

Timmerman



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Racal Corporation

File: B-240579

Date: December 4, 1990

Richard L. Moorhouse, Esq., Dunnells, Duvall & Porter, and Robert G. Bugge, Esq., for the protester. J. Eric Andre, Esq., Crowell & Moring, for Mine Safety Appliance Co., an interested party. Jeffrey I. Kessler, Esq., and David DeFrieze, Esq., Department of the Army, for the agency. Barbara R. Timmerman, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where all elements enumerated in the Competition in Contracting Act, 10 U.S.C. § 2304(a)(2) (1988), for the use of sealed bidding procedures are present, agencies are required to use those procedures and do not have discretion to employ negotiated procedures.

DECISION

Racal Corporation protests the Department of the Army's use of competitive negotiation in the procurement of a quantity of C2 gas mask canisters under request for proposals (RFP) No. DAAA09-90-R-0886. Racal contends that the Army is required to procure the canisters using sealed bidding procedures.

We sustain the protest.

The RFP, issued on July 20, 1990, requested offerors to furnish fixed prices for the canisters, national stock number (NSN) 4240-01-119-2315, both with and without first article testing, and for delivery on an f.o.b. origin and f.o.b. destination basis. Award was to be made on the basis of price

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and other price related factors.^{1/} The RFP did not require the submission of technical proposals.

Racal contends that the solicitation violates the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a) (2) (A) (1988), which provides that an agency shall 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 a reasonable expectation of receiving more than one sealed bid."

According to Racal, all of the conditions are met in the procurement here and, consequently, the Army is required to use sealed bidding procedures.

The Army does not dispute that three of the conditions have been met, but states that it expects discussions will be necessary such that the use of negotiated procedures is appropriate. Specifically, the Army maintains that discussions are necessary to ensure that offerors fully understand the government's requirements. The Army also maintains that funding uncertainties (which may change the quantity required), the likelihood of changes in delivery schedules and the possibility of changes to the "technical data package" (TDP) may all require discussions.^{2/}

CICA, 10 U.S.C. § 2304(a), eliminated the previous specific statutory preference for sealed bid procurements. The Act provides that agencies should use the competitive procedure or combination of procedures that is best suited for the circumstances of the procurement. Nevertheless, because of the mandatory language contained in section 2304(a) (2) (A), the

^{1/} The "other" price related factors were a determination of whether to accept deliveries f.o.b. origin or destination, whether to impose a first article testing requirement, and what the appropriate government furnished equipment price factor would be.

^{2/} These issues were the subject of a conference on the record held by the General Accounting Office in which the agency's procurement director and the protester's project manager testified.

use of sealed bidding procedures is required where the four conditions specified are present. Northeast Constr. Co., 68 Comp. Gen. 406 (1989), 89-1 CPD ¶ 402. Negotiated procedures are only authorized if sealed bids are not appropriate under 10 U.S.C. § 2304(a)(2)(A). See 10 U.S.C. § 2304(a)(2)(B). While the decision whether to employ negotiated procedures involves the exercise of a business judgment, such decisions must still be reasonable. See Defense Logistics Agency--Recon., 67 Comp. Gen. 66 (1987), 87-2 CPD ¶ 365; Essex Electro Eng'rs, 65 Comp. Gen. 242 (1986), 86-1 CPD ¶ 92.

One of the common reasons utilized by agencies to justify negotiated procedures is the need for discussions, which we have found reasonable where the agency persuasively determined discussions were required or appropriate. For example, we have not objected to this justification in situations where (1) technical proposals or manning charts were requested to assess the understanding of the offerors because of historical performance problems or where the actual contractual terms might be developed through the negotiation process, see Military Base Management Inc., 66 Comp. Gen. 179 (1986), 86-2 CPD ¶ 720 and Essex Electro Eng'rs, 65 Comp. Gen., *supra*; or (2) where no technical proposals were requested but the procurement was for a large quantity of various types of automobiles involving considerable differences in products, such as the availability of various options, that might justify exceptions to the solicitation specifications such that the actual contractual terms might be developed through the negotiation process, see Carter Chevrolet Agency, Inc., B-228151, Dec. 14, 1987, 87-2 CPD ¶ 584 and Carter Chevrolet Agency, Inc., B-229679, Feb. 3, 1988, 88-1 CPD ¶ 107. On the other hand, we have sustained protests where agencies have asserted that discussions were required on a routine construction contract to assess understanding but no technical proposal was requested, see Northeast Constr. Co., 68 Comp. Gen., *supra*; or where the agency asserted that discussions were necessary to guarantee that award will be made at a fair and reasonable price. See ARO Corp., B-227055, Aug. 17, 1987, 87-2 CPD ¶ 165.

In this case, the Army has advanced two basic reasons why discussions are necessary and appropriate. First the Army asserts that discussions are necessary to ensure that all firms have a complete understanding of the specifications. Second, the Army essentially argues that it would be administratively convenient to have the flexibility of a RFP to allow for changes. As outlined below, neither reason justifies the conduct of discussions, given CICA's statutory conditions for employing negotiated procedures.

The Army asserts that discussions are necessary to ensure that all firms have a complete understanding of the specifications. The agency has failed to demonstrate, however, how it intended to utilize discussions to evaluate the understanding of responding offerors. In this regard, an offeror's understanding is typically reflected in its technical proposal, which the agency did not require in this case. See Northeast Constr. Co., 68 Comp. Gen., supra. The agency has not explained how it would otherwise evaluate an offeror's understanding in this procurement.

Instead, the record reflects that the Army is in reality concerned that offerors may not have the capability to produce the canisters. See Transcript of Conference (Tr.) at 41, 59-60. In this regard, the agency notes that one prior producer went bankrupt and unproven producers have submitted low priced proposals on previous RFPs. On the other hand, except for the bankrupt contractor, only experienced producers, that is, Racal and Mine Safety Appliance Co., have received awards for this item. While the agency's concern that prospective contractors have the capability to perform is legitimate, we think that where no technical proposal is required, an investigation of the offeror's responsibility, using such tools as a preaward survey, is generally the proper mechanism to ameliorate the agency's concerns. Northeast Constr. Co., 68 Comp. Gen., supra; Federal Acquisition Regulation (FAR) § 9.105 (FAC 84-39). Moreover, sealed bid procedures have a specific mechanism, pre-bid conferences, for the explicit purpose of briefing prospective bidders and explaining complicated specifications. FAR § 14.207 (FAC 84-58). Under the circumstances, we find the agency's concerns here, that offerors be capable and understand the requirements, do not support a conclusion that discussions are therefore required.

Nor do we think the agency's other basic reason that negotiated procedures would better allow for possible changes in quantity, delivery schedules, opening dates, etc., serves as a rationale for discussions. Such changes are properly accomplished by an amendment, regardless of the procurement type. FAR §§ 14.208, 15.410 (FAC 84-53).

The agency nevertheless contends that sealed bidding would require it to cancel the solicitation if it realized after bid opening that changes to the quantity, delivery schedule or TDP were necessary. It states that it needs to have the freedom provided by negotiated procedures to simply incorporate changes, whenever they occur, into the procurement. With respect to quantity or delivery changes, this risk is always present in any type of solicitation and to use it as a rationale to evade this statutory requirement would result in no procurements being conducted using sealed bid procedures.

In this case, the record does not indicate that procurements for the C2 canisters have any history of last minute quantity or delivery schedule changes.^{3/} Tr. at 24.

Moreover, the agency is not using the discussion process for specification development purposes as was the case in the Carter Chevrolet cases. The C2 canister has a NSN,^{4/} and the RFP requires that the canister be manufactured in accordance with a detailed TDP. The record also shows that the C2 canister specifications are relatively mature. See Tr. at 73. The agency admits that it is aware of potential changes to the TDP for the C2 canister well in advance of their actual incorporation into the solicitation. Tr. at 29, 30.

Under the circumstances, we do not think the likelihood of unexpected changes occurring in the relatively short period after bid opening and before award is an adequate justification for discussions.^{5/} Therefore, the agency's desire to maintain the administrative convenience to allow for potential changes or request best and final offers to update prices if awards are delayed and changes are made is not a sufficient reason to justify discussions. Since the Army has not asserted that any of the other three CICA conditions is applicable, we find that the agency was required by section 2304(a)(2) to employ sealed bidding procedures.

While the agency argues that Racal was not prejudiced by this defect, Racal testified that it would submit different initial prices in a sealed bid procurement than it would in a negotiated procurement where subsequent discussions may be conducted.^{6/} See Tr. 86, 92-93, 100-101. Thus, this case is

^{3/} The Army has informed us that during the pendency of this protest an amendment to the RFP increased the procured quantity from 770,780 to 1,248,784 canisters. However, the record shows that in previous procurements no major quantity changes occurred after the closing date for receipt of proposals. See Tr. at 24.

^{4/} The agency, in its report, in fact stated that this RFP was functionally equivalent to an invitation for bids (IFB).

^{5/} FAR 14.101(e) requires that award be made after bid opening "with reasonable promptness."

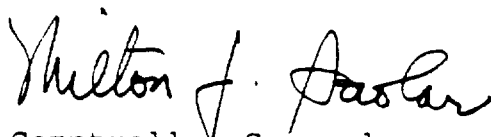
^{6/} We note that section 802 of the National Defense Authorization Act for fiscal year 1991, Pub. L. No. 101-510, Nov. 5, 1990, has amended CICA, 10 U.S.C. § 2305, to require agencies using competitive negotiation procedures to include in solicitations a statement of whether or not discussions

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different from Milbar Corp., B-232158, Nov. 23, 1988, 88-2 CPD ¶ 509, aff'd, Toolmate Inc.--Recon., B-232158.2, Mar. 13, 1989, 89-1 CPD ¶ 266, where none of the offerors had indicated that they would have bid differently had the solicitation been issued as a sealed bid procurement. Here, we conclude that Racal was prejudiced by the agency's failure to utilize sealed bid procedures.

We sustain the protest.

We recommend that the procurement be recompeted using sealed bid procedures. Under the circumstances, we find that Racal is entitled to the costs of filing and pursuing its protest. 4 C.F.R. § 21.6(d) (1990).

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6/(...continued)
will be conducted. H.R. Rep. No. 665, 101st Cong., 2d Sess. 301, in explaining one purpose of this statutory change, states that "competing contractors will be encouraged to make their best offer the first time--so the government doesn't waste its time reviewing a proposal that is likely to change anyway, and contractors don't have to waste their time preparing a 'going in proposal' and a 'best and final offer.'"