



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Department of the Navy--Request for Advanced
Decision, Holmes & Narver Services, Inc.
File: B-229558.2, B-229558.3
Date: October 4, 1988

DIGEST

Agency's negative determination of responsibility lacks a reasonable basis where the agency's sole basis for its determination is that protester's estimated manning level is lower than what agency believes is necessary and where agency does not find that the protester is unable or unwilling to stand by its commitment to perform the contract as required.

DECISION

The Department of the Navy requests our advance decision on the propriety of its determination that Holmes & Narver Services, Inc. (H&N), a large business bidder, under invitation for bids (IFB) No. N62477-83-B-6045 was not responsible. The Navy states that it found H&N non-responsible because the firm failed to demonstrate that it has proposed sufficient staffing to perform the services under the fixed price portion of the IFB. H&N has protested the Navy's non-responsibility determination. Because both cases involve the issue of H&N's non-responsibility, we have consolidated the Navy's request for advanced decision with H&N's protest.

We find that the Navy's determination of non-responsibility lacks a reasonable basis and sustain the protest.

The IFB solicited fixed price lump-sum and indefinite quantity bids for an 8 month base period and 3 option years to perform base maintenance, operation and repair services at various naval facilities, and provided that, for the purposes of award, the bids would be evaluated by adding the total price for all options to the price for the base period requirement. The IFB also stated that a cost comparison would be conducted in accordance with Office of Management and Budget (OMB) Circular A-76.

The solicitation required bidders to submit prices for the monthly performance of various services but did not state minimum manning levels or require bidders, as a part of their bids, to describe their proposed staffing. Bidders were merely required to agree to provide all labor, supervision, tools, materials, equipment and transportation necessary to perform the contract.

The Navy received the following nine bids:

Frank E. Basil	\$13,367,940
Burns & Roe	17,019,870
H&N	17,580,081
Intelcom	17,947,991
Beacon	19,760,211
American Services	22,051,823
Daniel International	22,380,846
Navy In-House Estimate	24,928,281
Joule	25,591,659

The first and second low bids were rejected by the Navy, leaving the protester's bid low. The Navy, in conjunction with the Defense Contract Administrative Services Management Area (DCASMA), conducted a pre-award survey of H&N. The survey team determined that H&N had not proposed sufficient personnel to perform the contract and concluded that H&N did not fully understand the terms of solicitation. The Navy and the protester then engaged in discussions regarding the protester's estimated staffing. The Navy states that H&N failed to demonstrate that it would provide sufficient manning to perform the IFB services satisfactorily and found H&N non-responsible.

The term "responsibility" relates to a potential contractor's ability to meet certain general standards set forth in the Federal Acquisition Regulation (FAR), § 9.104-1 (FAC 84-18), as well as any special standards set forth in the solicitation. The determination of a prospective contractor's responsibility rests within the broad discretion of the contracting officer who, in making that decision, must necessarily rely on his or her business judgment. We therefore will not question a negative determination of responsibility unless the determination lacked any reasonable basis. Oertzen & Co. GmbH, B-228537, Feb. 17, 1988, 88-1 CPD ¶ 158.

The Navy states that H&N has proposed fewer man-years of effort to perform the fixed price portion of the IFB than the 92.4 man-years of effort that the Navy estimates is

necessary.^{1/} The Navy contends that H&N has not shown how it can adequately perform the contract with significantly fewer man-years of effort than what the Navy estimates is necessary.^{2/}

The bidder's promise in a sealed bid procurement is to perform the specification requirements at the price bid irrespective of whether compliance with the specifications actually requires more effort than was anticipated by the bidder. Thus, the Navy's inquiry should be whether H&N has the technical and financial capability to fulfill its commitment and not whether H&N plans to perform the fixed price portion of the IFB with the number of man-years that the Navy believes is necessary. In this regard, H&N argues that while its pricing of the fixed-price portion of the IFB is based on an estimated number of man-years, H&N is committed to provide whatever staffing is needed to perform the contract as set forth in the specifications. Since the Navy did not find that H&N is unable or unwilling to stand by its commitment to perform the contract as required, we do not think the Navy has a basis to conclude that H&N is non-responsible.

The Navy suggests that H&N's level of staffing indicates that the protester may misunderstand the contract requirements. The record, however, indicates that the difference in staffing estimates is attributable to H&N's belief that certain labor saving techniques will enable it to perform the contract with fewer people than the Navy estimates. Apparently other bidders share H&N's belief as to the staffing required to perform. We note that H&N, Burns & Roe, and Intelcom all bid between \$17.02 and \$17.94 million and that these bidders were consistent in their bidding of the fixed price portion of the IFB. The 3 bidders bid between \$8.7 and \$9.1 million for the fixed price portion (which was approximately 50 percent of their total bid price). We may reasonably assume that these 3 bidders based the fixed price portion of their bids on using fewer than 92.6 man-years of effort. While the Navy

^{1/} H&N considers its estimated staffing figures to be proprietary and requests that we not disclose their figures.

^{2/} H&N contested the Navy's computations in calculating the difference between the protester's and the government's manning levels. Because we find that the Navy's negative responsibility determination lacked any reasonable basis apart from the question of the Navy's computation of manning levels, we do not deal with this issue.

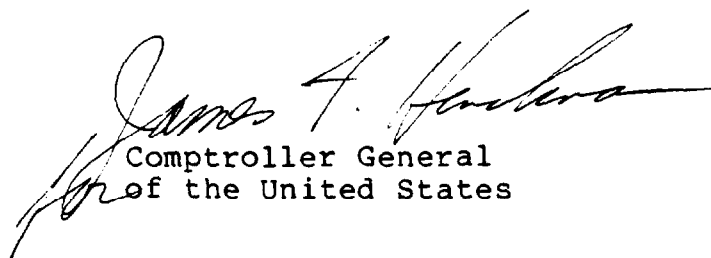
disagrees with H&N's estimate of the staffing required, we are not persuaded from the record before us that H&N misunderstands the contract requirements.

Finally, the Navy argues that in a solicitation issued for A-76 cost comparison purposes, such as here, bidders are required to bid on a break-even basis, which the Navy believes H&N has not done. We have held that a below-cost bid in an A-76 cost comparison procurement is not a legal impediment to award so long as the bidder is found otherwise responsible. See Contract Services Co., Inc., 66 Comp. Gen. 468 (1987), 87-1 CPD ¶ 521 at 5. In an A-76 cost comparison procurement, the government is primarily concerned with the price it will pay for the contract services and not necessarily the cost of performance to the contractor.

Because the Navy's determination that H&N was non-responsible lacked a reasonable basis, we sustain the protest and recommend that the Navy reconsider H&N's responsibility in accordance with this decision and if the Navy finds H&N responsible, we recommend that the Navy award a contract to H&N based upon H&N's bid.^{3/}

We also find the protester to be entitled to the costs of filing and pursuing the protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1988). H&N should submit its claim for such costs directly to the Navy. 4 C.F.R. § 21.6(e).

The protest is sustained.


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^{3/} We are not recommending immediate award to H&N because an affirmative determination of responsibility must be made by the contracting officer before H&N can be awarded a contract. See FAR § 9.103(b).