



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: GAI, Incorporated

File: B-247962; B-247971

Date: July 8, 1992

Howard A. Pollack, Esq., Braude & Margulies, for the protester.

Lester Edelman, Esq., Department of the Army, for the agency.

Paul E. Jordan, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency improperly awarded a contract to protester under a solicitation which was erroneously converted from sealed bidding to negotiation, agency corrective action of terminating the contract and recompeting the requirement was reasonable under the circumstances to protect the integrity of the competitive procurement system.

DECISION

GAI, Incorporated protests the United States Army Corps of Engineers' decision to terminate its contract No. DACA31-91-C-0233, for improvements to the existing storm sewer line at Carlisle Barracks, Pennsylvania, and the issuance of invitation for bids (IFB) No. DACA31-92-B-0060 for the same requirement. GAI contends that its contract should be reinstated.

We deny the protests.

The Corps issued IFB No. DACA31-91-B-0166 on August 21, 1991, as a possible small disadvantaged business (SDB) set-aside. Clause H.8 of the IFB provided that offers were solicited only from SDBs; that non-SDB bids would be rejected as nonresponsive; and that any award resulting from the solicitation would be made to an SDB. The clause also notified prospective bidders that it only applied if a sufficient number of SDBs showed interest, and that insufficient interest would result in deletion of clause H.8

The Corps sent the IFB to 25 firms and 11 submitted bids by the September 20 bid opening date. G.L. Marks, one of nine small business bidders, submitted the apparent low bid for the base and additive items of \$346,550, and Superior Management Services, Inc., the only bidder representing itself as an SDB, submitted the second low bid of \$393,500. GAI, another small business, submitted the third low bid of \$408,000. A large business submitted the highest bid. In reviewing the bids, the contracting officer erroneously concluded that the Corps had received no bids from SDBs and rejected all 11 bids as nonresponsive.

Agency contracting officials also determined that the IFB was ambiguous as a result of references to both small business and SDB set-asides,¹ and decided to convert the procurement from sealed bidding to negotiation procedures pursuant to Federal Acquisition Regulation (FAR) § 15.103. On Friday, September 27, the Corps informed the 11 bidders of the rejection of their bids, the conversion of the solicitation, and the unrestricted basis of the new solicitation. The letter set Saturday, September 28, as the closing date for receipt of proposals or confirmation of original bids.

Five of the original bidders submitted offers by the closing date. Since, at the time of closing, the Corps had \$361,780 in available funds, the offers were evaluated under the solicitation's additive/deductive provision. GAI's offer of \$358,000 for the base item and the first seven additive items was the low offer, and Marks' offer of \$366,350 was second low. Superior, the SDB bidder, and one other firm called the Corps on Monday, September 30, to confirm their earlier bid prices. Both offerors explained that they had not received the conversion letter until that day. Although the Corps rejected these two offers as late, the agency evaluated the offers for comparison purposes and found both higher than the offers of GAI and Marks.

The Corps awarded GAI the contract on September 30. On October 3, before a notice to proceed was issued, Marks filed an agency-level protest. Marks contended that the Corps should have provided it an opportunity to lower its price to its original bid. The agency denied the protest but decided that it would terminate the GAI contract and resolicit the requirement because of various other

¹While the cover sheet of the IFB advised that the procurement was a possible set-aside for small business concerns, clause H.8 of the IFB was entitled "Notice of

improprieties in the procurement. GAI then filed this protest with our Office contending that termination of its contract was improper.

Generally, we decline to review the termination of contracts for the convenience of the government because such actions are matters of contract administration which are appropriate for resolution by the contracting agencies and the contract appeals boards under the disputes procedure. We will review the propriety of the termination where the termination flows from a defect the contracting agency perceived in the award process. In such cases, we examine the award procedures that underlie the termination action for the limited purpose of determining whether the initial award was improper and, if so, whether the corrective action taken is sufficient to protect the integrity of the competitive procurement system. See Aegis Assocs.--Recon., B-238712.2, May 31, 1990, 90-1 CPD ¶ 526.

Here, the award to GAI was improper because the conversion to and award under negotiation procedures was improper. The Corps based its conversion decision on the ambiguity regarding the SDB set-aside. While an IFB may be canceled on the basis of ambiguous specifications (FAR § 14.404-1(c)(1)), the FAR does not authorize the conversion of such a canceled IFB to negotiation procedures. Rather, the contracting officer is required to proceed with a new acquisition. FAR § 14.404-1(e)(2).

Even if the decision to convert the solicitation had been proper,² FAR § 15.103 provides that award cannot be made unless three conditions are met: first, notice of the intention to negotiate and a reasonable opportunity to negotiate must be given to each responsible bidder that submitted a bid under the IFB; second, the negotiated price must be the lowest negotiated price offered by a responsible bidder; and third, the negotiated price must be lower than the lowest rejected bid price of a responsible bidder participating in the original IFB. Here, the award price of \$358,00 was greater than the original low bid of \$346,550 submitted by Marks. Further, while no bidders specifically protested the lack of a reasonable opportunity to negotiate, the record shows such a lack of a reasonable opportunity.

²After rejecting all the bids as nonresponsive, the Corps realized that it had received one responsive bid from Superior, an SDB. As explained by the contracting officer in denying Marks's protest, the Corps concluded that Superior's bid was unreasonably high and, thus, it could have canceled the IFB under FAR § 14.404-1(c)(6). An IFB canceled under this FAR provision may be converted to

The conversion notice was sent late on Friday afternoon, and announced a closing time and date of the next day at 2:00 p.m. Two of the original bidders, including the one SDB bidder, did not receive the notice until after the closing date; thus, the time for negotiation was unreasonably short. Award of the contract was improper for failure to comply with the first two of the requirements of FAR § 15.103.

With regard to the appropriateness of the corrective action, the determination as to whether an improperly awarded contract should be terminated involves consideration of several factors. These include, but are not limited to, the seriousness of the procurement deficiency, the degree of prejudice to other offerors or to the integrity of the competitive procurement system, the impact of termination on the procuring agency's mission, and the extent of performance. Amarillo Aircraft Sales & Serv., Inc., 63 Comp. Gen. 568 (1984), 84-2 CPD ¶ 269; Malco Plastics--Recon., B-219886.2, Feb. 5, 1986, 86-1 CPD ¶ 129.

As discussed above, the conversion of the IFB to negotiation procedures was improper and, even if it were proper, the award did not satisfy the requisite conditions under FAR § 15.103. We agree with the agency's determination that there were serious deficiencies in the procurement that warranted the corrective action of terminating GAI's contract and resoliciting the requirement.

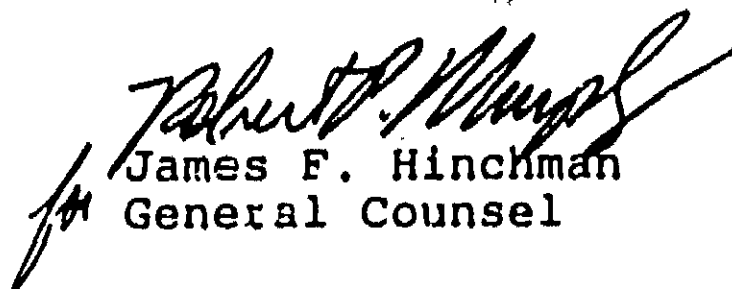
GAI argues that termination of its contract was not appropriate since no offeror was prejudiced. We disagree. The short response time for submission of proposals was prejudicial to other offerors. It eliminated two offerors, including the only SDB concern. Further, even though the converted procurement was unrestricted, only the 11 original bidders were solicited. It is reasonable to infer that an unrestricted procurement would result in more competition than one set aside solely for SDBs. Thus, the conversion may have been prejudicial to the 14 concerns who received the IFB and did not submit bids, and to all other business concerns who, due to size or status, were ineligible to participate in the original procurement. Under these circumstances, the corrective action of termination and resolicitation were appropriate.

GAI also contends that it will be unfairly prejudiced because its prices have been twice exposed and resolicitation will result in an auction. In our view, the risk of an auction is secondary to the need to preserve the

integrity of the competitive procurement system through appropriate corrective action. Cubic Corp.--Recon., B-228026.2, Feb. 22, 1988, 88-1 CPD ¶ 174.

GAI further argues that cancellation of the solicitation was improper because there was no compelling reason warranting the cancellation. Where, as here, the procurement is conducted under negotiated procedures, the contracting officer need only have a reasonable basis for canceling a solicitation after receipt of proposals rather than a compelling reason as is required for cancellation after bid opening under an IFB. See FAR §§ 14.404-1(a) and 15.608(b); Cantu Servs., Inc., B-219998.9; B-233697, Mar. 27, 1989, 89-1 CPD ¶ 306. The standards differ because in sealed bidding, bids are publicly exposed, while in negotiated procurements there is no public bid opening. Id. GAI argues that the compelling reason standard should apply to this negotiated procurement because its price was exposed after award. Under the circumstances of this case, even if we determined that the compelling reason standard applies, we would find that the agency properly determined to cancel the solicitation. Under FAR § 14.404-1(c)(10), cancellation is proper where it is clearly in the public's interest. We believe that the numerous deficiencies present here, including the improper conversion of the IFB to negotiated procedures, the rejection of the only apparently responsive bid, and the prejudice to other offerors, constitute a sufficiently compelling reason under this FAR standard.

The protests are denied.


James F. Hinchman
General Counsel