



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: American Technical & Analytical Services, Inc.

File: B-282277.5

Date: May 31, 2000

Robert J. Martinez, Esq., Williams & Jensen, for the protester.
Jonathon S. Baker, Esq., Environmental Protection Agency, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bid that was previously rejected because the bidder was determined nonresponsible under an invitation for bids contemplating multiple awards may be revived, where the agency intends to make additional awards under the IFB, because responsibility is to be determined based on any information received by the agency up to the time award is proposed to be made.

DECISION

American Technical & Analytical Services, Inc. protests the award of a contract to Laucks Testing Laboratories, Inc. under invitation for bids (IFB) No. PR-HQ-98-00031, issued by the United States Environmental Protection Agency (EPA), for laboratory services. American contends that the EPA improperly allowed Laucks to revive its expired bid.

We deny the protest.

The IFB, issued July 22, 1998, was to procure laboratory services from multiple contractors under fixed-price, indefinite-quantity contracts for a 1-year base period with 2 option years. The laboratory services were for analyzing samples from hazardous waste sites to determine the presence and concentration of certain organic analytes in aqueous and nonaqueous samples. IFB § B.1. Among other things, the IFB required the analysis data to be furnished to the EPA on a computer disk, defined as an electronic data deliverable (EDD). IFB § C.2, exh. H. The IFB provided for award of up to 26 contracts to those bidders with the lowest prices who passed the qualification requirements set forth in the IFB. IFB § M.3. The

qualification requirements consisted of a two-part test that bidders were to take after bid opening in order to be considered responsive. IFB amend. 3, § L.3, attachs. 14, 16. The IFB was amended to state that 19 contract awards were “anticipate[d]” with no more than 3 contracts going to one bidder, and with 9 contracts to be based on a 100-sample monthly capacity and 10 contracts to be based on a 300-sample monthly capacity. IFB amend. 3, at 2, and amend. 5, at 3.

EPA received 23 bids at bid opening on December 12. Fourteen bids, including American’s, were eliminated from consideration on February 23, 1999. EPA rejected American’s bid because it did not meet the qualification requirements. After an unsuccessful agency-level protest, American protested the agency’s action to our Office on May 6. Contracting Officer’s Statement at 1-2.

We sustained American’s protest because the EPA treated American unequally by providing it an incorrect version of the qualification test while providing other bidders the correct version. We also found the qualification test could not properly be used to reject bids in a procurement conducted under sealed bid procedures. We therefore recommended that the EPA decide whether the test was necessary and either cancel and resolicit the requirement under competitive procedures if the test was necessary, or, if the test was not necessary, determine whether American and the other rejected bidders were responsible and if so include them in the award consideration. American Analytical and Technical Servs., Inc., B-282277.3, Aug. 16, 1999, 99-2 CPD ¶ 38 at 6-7.

Pursuant to our recommendation, the EPA determined that the qualification test was not needed and began considering making awards to American and the other rejected bidders, including Laucks. Contracting Officer’s Statement at 2. On August 26, the EPA requested Laucks to revive its bid for an additional period of 60 days in order to be considered for an award. Laucks reinstated its bid on August 27. In early September, when the EPA was preparing to consider Laucks’ responsibility, Laucks informed the agency by letter dated September 13 that Laucks probably would fail a pre-award survey because it could not meet the EDD requirement. See Contracting Officer’s Statement at 2-3; Protest exh. 9. Thus, the EPA determined Laucks was not responsible and rejected that firm’s bid. Protest exh. 10. On September 24, the EPA proceeded with awarding the contracts to bidders with higher bids than Laucks until the anticipated 19 contract awards were made. Protest at 10; Contracting Officer’s Statement at 3.

Following these contract awards, the EPA determined that it needed more contracts to meet its needs, but it believed no more contracts could be placed under the IFB in light of the language in amendments Nos. 3 and 5 indicating that only 19 contract awards were anticipated. Thus, the EPA began meeting these requirements under the Small Business Administration’s (SBA) section 8(a) program on September 28. Contracting Officer’s Statement at 4. In late October, after learning of this action, American advised the EPA that it believed that the agency could meet its additional requirements under the IFB, at least up to 26 awards, based upon section M.3 of the

IFB. The agency then agreed and revived the IFB with the intention of making seven additional awards based on a 100-sample monthly capacity. To effectuate this action, the EPA contacted the responsive bidders who had not yet received three awards to seek reinstatement of their expired bids. Laucks was one of the bidders that the EPA contacted and that firm reinstated its bid on December 21. Id. at 4-5. In January 2000, the EPA determined Laucks was responsible and could now meet the EDD requirement. EPA thus proposes to make award to Laucks.

American, the next bidder in line for award if Laucks does not receive an award, protests the proposed award to Laucks. American contends that the EPA could not properly allow Laucks to reinstate its bid without compromising the integrity of the competitive bidding system because of Laucks' prior actions regarding its bid. Protest at 8-10. EPA responds that the integrity of the competitive bidding system has not been compromised here because a bidder's responsibility is to be determined as of the time of award, which has not yet been made to Laucks.

We agree with EPA that a bidder's responsibility is to be determined based on any information received by the agency up to the time award is proposed to be made to that bidder. CardioMetrix, B-255748.2, June 13, 1994, 94-1 CPD ¶ 364 at 2; Vulcan Eng'g Co., B-214595, Oct. 12, 1984, 84-2 CPD ¶ 403 at 9-10; Federal Acquisition Regulation § 9.105-1. In this regard, although EPA previously determined that Laucks lacked the technical capability to meet the IFB requirements and thus was not responsible, after reopening the IFB to make additional awards, it found that Laucks now has the technical capability to meet the IFB requirements and thus is responsible. An agency can and should reverse a previous nonresponsibility determination based on additional information brought to its attention prior to award. Henry Spen & Co., Inc., B-183164, Jan. 27, 1976, 76-1 CPD ¶ 46 at 4.

American does not dispute Laucks' current responsibility, but asserts that to allow Laucks' bid to be revived after its rejection as nonresponsible would compromise the integrity of the competitive bidding system. As a general rule, a bidder may be permitted to revive its expired bid, if doing so would not compromise the integrity of the competitive bidding system. Esprit Int'l Corp., B-276294, Mar. 10, 1997, 97-1 CPD ¶ 106 at 2. We see no adverse affect to the integrity of competitive bidding system in allowing a bidder previously determined nonresponsible to be reconsidered for award when the time for making awards has been extended. While American states that Laucks caused the rejection of its bid by indicating that it could not meet IFB requirements that it can now meet and thereby gave itself a competitive advantage, we cannot say American obtained any kind of unfair competitive advantage by this action, given that it could not know (since the agency did not know), at the time it indicated that it could not perform in accordance with the IFB, that additional awards would be made under the IFB. Contrast id. (where a bidder initially proposed a bid acceptance period shorter in duration than requested in the IFB and accepted by other bidders, it may not be permitted to revive its bid because such a bidder has not assumed as great a risk of price or market fluctuations as the other bidders); The Vemo Co., B-243390, B-243390.2, Nov. 12, 1991, 91-2 CPD ¶ 443 at 3

(bid which offered bid extensions for lesser periods than requested by the agency and offered by other bidders was properly rejected because allowing the bidder to so mitigate its risk in extending its bid may compromise the integrity of the competitive bidding system). Thus, we see no basis to object to the proposed award to Laucks.

The protest is denied.

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