



United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Hroma Corporation

File: B-285053

Date: June 6, 2000

Fili Deligiannidis for the protester.
Richard Santino, Esq., U.S. Army Corps of Engineers, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the
General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Under invitation for bids (IFB) set aside for small businesses, bidder that is found nonresponsible by contracting agency, but who is eligible for, and has applied for, a certificate of competency, remains in line for award until the Small Business Administration proceedings are resolved; accordingly, such a bidder is an interested party to protest cancellation of the IFB.
2. Compelling reason exists to cancel IFB after bid opening where IFB restricted competition by incorrectly requiring contractor to perform 60 percent of the work with its own organization.

DECISION

Hroma Corporation protests the cancellation after bid opening of invitation for bids (IFB) No. DACW33-00-B-0003, issued by the U. S. Army Corps of Engineers, New England District, for painting and rehabilitation of the Cape Cod Canal Vertical Lift Railroad Bridge, Buzzards Bay, Massachusetts. The protester contends that rather than canceling the IFB, the agency should have awarded it a contract.

We deny the protest.

The IFB, which was issued on November 18, 1999 as a total small business set-aside, included the following two requirements of relevance to this protest:

All Contractors and Subcontractors that perform surface preparation or coating application for this project shall be certified by the Society

for Protective Coatings (formerly Steel Structures Painting Council) (SSPC) to the requirements of SSPC QP-1 prior to the day of contract award, and shall remain certified while accomplishing any surface preparation or coating application.

IFB, Document 00010, at 5, and:

The contractor shall perform on the site, and with its own organization, work equivalent to at least sixty percent (60%) of the total amount of work to be performed under the contract.

Federal Acquisition Regulation (FAR) § 52.236-1, incorporated into the IFB at Document 00800, at 4.¹

Three bids were opened on the January 14, 2000 opening date. Hroma's bid of \$10,149,620 was lowest of the three. The contracting officer determined that Hroma was not a responsible contractor because it lacked experience on a project of the given project's magnitude and because it did not have the ability to perform 60 percent of the work with its own forces and organization. Letter from Agency to SBA 1 (Feb. 29, 2000). In accordance with FAR § 19.602-1, the Corps referred the contracting officer's nonresponsibility determination to the SBA for possible issuance of a certificate of competency (COC).

On March 23, the SBA notified the Corps that it was suspending action on the COC determination because the IFB contained the wrong subcontracting limitation clause. The SBA informed the Corps that because the solicitation was a small business set-aside, it should have included FAR § 52.219-14, requiring the contractor to perform 15 percent of the cost of the contract with its own employees,² rather

¹ The "Performance of Work by the Contractor" clause set forth at FAR § 52.236-1 provides as follows:

The Contractor shall perform on the site, and with its own organization, work equivalent to at least _____ [insert the appropriate number in words followed by numerals in parentheses] percent of the total amount of work to be performed under the contract. . . .

The section instructs contracting officers to complete the clause by inserting the appropriate percentage "consistent with the complexity and magnitude of the work and customary or necessary specialty subcontracting." In this instance, the Corps of Engineers determined that the appropriate percentage for insertion was 60 percent.

² FAR § 52.219-14 provides in relevant part as follows:

(continued...)

than FAR § 52.236-1, which, as completed by the Corps, required the contractor to perform 60 percent of the work with its own organization. In this regard, while FAR § 36.501(b) instructs contracting officers to insert the clause at § 52.236-1 in solicitations and contracts when a fixed-price construction contract is contemplated and the contract amount is expected to exceed \$1 million, it exempts those contracts, such as the one here, which are to be awarded pursuant to a small business set-aside. Instead, FAR § 19.508(e) instructs contracting officers to insert the clause at § 52.219-14 in solicitations and contracts for supplies, services, and construction, if any portion of the requirement is to be set aside for small business and the contract amount is expected to exceed \$100,000.

Upon learning that the IFB should have incorporated FAR § 52.219-14, requiring the contractor to perform at least 15 percent of the cost of the contract with its own employees, rather than FAR § 52.236-1 as completed by the Corps, requiring the contractor to perform 60 percent of the total amount of work with its own organization, the contracting officer determined that the IFB should be canceled. The contracting officer notified the bidders of the cancellation on March 24.

Hroma protests the agency decision to cancel the IFB, arguing that cancellation after bid opening mars the integrity of the bidding process.

As a preliminary matter, the agency argues that Hroma is not an interested party to maintain this protest because it has been determined nonresponsible, and, as a consequence, would be ineligible for award if its protest against cancellation of the IFB were sustained and the solicitation reinstated.

We disagree. Although we have held that a small business firm that fails to apply for a COC after being determined nonresponsible by the contracting agency is not an interested party to maintain a protest before our Office because it would be ineligible for award if its protest were sustained, The Swanson Group, Inc., B-249631, Aug. 10, 1992, 92-2 CPD ¶ 93 at 1-2, that is not the situation here. Here, the protester has applied for a COC, and the SBA has suspended its consideration of the application. A bidder that is eligible for, and has applied for, a COC remains in line

(...continued)

(b) By submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for—

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(3) General construction. The concern will perform at least 15 percent of the cost of the contract, not including the cost of materials, with its own employees.

for award until the SBA proceedings are resolved. See Service Contractors, Inc., B-234311, Apr. 3, 1989, 89-1 CPD ¶ 345 at 3. Accordingly, Hroma is an interested party to maintain this protest.

The agency argues that cancellation of the IFB was proper because the requirement that the contractor perform 60 percent of the work with its own organization had a restrictive effect on competition. As proof that competition was curtailed, the agency offers a letter that it received from another prospective bidder, Hercules Painting Company, representing that although it spent over 2 weeks and incurred considerable cost in preparing to bid on this project, it ultimately decided not to bid because it was not QP-1 or QP-2 certified, and “without being able to do the painting, there was no way [it] could do 60% of the work as [the IFB’s] specifications require.” Letter from Hercules Painting Co. to Agency 1 (Jan. 28, 2000).

A contracting agency must have a compelling reason to cancel an IFB after bid opening because of the potential adverse impact on the competitive bidding system of resolicitation after bid prices have been exposed. FAR § 14.404-1(a)(1); HDL Research Lab, Inc., B-254863.3, May 9, 1994, 94-1 CPD ¶ 298 at 5. An IFB may be cancelled and all bids rejected after opening where, consistent with the compelling reason standard, cancellation is clearly in the public’s interest. FAR § 14.404-1(c)(10). We have held that a contracting officer’s desire to obtain enhanced competition by materially modifying specifications to make them less restrictive constitutes a valid reason under this FAR standard. Diversified Energy Sys.; Essex Elec. Eng’rs, Inc., B-245593.3, B-245593.4, Mar. 19, 1992, 92-1 CPD ¶ 293 at 3. Similarly, we have upheld cancellation where undertaken to obtain enhanced competition through material modification of other restrictive solicitation requirements. Pride Container Corp., B-224678, B-224679, Jan. 16, 1987, 87-1 CPD ¶ 66 at 4; see also American Consulting Servs., Inc., B-276149.2, B-276537.2, July 31, 1997, 97-2 CPD ¶ 37 at 8 n.9.

Here, the record shows that at least one potential bidder was dissuaded from submitting a bid in response to the solicitation by the requirement that the contractor perform at least 60 percent of the work with its own organization,³ and we

³ The protester maintains that Hercules’s letter does not indicate that it was dissuaded from submitting a bid by the requirement that the contractor perform at least 60 percent of the work with its own organization; rather, Hroma asserts, the letter indicates that Hercules was dissuaded from submitting a bid by the requirement for SSPC QP-1 certification. As previously noted, Hercules stated in its letter that it had ultimately decided not to bid the job because “[it was] not QP1 and QP2 certified and without being able to do the painting, there was no way that [it] could do 60% of the work as [the] specifications require.” We think that Hercules’s letter clearly indicates that the requirement for 60 percent self performance played a key role in dissuading the firm from submitting a bid.

think that the agency could reasonably have surmised that other prospective bidders were likewise dissuaded, given that more than 50 contractors requested plans and specifications for the solicitation, but only 3 submitted bids. Agency Report, Apr. 21, 2000, at 7. Under such circumstances, we think that the agency reasonably determined that resolicitation would result in enhanced competition and, accordingly, that cancellation was in the public's interest.

The protest is denied.

Comptroller General
of the United States