



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: KIME Plus, Inc.

File: B-231906

Date: September 13, 1988

DIGEST

Agency decision to use negotiation procedures, in lieu of sealed bidding procedures to acquire mess attendant services, is justified where the contracting officer determines that discussions are necessary to ensure that offerors fully understand the services and the staffing required to adequately perform the contract.

DECISION

KIME Plus, Inc., the incumbent contractor, protests the use of negotiated procedures to procure mess attendant services under solicitation No. F03601-88-R-0019, issued by the Department of the Air Force, Eaker Air Force Base, Arkansas. KIME Plus contends that the Air Force decision to convert the solicitation from procurement by sealed bids to procurement by competitive proposals violates the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2301, et seq. (Supp. IV 1986), and implementing regulations.

We deny the protest.

The solicitation was originally issued using sealed bidding procedures on April 15, 1988. On June 9, the Air Force issued amendment 0003 to the solicitation which changed the solicitation to a request for proposals (RFP). The closing date has now been extended indefinitely by amendment 0005. Under the RFP, the contractor is required to prepare and serve an estimated 30,000 meals per month, serve meals away from the dining hall, provide a carry-out service, perform cashier services, clean equipment, perform related janitorial and housekeeping functions, and maintain the grounds around the facility. The RFP, as amended, includes technical factors such as management approach, understanding the requirements, experience, proposed personnel qualifications, and management organization.

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KIME Plus asserts that the solicitation as originally issued contained a detailed performance work statement setting forth with great particularity the nature, scope, and frequency of required mess services. It contends that in all material aspects, the required services for this procurement were identical to those of previous procurements for food services at Eaker AFB, which KIME Plus has furnished since 1985 and which had employed sealed bids. KIME Plus argues that because the amendment did not significantly alter the scope of required services under the solicitation, the change to the use of negotiated procedures was improper.

The Air Force, however, states that the decision to change to competitive proposals for this solicitation was made due to mess attendant requirements at Eaker and other Air Force bases not being fully understood by contractors, resulting in repeated contract performance failures in the past. Specifically, the Air Force indicates that KIME Plus, the present contractor, has had numerous contract deficiency reports issued for unsatisfactory service and that there have been several disputes concerning the specifications resulting in claims being filed by other contractors in the past. Changing the solicitation to an RFP, it argues, allows for discussions which may ensure that every bidder fully understands what is required under the contract.

The criteria which now govern the selection of the procurement method are contained in 10 U.S.C. § 2304(a)(2)(A) which requires an agency to solicit sealed bids if:

- "(i) time permits the solicitation, submission, and evaluation of sealed bids;
- (ii) the award will be made on the basis of price and other price-related factors;
- (iii) it is not necessary to conduct discussions with the responding sources about their bids; and
- (iv) there is reasonable expectation of receiving more than one sealed bid."

With the enactment of CICA, however, there is no statutory preference for sealed bids. Military Base Management Inc., B-224115, Dec. 30, 1986, 66 Comp. Gen. _____, 86-2 CPD ¶ 720. Under CICA, agencies are required to obtain full and open competition and to use the competitive procedures or combination of competitive procedures that is best suited under the circumstances of the procurement. 10 U.S.C. § 2304(a)(1)(B). The determination regarding which competitive procedure is appropriate essentially involves

the exercise of a business judgment by the contracting officer. Military Base Management, Inc., B-224115, supra.

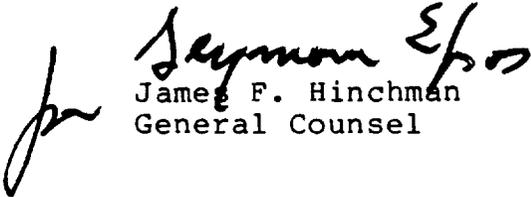
We find no basis to object to the Air Force's use of negotiation procedures. The fact that sealed bidding has been used in the past to procure this type of service is not relevant to what may properly be used now since the statutory preference for sealed bidding has been eliminated by CICA. Id. Moreover, contrary to KIME Plus' assertion, the FAR does not require a showing of compelling need to justify discussions. The FAR merely states that sealed bidding shall be used whenever the CICA conditions set forth in the FAR, § 6.401(a), quoted above, are met. Here, the CICA conditions requiring sealed bidding have not been met because the Air Force determined that it was necessary to hold discussions to assure that all offerors fully understood the services and staffing necessary to perform the contract. In this regard, we have recognized that prior difficulties with contractor performance may serve as a legitimate basis for requiring discussions and therefore the use of negotiation procedures for subsequent procurements. Military Base Management, Inc., B-224115, supra.

KIME Plus also argues that legitimate Air Force concerns regarding bidder understanding of performance requirements should be addressed during a pre-award survey. This argument is without merit. The use of a pre-award survey is not a substitute for negotiations, since a pre-award survey conducted after or aside from the actual competition would not accomplish the Air Force's purpose. See Essex Electro Engineers, Inc., 65 Comp. Gen. 242, 86-1 CPD ¶ 92. A pre-award survey, as part of the agency's investigation of an offeror's responsibility, focuses on the firm's ability to perform as required and involves matters like financial resources, experience, facilities, and performance record. In contrast, the focus of the negotiation process is a relative assessment of the merits of individual proposals, including an evaluation of matters that are traditionally areas of responsibility. Folk Construction Co., Inc., B-225560, Feb. 12, 1987, 87-1 CPD ¶ 157. Here, the Air Force does not seek to determine whether a low bidder is minimally acceptable; rather, the Air Force is seeking one contractor among many responsible contractors that, on a comparative basis, is highly technically qualified. A pre-award survey is not a proper vehicle for that kind of requirement. Id.

Finally, KIME Plus places great importance on the fact that the solicitation was initially issued as an IFB and was only later amended to an RFP. Having determined that the contracting officer's determination to utilize negotiated procedures was proper, we find nothing improper about the

Air Force's decision to amend the solicitation prior to bid opening to accomplish this. Here, the Air Force, in effect, canceled the IFB prior to bid opening and resolicited the procurement as an RFP. We have held that the determination of whether a cogent reason exists for the cancellation of an IFB before bid opening is a matter primarily within the discretion of the contracting agency; therefore, the determination will not be disturbed by our Office absent clear proof of an abuse of this discretion. See The Rhodes Co., Inc., B-213068, Apr. 23, 1984, 84-1 CPD ¶ 455. We find that the agency did not abuse its discretion in determining before bid opening, that in light of past unsatisfactory performance by contractors, negotiated proposals would better serve its needs for this procurement.

The protest is denied.

 James F. Hinchman
General Counsel