



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: PPATHI, Inc.
File: B-249182.4
Date: January 26, 1993

Frank B. Powell for the protester.
Henry M. Moore, Esq., Lewis & Moore, for Community Finance Corporation, an interested party.
James L. Ropelewski, Esq., Federal Bureau of Prisons, for the agency.
Paul Britner, Esq., and David F. Engstrom, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

A contracting officer acted within her discretion when she canceled a contract based on information learned after the award that the awardee failed to disclose serious problems involving earlier government contracts and other pertinent information. In these circumstances, the contracting officer's decision to renegotiate the contract and exclude the participation of the initial awardee was reasonable.

DECISION

PPATHI, Inc. protests the Bureau of Prisons (BOP) determination (1) to cancel a contract awarded to PPATHI, (2) to renegotiate the contract, and (3) to exclude PPATHI from the negotiations.¹ The protest is denied.

BACKGROUND

On June 16, 1992, the BOP awarded contract #J200c-097 (a negotiated procurement) to PPATHI² to provide prison facilities and services for federal offenders and Immigration and Naturalization Service (INS) detainees. Community Finance Corporation protested the award, in part, on the ground that PPATHI did not meet certain solicitation

¹PPATHI also alleged discrimination by BOP. However, PPATHI made this allegation in its response to the agency report on its protest. Because PPATHI did not raise this allegation within 10 days of the cancellation of the contract, it is not timely filed and is dismissed. 4 C.F.R. § 21.2 (1992).

²A joint venture of Private Prisons of America, Ltd., Inc. and Transitional Housing, Inc.

requirements. In the course of responding to that protest, BOP developed information that it believed indicated the award to PPATHI was improper. BOP states that it found that PPATHI had failed to fully disclose pertinent information, which if known prior to award, would have altered the result of the award process. BOP states that it also discovered that PPATHI continued this practice of nondisclosure after award. Therefore, on September 4, 1992, BOP canceled PPATHI's contract and this protest followed.³ BOP cites the following examples of the conduct referred to above. These allegations, and PPATHI's responses, are discussed below.

BOP states that certain listed 'key personnel' in PPATHI's proposal changed from the time PPATHI submitted its initial proposal to the time of award, and again after award. This refers primarily to PPATHI's listing Mr. Carl "Sonny" Emerson as a consultant in its technical proposal, but shortly before BOP awarded the contract, identifying Mr. Emerson as Director of Operations. BOP, states that this project involved serious security concerns and this last-minute change prevented BOP from conducting an adequate investigation of Mr. Emerson's background. BOP states that this is important because Mr. Emerson operated another private detention facility under contract in a way that raises serious questions about Mr. Emerson's ability to manage the contract at issue here. This prior contract is discussed below.

PPATHI responds that the request for proposals (RFP) did not explicitly require the disclosure of Mr. Emerson's role and, further, PPATHI notes that BOP acknowledges that PPATHI verbally identified Mr. Emerson as the Director of Operations before the award.

In fact, the request for proposals (RFP) required offerors to list key personnel and their job descriptions, and stated that the following are considered such: the Chief Executive Officer, Assistant Chief Executive Officers, Program Coordinator, Department Heads and Internal Control Officer. While not specifically named, the position of the Director of Operations would appear to encompass the role of at least one of the listed key positions.

BOP also reports that as a result of Community Finance Corporation's protest it learned that PPATHI did not disclose the existence of previous Government investigations. As evidence of its experience, PPATHI's proposal

³We dismissed Community Finance Corporation's protest on the basis that the relief requested was granted by the agency's cancellation of the contract. B-249182.3, Sept. 8, 1992.

noted that Transitional Housing, Inc. (THI) previously had operated detention facilities for the Immigration and Naturalization Service (INS) in California and Mr. Emerson had operated such facilities for BOP in Colorado. However, BOP states that PPATHI failed to mention that the Department of Labor (DOL) investigated THI for violations of the Service Contract Act and Contract Work Hours and Safety Standard Act in connection with the INS project and investigated Mr. Emerson for similar violations in connection with Emerson House, a detention facility he operated for BOP. DOL provided this information to BOP in letters of August 31, and October 22, 1992. Those letters also indicate that as a result of the investigation, THI was found to owe employees in excess of \$40,000 in back wages and DOL was considering debarring THI. DOL also advised that, in the investigation of Emerson House, Emerson House was found to owe back wages in excess of \$25,000.

PPATHI argues that its identification of the prior contract in its proposal was sufficient and that BOP could have learned the additional information by referring to the files concerning the contracts, which are readily accessible to BOP's contracting officers.

BOP also reports that PPATHI, in its proposal's description of the firm's past performance, disclosed the existence of a previous contract, but did not disclose the fact that contractual obligations under the agreement were not fulfilled. This also refers to PPATHI's citing as experience the contract between Emerson House, operated by Mr. Emerson, and the BOP component in Colorado. However, BOP asserts, the proposal did not disclose that Mr. Emerson failed to complete the contract and, in fact, that on the same day that Emerson House sent its 30-day notice of cancellation to BOP, Emerson House sold its building to another corporation.

Again, PPATHI argues that its disclosure of the prior contract is sufficient and that BOP could have learned the additional information from the files.

Finally, BOP reports that PPATHI's nondisclosure of its financial status may have affected its award decision. BOP notes that in its pre-award discussions with PPATHI, PPATHI officials stated that funding for the project would be obtained by THI, one of the joint venturers. The contracting officer checked THI's references and was given an excellent report. However, after the award, BOP learned from a Dunn and Bradstreet report that THI had vacated its facility prior to the award and was no longer in operation at its previous address.

PPATHI responds, in essence, that its original business proposal asserted that funding would be developed after the award, and thus it was not necessary to advise BOP of this matter. Finally, with respect to these matters generally, PPATHI argues that each one could have been explained had BOP taken the initiative to open a dialogue with them. Further, PPATHI argues that BOP's failure to discuss these issues with PPATHI before canceling the contract constitutes bad faith on BOP's part.

ANALYSIS

Cancellation of the Contract

Contracting officials have a duty to both safeguard the interests of the United States and to protect the integrity of the procurement process. 48 C.F.R. § 1.06. When a contracting official discovers an impropriety after an award has been made, the official may terminate the contract and exclude the awardee from further participation in the procurement. NES Gov't Servs. Inc.; Urgent Care, Inc., B-242358.4; B-242358.6, Oct. 4, 1991, 91-2 CPD ¶ 291. The contracting official need only show that the impropriety "might have affected the award decision." Childer's Serv. Center, B-246210.3, June 17, 1992, 92-1 CPD ¶ 524. Our role here is limited to a review of whether the procedures leading to the award were improper and the award should not have been made. New England Telephone and Telegraph Co., 59 Comp. Gen. 746 (1980).

The issue in this case is whether BOP has met the test described above for canceling a contract based on information concerning impropriety prior to award learned after an award.⁴ As explained below, we believe it has.

According to BOP, "Staff qualifications, Training, Capability and Experience" was the second-highest rated factor among seven non-price evaluation factors for award. Full disclosure of the investigations and violations involving THI and Emerson House would have greatly affected its scoring for this factor.

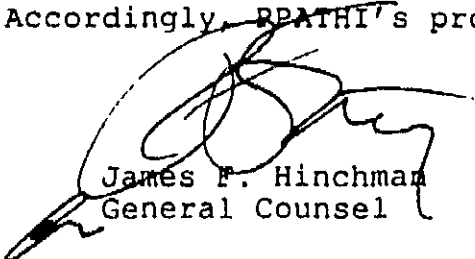
⁴Apart from disputing the substantive reasons given for canceling the contract, PPATHI argues that the proper method to have terminated the contract is by termination for the convenience of the government, rather than cancellation. However, we have no jurisdiction over the method used to terminate a contract; it is a matter for resolution under the contracts disputes procedures. New England Telephone and Telegraph Co., 59 Comp. Gen. 746 (1980).

PPATHI's assertion that it needed only to identify the prior contracts is not persuasive. Because an agency's technical evaluation is based on information submitted with the proposal, the burden is on the offeror to submit an adequately written proposal. Computer Brokers, B-226103.2, Nov. 30, 1987, 87-2 CPD ¶ 526. In this case, THI's and Mr. Emerson's performance under the previous contracts could have been a vital factor in BOP's scoring of PPATHI, and PPATHI's failure to disclose and explain the prior problems in advance of the award appears to have prevented BOP from properly scoring this factor, as BOP indicates.

Similarly, it appears the BOP's position, that PPATHI had an obligation to advise it in advance of the award that THI vacated its facility and was no longer operating at the address it had given BOP, is well-founded. THI was one of the two principals in the joint venture to which the award was given, and clearly this was pertinent information for BOP to have in evaluating PPATHI.

In these circumstances, where the record shows that the information which PPATHI did not disclose reasonably could have resulted in a different award decision, we think the agency's actions here were reasonable. As to PPATHI's allegation of bad faith, we note that BOP developed most of this information while preparing to defend its award to PPATHI in response to the earlier protest filed by Community Finance Corporation. BOP did not cancel the contract until September 4, 1992, about 2-1/2 months after the award. During this time, the contracting officer states she had numerous meetings with PPATHI and gave them ample opportunities to clarify matters.

Accordingly, PPATHI's protest on these grounds is denied.⁵



James F. Hinchman
General Counsel

⁵Since we denied the protest to the cancellation, there is no basis for us to question the renegotiation. An agency may choose to renegotiate a contract that has been properly terminated. NES Gov't Servs.; Urgent Care, supra. Further, regarding PPATHI's challenge to its exclusion from the recompetition, a determination to exclude a firm from a recompetition may be appropriate, as here, where the firm's actions create the appearance of an impropriety that is detrimental to the competitive system. See NES Gov't Servs.; Urgent Care, supra.