



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Vantex Service Corporation

File: B-266199

Date: January 30, 1996

D. J. Brown for the protester.

Michael J. O'Farrell, Jr., Esq., Department of the Army, for the agency.

Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly determined to use competitive negotiation procedures, as opposed to sealed bidding, to procure its requirements where, based on prior performance problems, the agency determined that discussions would be necessary to ensure that offerors understood the requirements of the solicitation prior to award and where the award would not be based solely on price.

DECISION

Vantex Service Corporation protests the decision of the Department of the Army to use competitive negotiation procedures to procure portable latrines and related services at Fort Hood, Texas under request for proposals (RFP) No. DAKF48-95-R-0015. Vantex maintains that the agency should conduct this procurement using sealed bidding procedures.

We deny the protest.

The RFP, issued as a total small business set-aside, contemplated the award of a firm, fixed-price contract for a base period with 4 option years. The RFP required offerors to submit technical and price proposals. Technical proposals were to describe an offeror's supplies and equipment, company experience, and quality control program. With respect to an offeror's supplies and equipment and quality control program, the RFP required offerors to furnish particular information, demonstrating the firm's understanding of the solicitation requirements. With respect to experience, the RFP stated that a minimum of 2 years experience was desired, and that an offeror with less than the desired experience would be referred to the Small Business Administration (SBA) for the possible issuance of a certificate of competency (COC).

The RFP provided that the award would be made to the responsible offeror that submitted the lowest-priced, technically acceptable proposal. The RFP included the following technical evaluation factors: (1) material and equipment list; (2) company experience; and (3) quality control program. The RFP stated that once technical acceptability was established based on these evaluation factors, price would become the determining factor for award.

Vantex, a small business, maintains that the agency should procure its requirements using sealed bidding procedures because discussions are not necessary for these "uncomplicated and low-tech" requirements and because the award will be based solely on price.¹

Under the Competition in Contracting Act of 1984 (CICA), contracting agencies are required to obtain full and open competition and, in doing so, are required to use competitive procedures--negotiation or sealed bids--that they determine to be best suited to the circumstances of a given procurement. 10 U.S.C. § 2304(a)(1) (1994); Military Base Management, Inc., 66 Comp. Gen. 179 (1986), 86-2 CPD ¶ 720. CICA further provides that, in determining which competitive procedure is appropriate, an agency must solicit sealed bids if: (1) time permits; (2) award will be based on price; (3) discussions are not necessary; and (4) more than one bid is expected. 10 U.S.C. § 2304(a)(2)(A); see JT Constr. Co., Inc., B-244404.2, Jan. 2, 1992, 92-1 CPD ¶ 1. Negotiated procedures are authorized only if sealed bids are not appropriate under 10 U.S.C. § 2304(a)(2)(A). See 10 U.S.C. § 2304(a)(2)(B). While the decision whether to employ negotiated procedures involves the exercise of business judgment, such decision must be reasonable. Racal Corp., 70 Comp. Gen. 127 (1990), 90-2 CPD ¶ 453.

The agency explains that the contracting officer decided to conduct this procurement using competitive negotiation procedures in order to have an opportunity to conduct discussions. The agency reports that while it previously procured portable latrines for military training field exercises using small purchase procedures, it encountered problems with timely delivery and servicing of the latrines in a military training field environment, often in a remote area under various weather conditions. Given recent performance problems, the contracting officer believed it would be necessary to conduct discussions to ensure that the offerors understood, prior to award, the solicitation requirements and the magnitude

¹Vantex raised this argument in an agency-level protest filed prior to the closing time for receipt of initial proposals. The agency denied the agency-level protest prior to the closing time. This protest was timely filed within 10 working days after the denial of Vantex's agency-level protest (which was also before the closing time). Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1995).

of logistical considerations involved in providing portable latrines and related services during military training field exercises. The agency anticipates that discussions could result in the amendment of solicitation requirements.²

Moreover, the award will not be based solely on price. The RFP listed three technical evaluation factors which the agency states will be evaluated on a "go/no-go" basis to determine the technical acceptability of an offeror's proposal. According to the RFP, only when technical acceptability is established will price become the determining factor for award. The RFP specifically states that the award will be made to the responsible offeror that submits the lowest-priced, technically acceptable proposal.

The protester does not establish that the agency's determination that discussions might well be necessary to evaluate an offeror's understanding of the solicitation requirements is unreasonable. Moreover, award is to be based on an assessment of an offeror's technical acceptability and price, not only on price as Vantex states. In these circumstances, we have no basis to object to the agency's use of competitive negotiation procedures, instead of sealed bidding, to procure its requirements. See D.M. Potts Corp., B-247403, May 29, 1992, 92-1 CPD ¶ 479.

Vantex is concerned that the agency will improperly use responsibility factors to determine the technical acceptability of an offeror's proposal, thereby circumventing the SBA's referral procedures for COC purposes.

The use of traditional responsibility factors as evaluation criteria in a negotiated procurement is permissible. Premier Enters., Inc., B-259027, Mar. 1, 1995, 95-1 CPD ¶ 118. However, if an agency evaluates proposals on a "go/no-go" basis using traditional responsibility factors, as the agency reports it intends to do in this case, and solely as a result of these factors finds a proposal from a small business unacceptable, the agency would be required to refer the matter to the SBA for a final determination under COC procedures. Id.

The agency reports that it is evaluating proposals. Since the agency has not completed the evaluation process, Vantex is merely anticipating improper agency

²In the protest, Vantex also raised four arguments involving various solicitation requirements. In its administrative report, the agency notes, for example, that in response to one of Vantex's arguments, it amended the solicitation with respect to the designation of an on-site project manager, a requirement which Vantex characterized as an "ivory tower" or "gold-plated" administrative requirement. The agency believes that this example is representative of solicitation requirements that could be amended based on input from offerors during discussions. In its comments to the administrative report, Vantex withdrew these four arguments.

action, that is, that the agency will fail to refer a small business whose proposal is found to be technically unacceptable on the basis of responsibility factors to the SBA for the possible issuance of a COC. Protests that merely anticipate improper agency action are speculative and premature. See General Elec. Canada, Inc., B-230584, June 1, 1988, 88-1 CPD ¶ 512. Consequently, we have no basis to consider Vantex's concern at this time.

Finally, Vantex basically challenges the agency's decision to procure its requirements under a single solicitation, as opposed to dividing its requirements and using small purchase procedures, as previously was done.

In procuring its current requirements, the agency has determined that its minimum needs can best be satisfied by conducting a negotiated procurement and awarding a single requirements contract. The determination of the agency's minimum needs and the best method of accommodating them are primarily within the agency's discretion; we will not question such a determination unless the record shows that it does not have a reasonable basis. RMS Indus., B-247233; B-247234, May 1, 1992, 92-1 CPD ¶ 412. The Army believes that a single contract, under which one vendor will be responsible for satisfying all of the agency's requirements, will allow the agency to manage its needs more efficiently and to better address previous performance problems. Vantex has failed to show that the agency's determination in this regard is unreasonable.

The protest is denied.

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