



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: General Elevator Co., Inc.

File: B-237285

Date: January 30, 1990

DIGEST

A contracting agency has a reasonable basis for determining that only one source can meet its needs for elevator maintenance services where only two sources expressed interest in maintaining the elevators and one of the two sources had been determined nonresponsible under solicitation for identical services less than 1 month before based on its poor past performance.

DECISION

General Elevator Co., Inc., protests the Department of Veterans Affairs' (VA) award of a sole-source contract to Schindler Elevator Co., under request for proposals (RFP) No. 630-47-90, for elevator maintenance services at the VA Medical Center, New York.

The protest is denied.

On July 6, 1989, the VA issued invitation for bids (IFB) No. 630-12-90 for these services. However, only General Elevator, the incumbent elevator maintenance contractor at the Medical Center, submitted a bid. By letter dated August 29, the contracting officer notified General Elevator that its bid of \$309,792 for 1 year had been rejected because the price was too high. The VA explains that the contract price for the previous year was only \$192,000, while the government estimate for 1 year under the new solicitation was only \$225,000. The August 29 letter also detailed problems with General Elevator's performance under the previous contract, including unnecessary delays in repairs, repeated breakdowns of inadequately repaired elevators, failure to provide adequate weekend coverage and

failure to respond to phone requests for service. Although the August 29 letter to General Elevator did not mention responsibility, the VA reports that the contracting officer also determined at that time that General Elevator was nonresponsible under the IFB because of the firm's inadequate performance under the previous contract.

The VA further reports that after General Elevator's bid was rejected, the contracting officer decided to complete the acquisition using negotiated procedures. Federal Acquisition Regulation (FAR) § 14.404-1(e)(1). The VA explains that it then contacted the 11 firms other than General Elevator who had received the IFB to ask why they had not bid. According to the VA, only Schindler expressed an interest in maintaining the Medical Center elevators. (It explained that it did not bid on the IFB because it misplaced the solicitation.) The VA reports that most of the other firms said they had not bid on the IFB because they were not capable of maintaining the equipment or could not get repair parts for the elevators; in this regard, according to the agency, the elevators at the Medical Center are of a type not in common use. Although the agency did not contact General Elevator during this period, the record indicates that in letters dated September 15 and 29, the protester expressed interest in continuing to perform elevator maintenance at the Medical Center.

As a result of its survey, the VA prepared a "Justification for other than full and open competition," signed by the contracting officer and the Medical Center's director, who is the contracting activity's Competition Advocate. The Justification authorized a sole-source award to Schindler under FAR § 6.302-1; that section, based on 41 U.S.C. § 253(c)(1) (Supp. IV 1986), authorizes the use of other than competitive procedures when the property or services needed are available from only one responsible source and no other product or services will satisfy the agency's needs. The Justification explains that based on a Commerce Business Daily (CBD) announcement issued for the canceled IFB, a market survey and telephone contacts with the firms that had expressed interest in the IFB, agency officials determined that Schindler was the only responsible source capable of maintaining the type of elevator system found at the Medical Center. The justification also explains that General Elevator, the only other firm that had expressed interest in the contract, was found to be nonresponsible under the IFB.

Based on the Justification, the Medical Center on September 29, issued RFP No. 630-47-90 to only Schindler, and then awarded the contract to that firm on October 1.

In its protest, General Elevator argues that it was improperly excluded from competing under the RFP.^{1/} The protester maintains that the agency could not properly exclude it from competing under the RFP on the basis of its responsibility because the August 29 letter rejecting its bid under the IFB stated that the rejection was based solely on its high price; it did not mention any lack of responsibility.

We disagree. While it is true that the August 29 letter did state that General Elevator's bid was rejected because of its high price, the letter also informed the protester that the VA "had substantial problems with your performance over the past several years," and went on to list several specific past performance deficiencies. In this regard, the VA report that at the time General Elevator's bid was rejected, the contracting officer determined that the protester was nonresponsible because of the firm's poor past performance and its failure to improve despite weekly meetings with VA officials concerning its problems. Specifically, the record on which the contracting officer based the nonresponsibility determination includes numerous complaints about the condition of the elevators from management, staff, patients and visitors, critical reports by two elevator consultants that inspected the Medical Center elevators, and a citation by the United States Department of Labor, Occupational Safety and Health Administration, for maintaining the elevators in an unsafe condition.

In sum, the record contains the contracting officer's nonresponsibility determination, the basis for which had been communicated to General Elevator in the August 29

^{1/} To the extent General Elevator protests the VA's rejection of its bid, this argument was untimely filed. The record indicates that on September 5, General Elevator received the VA's August 29 letter which stated that the firm's bid under the IFB had been rejected because of its high price. Under our Bid Protest Regulations, a protest based on other than a solicitation impropriety must be filed not later than 10 working days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1989). Since General Elevator did not protest the rejection of its bid to either the agency or our Office within 10 working days after September 5 when it was informed of the rejection, this basis for protest is not timely and will not be considered.

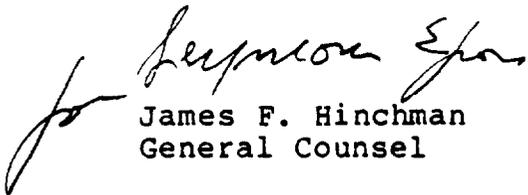
letter. Although General Elevator was not immediately informed of the actual determination, we cannot agree with the protester's argument that it was not in fact determined to be nonresponsible under the initial solicitation. See Aceves Constr. and Maintenance, Inc., B-233027, Jan. 4, 1989, 89-1 CPD ¶ 7.

General Elevator further argues that notwithstanding its nonresponsibility under the IFB, it should have been allowed to compete under the RFP.

Because the overriding mandate of the Competition in Contracting Act of 1984 is for "full and open competition," 41 U.S.C. § 253(a)(1)(A), this Office will closely review noncompetitive procurements conducted under 41 U.S.C. § 253(c)(1). JTP Radiation, Inc., B-233579, Mar. 28, 1989, 89-1 CPD ¶ 315. To approve of a procurement conducted under that authority, we must find that the agency's determination that the property or services needed by it are available from only one responsible source and no other product or services will satisfy its needs is reasonable. Id.

The record shows that the agency contacted all of the firms that had responded to the CBD notice for the IFB and found that only Schindler and General Elevator believed they could perform the services. Since the VA had less than a month before the resolicitation determined the protester to be nonresponsible because of the poor past performance of these same services, the VA concluded that Schindler was the only currently responsible source who could provide the required services. Under these circumstances, we cannot conclude that the VA's determination was unreasonable.

The protest is denied.


James F. Hinchman
General Counsel