

G-1955



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: General Electric Canada, Inc.
File: B-230584
Date: June 1, 1988

DIGEST

1. Protest that agency violated Federal Acquisition Regulation (FAR) §§ 15.402(c) and (d) (FAC 84-5) for failure to have a definite intent to award a contract for the correction of deficient turbine units is denied where the agency advised all offerors, prior to receipt of proposals, that it intended to award a contract, but that, if the incumbent contractor corrected its deficiencies, at no cost to the agency, the solicitation would be canceled. Protester could have elected not to participate in the procurement.
2. Protester's objection to the agency's continued settlement negotiations with the incumbent contractor during the pendency of the current procurement for correction of deficiencies under the incumbent's prior contract, because of the possibility of technical transfusion or the use of auction techniques, is based on mere speculation and provides no basis with which to challenge the propriety of the agency's conduct of the procurement.
3. General Accounting Office will not review the agency's decision to continue negotiations for correction of deficiencies with incumbent contractor as it concerns a matter of contract administration that this Office does not review under its bid protest function, since administration of an existing contract is within the discretion of the contracting agency.
4. Where letter containing questions and answers concerning the terms of the solicitation is furnished to all offerors in a writing signed by the contracting officer, this letter meets the essential requirements for a solicitation amendment and is binding on all parties.

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5. Contentions which merely anticipate agency action are premature and will not be considered.

DECISION

General Electric Canada, Inc., protests review of proposals and award of a contract under solicitation No. DACW67-88-R-0001 issued by the Department of the Army, Seattle District, Corps of Engineers. As the first step of a two-step sealed bid procurement,^{1/} the Corps issued a request for technical proposals (RFTP) to correct performance deficiencies in 11 each 136,000 horsepower turbines at Chief Joseph Dam, Bridgeport, Washington.

The protest is dismissed in part and denied in part.

Step one, the RFTP, was issued on November 23, 1987, requesting technical proposals to correct performance deficiencies in the turbines. The turbines were originally manufactured by Hitachi America, Ltd. under contract No. DACW67-74-C-0050. Under the terms of that contract, Hitachi guaranteed to provide turbines that would operate at 92.5 percent efficiency level when developing 116,000 horsepower at a net head of 163 feet. The turbines failed to meet the guaranteed efficiency and the Corps, to this date, has failed to obtain Hitachi's agreement to correct the deficiencies.

The RFTP was divided into two schedules. Under Schedule A, offerors submitted proposals to "perform engineering and design work and hydraulic model testing necessary to determine and describe a method of correcting the performance deficiency of Chief Joseph Dam's Units 17-27 turbines." Schedule B solicited offers for the actual performance correction developed under Schedule A. The RFTP provided that the evaluation of technical proposals under step one would be based solely on the technical criteria contained therein along with drawings, descriptive data, qualifications and experience. Proposals that were determined to meet the RFTP criteria would be classified as

^{1/} Two-step sealed bidding is a hybrid method of procurement that combines the benefits of sealed bids with the flexibility of negotiations. Step one is similar to a negotiated procurement in that the agency requests technical proposal, without prices, and may conduct discussions. Step two consists of a price competition conducted under sealed bid procedures among those firms that submitted acceptable proposals under step one. See Federal Acquisition Regulation (FAR), subpart 14.5 (FAC 84-12).

"Acceptable," and prices for these proposals would be requested under step two. Seven proposals were received, including one from GE Canada, in response to the RFTP on March 3, 1988.

GE Canada's protest raises several issues. First, GE Canada contends that the Corps issued the subject RFTP in violation of the FAR §§ 15.402(c) and (d) (FAC 84-5) requirements that there be a "definite intent to award a contract." GE Canada argues that the Corps cannot have an intention to award a contract when it is already obligated to negotiate with Hitachi under an open contract to perform the same work and where the agency has advised prospective offerors that if Hitachi completes its contract satisfactorily and at no further cost to the government, then the solicitation would be canceled. GE Canada requests that this Office recommend to the Corps that they complete, resolve and close-out the ongoing Hitachi contract before soliciting other contractors for the correction of Hitachi's performance deficiencies.

The agency's response is that it intends to award a contract under the current RFTP and has so advised all offerors. Further, all offerors are aware of the agency's ongoing negotiations with Hitachi to correct the deficiencies at no additional cost to the government and are also aware of the consequences of a possible agreement between Hitachi and the Corps.^{2/}

We find no basis to disturb the procurement. Initially, we note that there is no evidence that the agency is not acting in good faith. Rather, the protester, in essence, objects to the risks involved in submitting a proposal where the possibility exists that a settlement may be reached by the Corps and Hitachi, leading to the cancellation of the solicitation. However, the protester knew, prior to the submission of its proposal, of the ongoing negotiations and could have elected not to participate in this procurement. Further, we also note that six other offerors who were fully aware of these facts decided to submit proposals. Under the circumstances, we find that the protester and the other firms knowingly and voluntarily assumed the risk of competing with the possibility that the concurrent negotiations

^{2/} Negotiations with Hitachi to correct the deficiencies have been ongoing for over 5 years with little or no progress. We also note that the Corps, by issuing this RFTP, is proceeding under the inspection clause contained in Hitachi's contract under which the government may by contract or otherwise replace or correct defective performance and charge the cost to Hitachi. Hitachi's contract has not been terminated.

between Hitachi and the Corps may lead to cancellation of the solicitation. Since all offerors are equally subject to the same risks, knowingly assumed, we find no merit to the protester's contention.

Second, the protester argues that the Corps is conducting preferential negotiations with Hitachi, thus discriminating against other prospective proposers by denying them an opportunity to participate in similar negotiations. The protester contends that continued negotiations with Hitachi carry the risk that proprietary and novel technical solutions will be transferred to Hitachi and "all but guarantees" a violation of the FAR § 15.610(d)(3) (FAC 84-16) prohibition against auction techniques.

The Corps responds that its negotiations with Hitachi do not prejudice the interests of any RFTP proposers because the Corps is not discussing the current RFTP with Hitachi. The Corps states that it can and will avoid technical transfusion of RFTP submittal contents to Hitachi and all other offerors.

To the extent that the protester is making allegations of technical transfusion and auctioneering, we find that the protest is premature since proposals are currently being evaluated and there is no evidence to support the protester's contention other than its mere speculation that the Corps will engage in such improper actions in the future. Speculation alone provides no basis for sustaining a protest. See Mount Pleasant Hospital, B-222364, June 13, 1986, 86-1 CPD ¶ 549. This is because the protester has the burden of demonstrating the merits of its case. E.H. Pechan Associates, Inc., B-225648, Feb. 17, 1987, 87-1 CPD ¶ 176. Consequently, there is no basis for us to consider the protester's concerns at this time. Further, with respect to the protester's request that this Office recommend that the Corps cease from any negotiations with Hitachi while soliciting correction of performance deficiencies from other contractors, this request concerns the Corps' administration of an existing contract which is within the discretion of the contracting agency and not for consideration by this Office. 4 C.F.R. § 21.3(m)(1) (1988).

Third, the protester argues that the solicitation is ambiguous. The protester sent 29 questions by letter dated February 1, 1988, to the Corps concerning evaluation factors, how proposal content would be protected from disclosure, why the RFTP contains two bidding schedules, and what line items are considered services as opposed to supplies and end products. There were also questions seeking affirmation of the protester's understanding of the specifications and speculation about what will happen among

the Corps, Hitachi and the new contractor after award under the current solicitation. In response to the protester's questions, the Corps answered all 29 questions by letter and provided all prospective offerors a copy of the questions and answers. Additional amendments concerning only some of these matters were also subsequently issued. The gist of this protest allegation stems from the protester's belief that the Corps should have answered the protester's 29 questions by a formal amendment to the solicitation rather than by a simple letter to all offerors. However, we find that although the letter was not formally designated as an amendment, it was in writing, signed by the contracting officer, and sent to all offerors. These are the essential elements of an amendment. See Audio Visual Concepts, Inc., B-227166, July 24, 1987, 87-2 CPD ¶ 86. We therefore think the written questions and answers constituted an amendment and was binding on all parties, even though it was not officially designated as an amendment. Id.

Next, the protester also alleges that the Corps' answers in its letter were inadequate. However, after reviewing the RFTP, its amendments, the response to questions posed by the protester and another offeror, we find that this allegation merely concerns the protester's disagreement with, and refusal to abide by, the Corps' stated requirements as clearly expressed by the Corps. For example, the following exchange occurred:

QUESTION: "Page C-2, paragraph 1.2 provides: 'It is the purpose and intent of this specification to correct the turbine performance deficiency to obtain the original contract performance guarantees.' Hitachi has asserted that full compliance is impossible and has suggested that if the replacement contractor achieves anything less than complete compliance with the original requirements that its position would be proved and the Government's claim defeated. Would the Corps take final acceptance if performance was slightly deficient with respect to the original contract?"

RESPONSE: "In a situation such as this, the Corps would expect to enforce the terms of the contract."

The protester refuses to accept this answer. We merely note that to the extent there are uncertainties in a solicitation, offerors should take them into account in

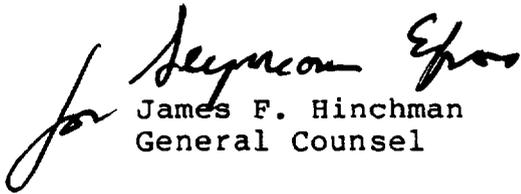
computing their offers; some risks are inherent in all government procurements. Dynalelectron Corp., 65 Comp. Gen. 290, 86-1 CPD ¶ 151. Based on this record, we find that the agency has adequately explained its needs and performance requirements, and the protester has failed to substantiate its allegation that the solicitation is ambiguous.^{3/}

Finally, the protester raises several other issues which this Office finds premature, for they merely anticipate agency action. The protester requests that this Office declare that Japanese companies cannot participate in any way under the current solicitation in accordance with Pub. L. No. 100-202, 101 Stat. 1329 (1987), which precludes Japanese companies from any participation on publicly funded civil works projects. The Corps has advised us that there is no Japanese participation in the instant procurement. Further, Pub. L. No. 100-202 does not prohibit the continued negotiations between the Corps and Hitachi under the current contract.

The protester also claims that the Corps is required to evaluate Canadian proposals for Schedule A without the application of any Buy-American evaluation factors. However, until the protester's proposals is actually evaluated after receipt of step two prices and is in line for award but for the agency's miscalculation of the Buy-American Act evaluation factors, we think this matter is premature.

The protest is denied in part and dismissed in part.

The protester seeks to recover all costs associated with filing and pursuing this protest as well as proposal preparation costs. Since we have denied in part and dismissed in part the protest, these costs are not recoverable. See 4 C.F.R. § 21.6(d).


James F. Hinchman
General Counsel

^{3/} Other alleged ambiguities, such as the relationship between Schedules A and B, were subsequently corrected by amendment.