



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Trison Construction, Inc.

File: B-401537.2

Date: November 9, 2009

Joel S. Rubinstein, Esq., Lawrence M. Prosen, Esq., and Sean P. Bamford, Esq., K&L Gates LLP, for the protester.

Vera Meza, Esq., Department of the Army, for the agency.

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DIGEST

Agency reasonably limited competition for renovation services to holders of indefinite-delivery, indefinite-quantity, multiple-award, task-order contracts, where the record shows that this acquisition approach was necessary to meet the agency's urgent requirements.

DECISION

Trison Construction, Inc. of College Park, Maryland, protests the decision of the U.S. Army Research, Development and Engineering Command to limit competition for the procurement of construction services at the Aberdeen Proving Ground (APG), Maryland to firms with indefinite-delivery/indefinite-quantity, multiple-award, task-order contracts (MATOC). This decision followed the Army's proposed corrective action in response to Trison's prior protest of award of a contract to EEC Incorporated under invitation for bids (IFB) No. W91ZLK-09-B-0002. Based upon the Army's promise that it would terminate EEC's contract and resolicit under a different solicitation, we dismissed Trison's prior protest as academic.

We deny the protest.

The IFB provided for award of a construction contract for renovations to Building No. 316 at the Aberdeen Proving Ground. The Army received 13 bids, 6 of which were found to be responsive. Contracting Officer Statement, Sept. 4, 2009, at 1. Award was made to EEC, the apparent low bidder on June 23. Trison, the second low bidder, protested to our office on June 29 challenging the agency's price evaluation. In response to the protest, the agency determined that the IFB was

ambiguous with respect to how price would be evaluated, and informed our Office that it would terminate EEC's contract and recompile under a new solicitation. The Army requested that we dismiss Trison's protest as academic based upon the proposed corrective action; Trison did not oppose the agency's dismissal request.¹ Contracting Officer's Statement, July 16, 2009, at 2. We dismissed Trison's protest as academic on July 17. On August 3, the contracting officer informed the protester that, given the agency's urgent need for the services by June 1, 2010, the Army had decided to limit the competition for this requirement to six firms that hold MATOCs. Trison, which does not hold a MATOC, protested to our Office.

Trison contends that the Army's decision to limit the competition to existing MATOC holders is inconsistent with its proposed corrective action, which caused our Office to dismiss Trison's prior protest as academic. Protest at 5. The protester argues that the goals of the protest system are circumvented where the agency does not promptly implement its promised corrective action. *Id.* at 5-7. In this respect, the protester suggests that (although it states that it does not allege that the Army acted in bad faith) the agency's actions are a "mere pre-text and not rationally related to the agency's own stated corrective action." Comments at 4. Finally, Trison challenges the urgency of the agency's needs, complaining that the agency waited 12 days to decide how to procure the requirement after terminating EEC's contract and canceling the IFB, and argues that the urgency associated with the agency's requirements are the result of poor procurement planning. *Id.* at 7.

The agency responds that resoliciting under a new IFB (as the agency originally contemplated) would "endanger the Agency's ability to assure that the work could be completed within the necessary time limits." Contracting Officer's Statement, Sept. 4, 2009, at 2. Specifically, the agency states that a wide variety of operations and activities are being transferred to APG under base realignments and closures (BRAC) and that the renovations are necessary to prepare a building that houses the APG's data center, a mission critical facility for the entire APG installation. *Id.* In this regard, the agency expects an influx of personnel and a four-fold expansion of the capacity of existing systems in the building and states that the construction services (which would take at least 270 days) must be completed by June 2010 to allow for occupancy in August. *Id.*

Following the July 17 dismissal of Trison's prior protest, agency officials met on July 21 to consider how to satisfy the agency's urgent requirements; among the

¹ Trison also did not assert that the agency lacked a compelling reason to cancel the IFB. Cancellation of an IFB after bid opening is only permitted where a compelling reason to cancel exists. See Federal Acquisition Regulation § 14.404-1(a)(1). Ambiguous pricing terms in an IFB provides a compelling reason to cancel the solicitation after bid opening. *P.J. Dick, Inc.*, B-259166, B-260333, Mar. 6, 1995, 95-1 CPD ¶ 131 at 4.

acquisition methods considered were whether to resolicit under a new IFB or to conduct a limited competition among MATOC holders. The agency concluded that, if it resolicited under a new IFB, award would likely not be made until mid-October, which the agency believed would likely not leave sufficient time for completion of the renovation services by June. The Army decided that it would conduct a limited competition among MATOC holders to satisfy its requirements. *Id.* at 2--3.

The record provides no basis to conclude that the agency acted unreasonably in deciding to restrict the resolicitation of the renovation services to MATOC holders to satisfy the agency's urgent requirements. Although Trison complains that the agency waited 12 days to decide how to reprocur the requirement after taking corrective action in response to the prior protest, the protester does not assert that the agency lacks an urgent basis for the completion of these renovation services by June 2010, nor show that the agency's urgent requirement could be timely satisfied by issuing a new IFB. Given that the agency reasonably found that resoliciting these requirements under a new IFB would not timely satisfy its urgent requirements, we have no basis to object to the agency's decision not to issue a new IFB.

Also, we are not persuaded by Trison's arguments that the agency's urgent requirements were created by the agency's taking 12 days after announcing that it would initiate corrective action to decide how to obtain these services or from the errors made in drafting the prior IFB. Although the prior IFB was ambiguous with respect to the price evaluation of certain contract line items, this alone does not establish that the agency's urgent requirements were the result of a lack of advanced procurement planning. *See, e.g., New Breed Leasing Corp.*, B-274201, B-274202, Nov. 26, 1996, 96-2 CPD ¶ 202 at 6; *Sprint Commc'ns Co., LP*, B-262003.2, Jan. 25, 1996, 96-1 CPD ¶ 24 at 9 (an agency's obligation to engage in reasonable advance planning prior to conducting procurements does not constitute a requirement that procurement planning be perfect or completely error-free). We also think that taking 12 days to determine an appropriate acquisition approach was unobjectionable.

Finally, the record does not support Trison's allegation that the cancellation of the IFB and decision to conduct a limited competition among MATOC holders was a "mere pretext" to avoid resoliciting Trison. As noted above, the record shows that the Army reasonably found that resoliciting under a new IFB likely would not meet the agency's urgent requirements. Trison's arguments that the agency's actions are a "mere pretext" are based upon no more than inference and supposition, upon which our Office will not attribute unfair or prejudicial motives to procurement officials. *See Shinwha Elecs., B-290603 et al.*, Sept. 3, 2002, 2002 CPD ¶ 154 at 5 n. 6.

The protest is denied.

Lynn H. Gibson
Acting General Counsel