the proposed award to Continental Maritime on the basis that the agency had violated 10 U.S.C. § 2319(b) (Supp. III 1985) by not affording Southwest a meaningful opportunity to obtain the NAVSEA certification. Southwest also contended that since only one firm had been certified, an award to Continental would represent a sole-source award without agency compliance with the justification and approval requirements of 10 U.S.C. § 2304. On December 24, after receiving notice of the contracting officer's nonresponsibility determination, Southwest filed

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2/ Some of the reasons cited by the agency for its nonresponsibility determination involve matters which also appear to involve elements necessary for the NAVSEA certification, i.e., certified mercury-free environment and written security procedures.

an additional protest (B-225559.2) challenging each of the reasons stated as a basis for that determination.3/

There is no merit to the protester's contention that the agency made award to Continental on a sole-source basis without complying with the requirements of 10 U.S.C. § 2304. That statute requires that agencies obtain full and open competition through the use of competitive procedures when acquiring goods or services, except in seven specified circumstances. 10 U.S.C. §§ 2304(a)(1)(A) and (c). When an agency invokes one of the seven exceptions, the use of other than competitive procedures must be justified and approved in accordance with the requirements of 10 U.S.C. § 2304(f). "Full and open competition" means, however, that all responsible sources are permitted to submit offers. 10 U.S.C. § 2302(3); 41 U.S.C. § 403(7) (Supp. III 1985). In this case, the agency allowed all potentially responsible sources to bid (solicitations were issued to six Master Agreement contractors in the San Diego area) and three potential sources, including the protester, did so. Thus, even though only one source may have been considered qualified by the time of award, this is not a case where the agency determined in advance that only one source could meet its needs, and therefore does not constitute a "sole-source" procurement to which the justification and approval requirements of 10 U.S.C. § 2304 apply. See Treadway Inc.--Request for Reconsideration, B-221559.2, July 31, 1986, 65 Comp. Gen. ____, 86-2 CPD ¶ 130. In fact, at the time the solicitation was issued it was possible that all six of these firms could have became qualified sources by the time award was made.

3/ After reviewing the allegations contained in the second protest, the agency requested that it be allowed to submit one report covering both protests no later than January 28, 1987. We approved the request after consulting with the protester's attorney. The agency filed its consolidated report on February 2, which was 3 working days after the agreed due date. On this basis, the protester requests that the report not be considered. We deny the protester's request because the delay in submission of the report was due, at least in part, to the closing of government offices in Washington, D.C. for 2 days because of snow. In any event, the protester was not prejudiced because of the delay since it still was allowed 7 working days from its receipt of the consolidated report within which to filed its comments. See TIW Systems, B-222585.8, Feb. 10, 1987, 87-1 CPD ¶ 140.

We also find no violation of section 2319 of title 10. That section, entitled "Encouragement of New Competitors," defines a "qualification requirement" as "a requirement for testing or other quality assurance demonstration that must be completed by an offeror before award of a contract." The term embraces such things as qualified bidders lists, qualified manufacturers lists, and qualified products lists (QPL). The agency argues that the reference in the statute to "quality assurance demonstration" should be read narrowly as applying only to an offeror's quality control procedures and not to a requirement involving safety and security. We do not agree. In our view, the statute appears to describe the requirement imposed by the agency in this case: that a bidder have obtained prior to award certification and approval by NAVSEA to perform work on secondary propulsion plant systems on nuclear-powered surface vessels.

The statute provides that if an agency wishes to establish a qualification requirement it must specify in writing and make available to potential offerors all requirements that prospective offerors must satisfy in order to become qualified. 10 U.S.C. § 2319(b)(2). The statute also requires that an agency promptly furnish to a firm seeking qualification specific information as to why qualification was not obtained. 10 U.S.C. § 2319(b)(6). It is these two requirements of section 2319 that Southwest claims were violated in this case.

The record shows that the agency informed ten San Diego-area Master Agreement contractors in June 1986 that the requirements of Attachment J-3 would apply to two scheduled vessel repair solicitations, one being the IFB for work on the TRUXTUN to be issued in early November. The agency furnished copies of the requirements to the firms and advised them to indicate their interest in qualifying no later than June 30. By memorandum dated August 21, the agency provided additional material to the several firms that apparently had expressed an interest in qualifying and informed them of a meeting scheduled for September 9 to discuss the qualification requirement. Representatives of Southwest attended that meeting. The agency assembled a certification team to inspect each firm's facilities and review its procedures for compliance with certification requirements. By letter dated November 25, the agency informed Southwest that the certification team had reported unsatisfactory findings with

respect to each of the five general areas[4/] involved in the certification process. The letter identified specific reasons for each unsatisfactory finding. For example, under "Training" the agency stated that lesson plans, topic exams, training records, and training were not properly presented. Under "Facilities" the agency noted that the flushing system was not operational and that the procedures for procurement of QPL, mercury-free and "MIC Level, Material" were not submitted.

Thus, based on our review of the record, it appears that the agency complied with 10 U.S.C. § 2319. The agency provided all interested firms, including Southwest, with detailed descriptions of the requirements for qualification several months prior to the date scheduled for issuance of the IFB. In addition, the agency promptly informed Southwest in writing of the reasons why it had not qualified. Further, the certification process involved a number of detailed requirements, with the applicant having the responsibility to prepare adequate documentation with respect to each of them. The record indicates that there were numerous submissions, evaluations, and resubmissions of required written procedures. While each party in this case blames the other for the length of time consumed in Southwest's attempt to obtain the certification, it appears to us that the time involved here was not extraordinary given the volume of the submissions and the nature of the work. That Southwest did not qualify for the certification does not mean that the agency violated section 2319.

In any event, Southwest was found nonresponsible for several reasons, the lack of a NAVSEA certification being only one of them. As we read the contracting officer's determination of December 12, which was based on the preaward survey report of December 5, the primary concern underlying the remaining reasons cited in support of the determination appears to be that there was a very high risk that Southwest would not be able to complete work under the contract on time.

4/ The five areas cited were, "Training," "Project Manager Team," "Security Requirements," "Procedures," and "Facilities." As indicated in footnote 2, some of these areas were cited with respect to the contracting officer's nonresponsibility determination. They are discussed more fully later in this decision.

A procuring agency is vested with broad discretion in determining whether a prospective contractor is responsible. American Bank Note Co., B-222589, Sept. 18, 1986, 86-2 CPD ¶ 316. For this reason, and since it is the agency that must suffer the consequences of unsatisfactory contract performance, we will not disturb an agency's determination of nonresponsibility unless the protester can demonstrate bad faith on the part of the agency or that the agency's determination lacked a reasonable basis. Martin Electronics, Inc., B-221298, Mar. 13, 1986, 86-1 CPD ¶ 252. The protester has not alleged bad faith in this case. Although, as discussed below, Southwest has raised legitimate points with respect to at least one of these reasons given for the nonresponsibility determination,5/ on balance we conclude that the agency's concern that an award to Southwest would create an unacceptable risk of performance delays was reasonably based.

With respect to the protester's plan to sell the firm's certified facility, the protester insists that in addition to informing the preaward survey team of this plan the protester also advised the team that the firm would not divest itself of the existing certified facility unless and until the new facility had been completed and certified. A member of the agency's preaward survey team, on the other hand, reports being informed by the protester only that if a sale should occur during contract performance, Southwest would not retain possession of the mercury-free facility and would have to relocate.

Even assuming the protester's version of the facts, we think the agency reasonably could conclude that if the protester were required to change facilities during contract performance, there was a substantial risk of at least some delay. In this connection, the solicitation required the work under the contract to be completed by May 18, 1987.6/

5/ The contracting officer stated that Southwest's proposed work schedule did not provide for accomplishment of some of the work items, but from our review of the work schedule it appears that Southwest did so provide.

6/ Subsequent to the filing of Southwest's protests the agency awarded a contract to Continental notwithstanding the pendency of the protests based upon its written determination that urgent and compelling circumstances significantly affecting the interests of the United States would not permit waiting for our decision. See 31 U.S.C. § 3553 (c)(2)(A) (Supp. III 1985).

Concerning the issue of whether Southwest had arranged for subcontractor performance of some of the work items, the preaward survey team reported that one proposed subcontractor, Wilson Snyder, Inc., stated that it had not been contacted by Southwest for a quote and that it would not have sought additional work in any event because of ongoing labor problems. Southwest, on the other hand, has provided us with a copy of its written request to Wilson Snyder for a quotation for work on the main feed pumps and turbines. Southwest acknowledges that Wilson Snyder was reluctant to bid on this work, but says that it still had hoped to use the firm as a subcontractor. One of Southwest's employees says that he had solicited and received a backup quotation from another firm, but another of Southwest's employees states that he informed the preaward survey team only that Southwest "was obtaining" a back-up quote from another subcontractor. There is no indication that Southwest ever informed the agency that a back-up quotation had been received. Thus, while the agency apparently was misinformed concerning Southwest's contacts with Wilson Snyder, we think that based on the information available to the agency, there was a reasonable basis for concluding that Southwest's arrangements for work on the main feed pumps and turbines were so indefinite that timely performance of key subcontractor work could not be assured.

Another reason cited by the agency as a basis for doubting Southwest's ability to perform the contract in a timely manner was that the firm did not appear capable of providing a sufficient number of personnel with the required security clearance. The agency noted that of the 40 clearance applications it reviewed, in only 19 cases did it appear that the applicant had obtained a previous clearance from the Department of Defense. The agency states that obtaining clearances for those not previously cleared would require a significantly longer period of time than was available prior to the scheduled commencement of the work. Moreover, all personnel would require government training before being permitted access to the ship, and security clearances were necessary before such training could commence.

The protester does not dispute the agency's findings with respect to the number of its personnel with a previous security clearance, but merely points out that the agency awarded the contract to Continental despite Southwest's protest because of the need to allow the awardee 6 to 8 weeks to process its security clearance applications. The protester does not contend, however, that it could have obtained all required security clearances within the same period. In the absence of any indication that the protester could have met the solicitation's requirements concerning security clearances in a timely manner, we have no basis to question the agency's judgment that Southwest's ability to do so appeared doubtful.

Finally, as noted earlier in this decision, the contracting officer's nonresponsibility determination listed a number of the written procedures that Attachment J-3 (paragraph H2-20) required to be submitted in connection with a preaward survey, but which either were not submitted or were unacceptable as submitted. Specifically, the contracting officer noted that Southwest had failed to submit procedures for the work item entitled "Scheduling, Progressing, Material Status and Associated Reports," and for the schedule control of individual work items. The procedures submitted but found to be unacceptable concerned control of government-furnished property, contractor-furnished material, and subcontractor work.

The protester does not dispute the finding of the preaward survey team that the firm's procedures were deficient. Instead, the protester characterizes the deficiencies as merely "informational" and notes that while Attachment J-3 provided that these written procedures were required to be produced within 5 working days of notification from the contracting officer, Southwest was given only 3 working days. In addition, the protester points out that the contracting officer failed to advise the firm that the preaward survey team had reported the deficiencies. In our view, the protester had not provided us with a sufficient basis on which to question the agency's judgment concerning the deficiencies noted in the firm's written procedures.

We cannot conclude from this record that the agency's nonresponsibility determination was unreasonable. Rather, it appears the agency had several valid concerns regarding Southwest's ability to perform the contract within the time required by the solicitation. The protest is denied.

Harry R. Van Cleve
General Counsel