GAO

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: FCS Construction Services, Inc. A-B409531

File: B-283726.2

Date: January 3, 2000

Fredric W. Stearns, Esq., Vaughn, Wright & Stearns, for the protester.
Maj. James A. Lewis and Col. Nicholas P. Retson, Department of the Army, for the agency.
Linda C. Glass, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly converted the procurement from sealed bid to negotiated procedures, after bid opening, where the only acceptable bid received was at an unreasonable price.

2. Agency's corrective action of canceling converted negotiated procurement was permissible where agency determined that a potentially ambiguous solicitation requirement may have resulted in unduly restricted competition.

DECISION

FCS Construction Services, Inc. protests the cancellation of solicitation No. DAKF11-99-B-1001, issued by the Department of the Army for the renovation and repair of certain buildings at Fort McPherson, Atlanta, Georgia.

We deny the protest.

The solicitation, originally issued as an invitation for bids (IFB) on August 5, 1999, contained a schedule calling for prices for demolition work at two barracks buildings including the removal and disposition of any hazardous materials encountered, and for the installation of new partitions, ceilings, plumbing, electrical wiring and heating ventilating and air conditioning equipment. The schedule also required the attachment of certificates and the entry of license numbers for Georgia asbestos and LBP (lead-based paint) licenses; it stated that failure to submit these license numbers would render the bid ineligible for award. IFB §B. Section H of the solicitation contained a provision entitled "SPECIAL REQUIREMENT FOR PRIME

CONTRACTORS ON FORT MCPHERSON AND FORT GILLEM," which provided at paragraph A that "[a]ll prime contractors involved in alteration, renovation and/or repair on Fort McPherson and Fort Gillem are required to have Georgia State licenses for conducting work involving Asbestos and Lead-[based] paint." The provision further provided at paragraph D that "[f]ailure to include the required license and training certifications with the initial proposal submission will render offeror's bid/proposal as ineligible for award and further consideration will not be given." Internal agency correspondence shows that, because of asbestos and LBP related performance problems that had necessitated delays and stoppages of a renovation contract for building 56, the agency intended to have the solicitation at issue, as well as any other solicitation for similar work at Fort McPherson and Gillem, require Georgia asbestos and LBP licensing and certification for all prime contractors in order to be eligible to compete. Agency Report, Tab D.

Five firms submitted bids in response to the solicitation by the September 15 bid opening time, as follows:

Government Estimate	$2,600,180
FCS	$2,683,349
Reams Enterprises	$2,687,201
Total Systems	$3,365,808
Georgia/Atlantic	$3,385,702
CompuCraft, Inc.	$3,606,000

Agency Report, Tab I.

FCS, the apparent low bidder, submitted with its bid Georgia licenses for conducting work involving asbestos and LBP for Morley Environmental, Inc., a subcontractor. ABU09533
ABU09532 Agency Report, Tab R. Reams Enterprises and CompuCraft, Inc. were the only ABU09534 bidders that submitted the required licenses in their own names as prime contractors. Id. The bids from the three firms (including FCS) that did not submit licenses in their own names were rejected. Legal Memorandum at 2. On September 17, award was made to Reams as the lowest responsive, responsible bidder. Contracting Officer's Statement at 2. CompuCraft then filed an agency-level protest alleging that Reams did not hold the Georgia certificates in its own name. Id. The agency concluded that the awardee's asbestos certification was defective and the award was terminated for convenience. CompuCraft, the remaining eligible bidder, was considered for award, but the contracting officer concluded that its bid was too high to permit a determination that the price was reasonable.

Pursuant to Federal Acquisition Regulation (FAR) § 14.404-1 (e) and (f), the contracting officer determined that the use of negotiation was in the government's interest, and elected to convert the solicitation to a request for proposals, and to negotiate and make an award without issuing a new solicitation. Each bidder under the sealed bid acquisition was given notice that negotiations would be conducted and was given an opportunity to participate in the negotiations. Amendment

No. 0005 was issued converting the sealed bid procurement to a negotiated procurement and also changing the language in the specifications to permit offerors to provide LBP and asbestos certifications in the names of subcontractors as well as in the names of prime contractors.

Thereupon, on September 24, FCS filed a protest with our Office asserting that the original IFB specifications permitted Georgia LBP and asbestos certifications in the name of either the prime contractor or a subcontractor. FCS maintained that it was entitled to award under the IFB as the low responsive, responsible bidder, and objected to the conversion from a sealed bid procurement to a negotiated procurement.

As a result of FCS's protest, the agency concluded that the original solicitation requirement with respect to LBP and asbestos had been ambiguous. The agency states that it had intended to require prime contractor certifications because the agency's experience had been that because many prime contractors performing renovation work at Fort McPherson had not possessed the expertise required for recognizing hazardous situations, workers had been unnecessarily exposed to hazardous materials. Determination to Cancel Solicitation at 2. The agency further states that the prime contractor certification requirement was intended to address this important safety concern. On October 1, in response to the FCS protest, the contracting officer decided to issue amendment No. 0006 canceling the solicitation because the original specifications were subject to differing interpretations and the specifications may have unduly restricted competition as evidenced by the fact that only two bids included prime contractor certifications.[1] By letter dated October 4, the agency advised our Office that it had taken corrective action by canceling the solicitation, whereupon our Office dismissed the protest as academic.

FCS now protests the cancellation on the basis that the agency did not have a compelling reason to cancel the solicitation, and seeks award of a contract under the initial sealed bid procurement.

FCS supports the agency's decision to terminate Ream's contract but contends that the conversion of the solicitation from sealed bid to negotiated, and the subsequent cancellation were improper because award should have been made to FCS under the IFB. The agency asserts that award to the protester was not an option because the protester's bid, like Reams's bid, was unacceptable because it did not provide the appropriate LBP and asbestos certifications as required by the IFB.[2]

---

[1] In addition, the agency reports that its records reflect an inquiry from one potential bidder that did not bid on the requirement because the company did not have asbestos and LBP licenses in its own name. Agency Report, Tab D, at 4.

[2] A provision, such as the one here, that requires the awardee to possess specific licenses at the time of award is a definitive responsibility criterion, compliance with

(continued...)

Termination of the contract and conversion of the procurement from sealed bid to negotiated was unobjectionable here since, subsequent to award, the agency discovered that the awardee's certification in its own name was defective, and the only other bidder with the appropriate certifications was determined to have bid an unreasonable price. An IFB may be cancelled after bid opening and the acquisition completed through negotiation where the cancellation is based on a determination or that all otherwise acceptable bids are unreasonably priced. FAR § 14.404-1(c) and (e).

The protester takes the position that it should have been awarded the contract under the original IFB. However, the initial IFB, as quoted above, required that prime contractors have specific Georgia licenses for conducting work involving asbestos and LBP. The protester did not meet this requirement and therefore was ineligible for award under the original IFB.[3]

Regarding the propriety of the agency's subsequent cancellation of the negotiated procurement, for procurements conducted under negotiated procedures, the agency maintains that canceling the solicitation is proper because the requirement for prime contractor certification may have been restrictive of competition. A procuring agency may cancel a negotiated procurement based on the potential for increased competition. Adrian Supply Co., B-237531.3, Aug. 17, 1990, 90-2 CPD ¶ 138 at 2. Where, as here, the original solicitation is ambiguous, with the result that offerors responded to it based on different reasonable assumptions as to what was required, the competition has been conducted on an unequal basis and the government has been deprived of the full benefits of competition. Under these circumstances, it is

---

(...continued)
which is a necessary prerequisite to contract award. Aero Sys., Inc., B-215892, Oct. 1, 1984, 84-2 CPD ¶374 at 2.

[3] The protester argues that the amendment language allowing license certification in the name of either the prime contractor or a subcontractor somehow constitutes an admission by the agency that the agency's interpretation of the IFB licensing requirement was unreasonable, and that the original IFB unambiguously permitted either certification. We disagree. We view the original IFB as requiring certification in the name of the prime. At most, the original provision was ambiguous, that is, subject to two possible interpretations; nothing in the fact that the agency amended the solicitation suggests that the IFB initially allowed licenses issued in the name of a subcontractor.

appropriate to resolict the requirement.[4] Allied Signal, Inc.; Electronic Sys., B-275032, B-275032.2, Jan. 17, 1997, 97-1 CPD ¶ 136 at 11.

The protest is denied.

Comptroller General
of the United States

[4] FCS also seeks bid protest costs because of the "corrective action" taken by the agency. Our Bid Protest Regulations, 4 C.F.R. § 21.8(e) (1999), provide that where an agency takes corrective action in response to a protest, we may recommend that the agency pay protest costs, including attorneys' fees; however, we will make such a recommendation only where the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. CSL Birmingham Assocs.; IRS Partners–Birmingham–Entitlement to Costs, B-251931.4, B-251931.5, Aug. 29, 1994, 94-2 CPD ¶ 82 at 3. Here, the agency took corrective action one month before the date on which it was required to file the agency report in our Office. Where, as here, corrective action is taken prior to the protest report due date, we regard such action as reasonably prompt and decline to consider the protester's request that we recommend reimbursement of protest costs. CDIC, Inc.–Entitlement to Costs, B-277526.2, Aug. 18, 1997, 97-2 CPD ¶ 52 at 2.