



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Bay Cities Services, Inc.

File: B-239880

Date: October 4, 1990

Timothy H. Power, Esq., for the protester.
Vasio Gianulias, Esq., Department of the Navy, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest by incumbent contractor challenging its exclusion from a limited competition for an interim contract for waste collection and disposal services is sustained where contracting agency failed to obtain maximum practicable competition by not inviting protester to respond to solicitation on the basis that the solicitation required submission of supporting cost data with proposals and protester had been unwilling to provide such data when offered an extension to its then-current contract to cover these services. The agency's exclusion of the contractor on this basis is unreasonable since such data would not have been required if adequate price competition were achieved.

DECISION

Bay Cities Services, Inc. protests its exclusion from the limited competition conducted pursuant to request for proposals (RFP) No. N68711-90-R-5647, issued by the Navy Public Works Center, Department of the Navy, San Diego, California, for solid waste collection and disposal for a 4-month period at various Navy facilities in the San Diego area. Only two potential sources were solicited based on the Navy's determination of unusual and compelling urgency for these services; only one of those sources submitted a proposal. That offeror, U.S. Disposal Services, was awarded the contract. Bay Cities, the previous contractor providing these services, argues that it was improperly excluded from the solicitation process and thereby excluded from submitting a proposal under the solicitation.

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We sustain the protest.

BACKGROUND

The procurement challenged by Bay Cities resulted in a 4-month interim contract awarded on May 21, 1990, by the Navy on an urgent basis to assure uninterrupted waste collection and disposal services for several Navy facilities in the San Diego area. The previous full-term contract for these services expired on March 31, and included a full range of facility maintenance services, such as custodial and grounds maintenance, as well as solid waste disposal and collection services for the Navy. Bay Cities performed the waste collection and disposal services portion of that full-term facilities maintenance contract as a subcontractor to the prime contractor.

During March 1990, when the Navy became aware that it would not have a new contractor in place prior to October 1, the agency conducted a limited competition for its facility maintenance services for the 6-month period--April 1 to September 30--during which the Navy would have no coverage. The solicitation for this 6-month "bridge contract" permitted companies to respond to any or all of several line items for the different services included within the facility maintenance services contract.

Bay Cities was the only company responding to the solicitation for a 6-month interim contract that offered to provide the waste collection and disposal services. However, the Navy declined to accept Bay Cities' offer because its price, approximately \$90,000 per month, exceeded the government estimate by 17 percent, and exceeded Bay Cities' previous price for the same services by nearly 35 percent. In addition, Bay Cities refused to provide a price breakdown in support of its offer.

The Navy next redesignated the waste collection and disposal services as a separate solicitation apart from the larger facilities contract, and requested that Bay Cities submit a best and final offer (BAFO) along the lines of its initial submission in response to the facilities management services solicitation. For this solicitation, Bay Cities was asked to provide prices for 1-, 2- and 6-month periods. Bay Cities offered the same price as before for a 1- or 2-month contract, and a slightly lower price for a 6-month contract. Although unsatisfied with Bay Cities' price, the Navy awarded the company a 2-month interim contract to cover the agency's immediate need for waste collection and disposal, and continued its attempts to obtain limited competition for the remaining 4-month period.

After conducting an extensive market survey of sources for the remaining 4-month period and locating only two potential sources, the Navy asked Bay Cities to submit a proposal for a 4-month extension of its 2-month contract. The Navy also requested that Bay Cities submit, along with its proposal, cost data on a standard form (SF) 1411. Although Bay Cities provided a proposal to the Navy, it did not provide data in support of its price, and did not complete the SF 1411. Despite several requests by contracting officials for the cost information, and despite warnings that its contract would not be extended without such data, Bay Cities refused to provide the cost data. As a result, the Navy refused to consider Bay Cities' proposal and did not extend its 2-month contract.

On May 11, the two companies identified by the market survey as potential sources were given copies of a solicitation for the waste collection and disposal services covering the 4-month period of June 1 to September 30. The solicitation, RFP No. N68711-90-R-5647, was a copy of Bay Cities' 2-month interim contract. The Navy invited both companies to submit a proposal and requested that any offer be accompanied by cost data, set forth on SF 1411. Only one of the companies, U.S. Disposal, submitted an offer; it also provided the requested SF 1411. On May 21, the Navy awarded the contract to U.S. Disposal; on May 30, Bay Cities protested to our Office.

ARGUMENTS

Bay Cities protests that the Navy improperly excluded it from the solicitation process resulting in award to U.S. Disposal in violation of the Competition in Contracting Act of 1984 (CICA). The protester argues, in essence, that the Navy barred it from competing for the 4-month interim contract because Bay Cities refused to provide SF 1411 cost information either in response to the solicitation for a 6-month interim contract, or in response to the discussion regarding an extension to Bay Cities' 2-month interim contract in progress at the time.^{1/} According to Bay Cities, it would have submitted a proposal if solicited, and the resulting competition would have negated any need for

^{1/} Bay Cities' refusal to submit the requested cost data was based on its claim that it did not keep sufficiently detailed records to complete the SF 1411, and that the effort and potential liability of providing such data outweighed the benefit of a 4-month contract for these services.

providing cost data, since adequate price competition would have existed.

The Navy responds that it had already solicited Bay Cities twice for the services covered by this procurement, and that it reasonably concluded that the protester was not an available source for this urgent requirement. According to the Navy, it is irrelevant that previous attempts to obtain cost data from Bay Cities were made under different solicitations and contracts, since all three contract actions--the solicitation for a 6-month interim contract, the aborted attempt to extend Bay Cities 2-month contract, and the solicitation for a 4-month contract--were for the same services, with the same terms, and for essentially the same time period. The Navy claims that since it wanted cost data from offerors, and since Bay Cities had already refused to provide such data, the Navy was justified in excluding Bay Cities from the limited competition for the 4-month interim contract.

As explained in detail below, we believe the Navy erred in excluding Bay Cities from the limited competition for the 4-month interim waste collection and disposal contract.

ANALYSIS

The dispute that led to both this procurement and this protest springs from the Navy's attempt to obtain cost data and Bay Cities' refusal to provide it. Submission of cost or pricing data is mandated by the Truth in Negotiations Act, 10 U.S.C. § 2306a (1988), for all negotiated contracts, or modifications to contracts, in excess of \$100,000, except in certain circumstances. The Act does not require that agencies obtain such data for contracts awarded with "adequate price competition," 10 U.S.C. § 2306a(b)(1)(A); Federal Acquisition Regulation (FAR) § 15.804-3(b); however, agencies are granted the discretion to request such data when the agency determines the information is necessary to assure that prices are reasonable. 10 U.S.C. § 2306a(c); FAR § 15.804-2(a)(2). When a requirement for such data is included in a solicitation we have held that a contractor's failure to provide cost data may be waived as immaterial if the contracting officer concludes that the solicitation generated adequate price competition. See Contract Servs., Inc., B-232689, Jan. 23, 1989, 89-1 CPD ¶ 54. The SF 1411, mentioned above, is the form used for the submission of such data.

When Bay Cities refused to provide the Navy with cost data to support a 4-month extension of the company's 2-month contract, the Navy properly refused to extend the existing

contract. Awarding a contract modification of this magnitude, without obtaining such data, would have violated the terms of the Truth in Negotiations Act. 10 U.S.C. § 2306a(a)(1)(B). On the other hand, we do not agree with the Navy's assertion that Bay Cities' refusal to provide such information justified excluding the company from the limited competition that followed.

Under CICA, an agency may use other than fully competitive procedures to procure goods or services where the agency's needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency is not permitted to limit the number of sources from which it solicits bids or proposals. 10 U.S.C. § 2304(c)(2). Here, we agree with, and the protester does not challenge, the Navy's determination that protecting public health created an urgent need to ensure uninterrupted collection and disposal of solid waste at Navy facilities. However, the authority to limit competition does not automatically justify a sole-source award. Rather, agencies are required, by 10 U.S.C. § 2304(e), to request offers from as many potential sources as practicable under the circumstances.

The statutory framework of CICA requires that even though the Navy determined urgent circumstances justified limiting competition, it still must compete its needs to the maximum extent practicable. Servrite Int'l, Ltd., B-236606, Dec. 6, 1989, 89-2 CPD ¶ 520. We have sustained challenges to such limited competitions, where the existence and capability of an excluded potential source was clearly known to agency contracting officials by virtue of the source's prior performance of the same services, and the agency did not adequately justify the contractor's exclusion from the competition. See Earth Property Servs., Inc., B-237742, Mar. 14, 1990, 90-1 CPD ¶ 273, aff'd, B-237742.2, June 11, 1990, 90-1 CPD ¶ 546; Fairchild Weston Sys., Inc., B-225649, May 6, 1987, 87-1 CPD ¶ 479. In this case, the Navy solicited the two potential sources obtained from its market survey, but did not solicit the contractor currently performing the needed services. This omission occurred not because the agency was unaware of Bay Cities' willingness to perform the services--whenever asked, Bay Cities provided a proposal--but because Bay Cities represented that it was unwilling to provide supporting cost data for a 4-month contract.

The Navy argues Bay Cities indicated it had no interest in the 4-month interim procurement. The Navy claims that when it pressed Bay Cities for cost data while considering an extension to the company's contract, Bay Cities' president responded that providing the data "was not worth the

effort, that he would take his containers and bid the three year contract when it was advertised, and that the government could get someone else to do the work." Both the Navy and Bay Cities submitted sworn statements regarding this alleged comment; however, even if we assume the comment was made exactly as portrayed by the Navy, it does not justify excluding Bay Cities from the limited competition that followed. Bay Cities' consistent complaint, and the thrust of the comment to Navy officials (quoted above from Navy documents), is that it did not want to provide cost data. There is no doubt that the company would willingly perform the needed services if awarded the contract.


We recognize that even if solicited for the 4-month interim contract, it is not likely that Bay Cities would have provided cost data as requested. However, there is the possibility that adequate price competition would have been achieved with the submission of offers from both Bay Cities and U.S. Disposal. In that case, the Navy could have waived the requirement for such data--even if the requirement was included in the solicitation and one offeror provided the information and the other did not. Contract Servs., Inc., B-232689, supra. In the event that the Navy continued to require such data as authorized in the procurement regulations, it could have rejected Bay Cities' offer, and instead selected the lowest-priced offeror complying with the requirement for cost data. Id. For these reasons, it was not reasonable for the Navy to exclude Bay Cities from the limited competition on the basis that the company had refused to provide cost or pricing data in response to previous solicitations and requests for such data.

RECOMMENDATIONS

Because contract performance continued in the face of Bay Cities' protest due to urgent and compelling circumstances, and the interim contract here is nearly completed, it is not practical to recommend that the Navy resolicit this requirement. Since the protest is sustained, we find that Bay Cities is entitled to the costs of filing and pursuing

its protest, including attorneys' fees. Earth Property Servs., Inc., B-237742, supra. The protester should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.6(e) (1990).

The protest is sustained.

for 
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