

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

60129

FILE: B-184277
B-185243

DATE: January 27, 1976

MATTER OF: The Camran Corporation

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DIGEST:

1. IFB requirement that bidder certify with bid that intended method of debris disposal comply with state air pollution control regulations is matter of responsibility--ability to perform. Therefore, certification provided after bid opening satisfies requirement.
2. Since question whether demonstration that proposed method of debris disposal can comply with state air pollution control regulations concerns responsibility, issue is not for consideration because GAO no longer considers merits of protests against affirmative determinations of responsibility. For same reason, allegation that lowness of price indicates lack of responsibility of low bidder is not considered on merits.
3. Award under IFB to protester (other than low bidder) on basis of "other factors" representing its considered solution to the ecological problems of floating debris disposal would not have been proper since 10 U.S.C. § 2305(c) provides that award shall be made on basis of price and "other factors" considered, "other factors" having been interpreted as meaning responsibility or eligibility.
4. No fault found with decision of agency to formally advertise, rather than negotiate contract under 10 U.S.C. § 2304(a)(11) for experimental or research and development work in view of 10 U.S.C. § 2304(a) preference for formal advertising, agency discretion which encompasses the method to be utilized to fulfill requirements, and in light of competition generated.

B-184277
B-185243

This decision concerns invitation for bids (IFB) DACW68-76-B-0011, for debris disposal for the Corps of Engineers (Corps) from the Dworshak Dam and Lake, Idaho. The protest was lodged by The Camran Corporation (Camran) against an award to Wilber Peterson & Sons, Inc. (Peterson).

This procurement represents the culmination of a number of attempts by the Corps to secure similar services. Camran also protested the preceding IFB No. DACW68-75-B-0060. Cancellation of IFB -0060 rendered that protest academic. In the present IFB (-0011), bids were solicited for disposing of approximately 40 acres of floating debris at the Dworshak project. The essence of this controversy is the requirement in the IFB that debris disposal, particularly if by some incendiary method, comply with the Rules and Regulations for the Control of Air Pollution in Idaho (Idaho Regulations). The Idaho Regulation for Control of Smoke or Other Visible Emission, Section 3, Standard for New Sources, prohibits the emission of air contaminants for a period longer than 3 minutes in any 1-hour period that is darker in shade than that designated No. 1 on the Ringelmann Chart published by the United States Bureau of Mines.

The IFB required bidders to certify with their bids "that the equipment and method of disposal of debris upon which his bid is based is in full compliance with the [Idaho Regulations]." The IFB permitted the form of the certification to be simply a signed statement by the contractor attesting to compliance with the requirement. Further, after bid opening, but before award, the apparently successful bidder would be required to demonstrate to the satisfaction of the contracting officer that the proposed method is in full compliance with the Idaho Regulations.

Ten bids were opened as scheduled on October 7, 1975. Peterson submitted the low bid of \$139,000. The other bids ranged from \$242,000 to \$768,000. Due to the wide range in the bids, the contracting officer requested and received from Peterson verification that the \$139,000 was its intended bid and that no mistakes occurred in calculating the bid. Peterson failed to submit with its bid a certification that its intended method of disposal complied with the Idaho Regulations. When requested after bid opening by the contracting officer, Peterson provided the certification.

The Corps informed us of its determination on December 1, 1975, that award of this contract could not be delayed further and proceeded to award to Peterson notwithstanding the pendency

B-184277
B-185243

of this protest. See Armed Services Procurement Regulation § 2-407.8(b)(3) (1975 ed.).

As a result of this situation, Camran raises six bases of protest: (1) the failure to submit the certification with the bid that the intended method of debris removal complied with the Idaho Regulations renders the bid nonresponsive; (2) the Corps should not be permitted to award to Peterson without first requiring a physical demonstration that the intended method of disposal will meet the Idaho Regulations; (3) the unreasonably low bid indicates that Peterson is nonresponsive; (4) award to Peterson will not be the most advantageous to the Government, price and other factors considered; (5) the procurement should have either been negotiated or two-step formally advertised; and (6) the Corps does not intend to fully enforce compliance with the Idaho Regulations and terms of any resultant contract.

Concerning the certification requirement, whether it represents a matter of responsiveness or responsibility depends upon the impact of the certification. For the certification to affect responsiveness, it must be of such consequence that failure to submit the certification with the bid will materially alter the legal obligations that flow from any resultant contract. Control Power Systems, Incorporated, B-183603, September 16, 1975, 75-2 CPD 149. If the certification is the foundation of the compliance requirement, without which Peterson would not be required to meet the Idaho Regulations, then it involves a matter of responsiveness. On the other hand, if the certification deals with information as to whether Peterson has the ability to comply with the IFB requirements, it is a matter of responsibility. 52 Comp. Gen. 389 (1972). Information concerning responsibility may be supplied after bid opening until award. Securities Exchange Commission, B-184120, July 2, 1975, 75-2 CPD 9.

In this instance, we believe the certification concerns Peterson's responsibility. The presence or absence of Peterson's certification that its intended method of disposal complies with the Idaho Regulations does not alter Peterson's legal liability to comply therewith. At a conference on this protest held pursuant to section 20.7 of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975), a representative of the Idaho Department of Health and Welfare stated that there is no Idaho requirement for a certification, such as was required here. Moreover, he stated that this was the first project of this magnitude to which the Idaho Regulations were to be applied. Consequently, he represented that monitoring of the actual debris disposal is the only method by which conformity can be assured.

B-184277
B-185243

stating that Peterson's proposed method of disposal could meet its Regulations if properly conducted.

As indicated above, information submitted to demonstrate one's ability to perform relates to a prospective contractor's responsibility. The question of the requisite information necessary to satisfy a procuring activity that a prospective contractor is responsible is a matter entrusted to the discretion of that activity. The award of the contract acts as an affirmative determination by the Corps of Peterson's responsibility. In view of this broad discretion, our Office has discontinued its practice of considering protests against affirmative determinations of responsibility due to the remote chance of success. United Hatters, Cap and Millinery Workers International Union, 53 Comp. Gen. 931 (1974), 74-1 CPD 310. Therefore, we will not consider the merits of Camran's contention on this matter. We take the same position with regard to Camran's protest that the lowness of Peterson's bid indicates that Peterson is nonresponsible. Worldwide Services, Inc., B-184259, July 15, 1975, 75-2 CPD 40.

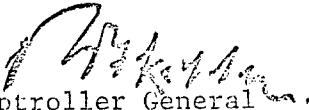
Camran's next basis of protest is that award to Peterson will not be the most advantageous to the Government, price and other factors considered. Camran's argument here encompasses broad considerations. Although Camran did not bid on the IFB, two other bidders submitted bids on the basis of utilizing Camran's floating method of debris disposal. Camran states that it has spent considerable monies to develop this particular system as an answer to the ecological problems of floating debris disposal. However, Camran points out that one facet of the development effort is a lack of operating and cost history upon which accurate price information can be used in a fixed-price procurement. Also, in Camran's opinion, problems exist in obtaining bonding for a new technology. Thus, in order to fulfill the Corps' responsibilities under 42 U.S.C. § 1857 (1970) (Clean Air Act) and Exec. Order No. 11752, 3 C.F.R. § 380, December 17, 1973, which Camran interprets as requiring Executive agencies to demonstrate new environmentally acceptable technologies, an award to Camran would have been most advantageous to the Government, primarily on the basis of other factors.

B-184277
B-185243

We do not dispute Camran's assertions concerning the problems encountered in having its floating system accepted. However, 10 U.S.C. § 2305(c) (1970) provides that, when formal advertising is used, award shall be made to the responsible bidder whose bid conforms to the invitation, price and other factors considered. We have interpreted "other factors" to mean responsibility or eligibility, as discussed above. Consequently, award in this instance to Camran on the basis of "other factors" would not have been proper.

While it is conceivable that Camran's system may be considered experimental, or research and development for the purposes of negotiating a contract (10 U.S.C. § 2304(a)(11) (1970)), 10 U.S.C. § 2304(a) (1970) establishes a preference for formal advertising by providing that, except in certain enumerated circumstances, procurements shall be conducted by formal advertising. A decision to negotiate a contract is discretionary with the procuring activity. Moreover, agency discretion encompasses the method to be utilized to fulfill requirements and we cannot fault the decision that the procurement of the services here should not have been negotiated or, for that matter, two-step formally advertised, particularly in light of the competition generated--10 bids received. See Social Systems Training and Research, Inc., B-182361, May 14, 1975, 75-1 CPD 294.

For the foregoing reasons, the protest is denied.


Deputy Comptroller General
of the United States