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**Comptroller General
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**United States Government Accountability Office
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Decision

Matter of: Ceres Environmental Services, Inc.

File: B-310902

Date: March 3, 2008

Karl Dix, Jr., Esq., and John S. Tobey, Esq., Smith, Currie & Hancock LLP, for the protester.

Amy Pereira, Esq., U.S. Army Corps of Engineers, for the agency.

Paula J. Haurilesko, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that the agency improperly used negotiated procedures instead of sealed bidding procedures to solicit proposals to construct a drainage canal is denied where the agency reasonably concluded that the importance of completing the project justified an accelerated construction schedule and, as a consequence, necessitated consideration of non-price factors in selecting a proposal.

DECISION

Ceres Environmental Services, Inc., protests the use of negotiated procedures by the U.S. Army Corps of Engineers in soliciting offers to construct an intake canal as part of the Southeast Louisiana Urban Flood Control Project (SELA) under request for proposals (RFP) No. W912P8-07-R-0103.

We deny the protest.

The intake canal project is the final phase of the Dwyer Road project, a three-phase project under SELA.¹ Agency Report (AR), Tab A, Legal Memorandum, at 1. The first phase involved construction of a larger canal to discharge water from the pumping station to Lake Pontchartrain via the Inner Harbor Navigation Canal and

¹ SELA was established in 1996, in response to severe flooding the year before, to improve flood control and drainage within three parishes in and around New Orleans.

was completed in 2003. Id. at 1-2. The second phase involves construction of a new pumping station to triple the pumping capacity of the old station. AR, Tab O, Affidavit of SELA Senior Project Manager, at 2. The pumping station project was disrupted by Hurricane Katrina and is still under construction. Comments on the AR, exh. 4, at 1. The final phase, and the subject of this protest, involves the construction of an intake canal under Dwyer Road to move water to the pumping station. AR, Tab O, Affidavit of SELA Senior Project Manager, at 2. The construction of the intake canal will complete the entire project.

On October 26, 2007, the Corps issued the RFP for a fixed-price contract to construct the intake canal. RFP at 1, 6. The RFP contemplates awarding to the offeror whose proposal provides the best value to the government based on a trade-off between price and non-price factors. RFP § 00130, at 1. The RFP provides that non-price factors—past performance, technical approach, duration, personnel experience, project management, and small business subcontracting plan—combined, would be approximately equal to price. Id. at 1, 3-4; RFP amend. 2 at 2. Among the non-price factors, past performance and technical approach are approximately equal in value and are significantly more important than the other four non-price factors. Id. Under the technical approach evaluation factor, the RFP anticipates an assessment of each offeror’s methodology for construction in proximity to power lines and the offeror’s ability to manage multiple work crews. RFP § 00130, at 4. Under the duration evaluation factor, the RFP advises that proposals reducing the 1,172-day period of performance by 180 days or more will receive a higher rating under this evaluation factor than proposals that simply offer to meet the schedule. Id.; RFP amend. 1 at 2.

The RFP also anticipates establishing a competitive range, and requiring offerors within that range to provide an oral presentation detailing their technical approach. In addition, the RFP advises that the agency could elect to hold discussions. RFP § 00130, at 5.

Ceres contends that the Corps’ decision to conduct this procurement using negotiated procedures, instead of using sealed bidding procedures, violates the Competition in Contracting Act (CICA). In this regard, Ceres disputes the agency’s conclusion that the complexity of this procurement requires the agency to use non-price evaluation factors. Ceres also asserts that discussions are not needed for this procurement, and that the Corps failed to sufficiently document its decision to use negotiated procedures instead of sealed bidding.

CICA requires the use of sealed bidding when: (1) time permits; (2) award will be based on price and other price-related factors; (3) discussions are not necessary; and (4) more than one bid is expected. 10 U.S.C. § 2304(a)(2)(A); Federal Acquisition Regulation (FAR) § 6.401(a); Specialized Contract Servs., Inc., B-257321, Sept. 2, 1994, 94-2 CPD ¶ 90 at 4. When an agency determines that these conditions are not met, CICA requires the use of negotiated procedures. 10 U.S.C. § 2304(a)(2)(B). The determination as to whether circumstances support the use of negotiated procedures

is largely a discretionary matter within the purview of the contracting officer. FAR § 6.401; Military Base Mgmt., Inc., B-224115, Dec. 30, 1986, 86-2 CPD ¶ 720 at 3. However, an agency must reasonably conclude that the conditions requiring use of sealed bidding are not present. F&H Mfg. Corp., B-244997, Dec. 6, 1991, 91-2 CPD ¶ 520 at 3.

As an initial matter, there is no dispute that the RFP here anticipates an evaluation that will include non-price factors. On this basis alone, this procurement is different from those that CICA requires to be conducted using sealed bidding.² In addition, the RFP anticipates a best value procurement, and anticipates a possible price/technical tradeoff; neither of these options would be appropriate in a sealed bid environment.

Given that the RFP, on its face, anticipates the use of non-price evaluation factors and a possible price/technical tradeoff, Ceres' remaining arguments essentially challenge the reasonableness of the agency's stated needs. Specifically, Ceres argues that previous canal construction projects have been awarded without using non-price evaluation factors, and that the agency has improperly concluded that it needs to assess technical merits and possibly perform a trade-off analysis to determine which proposal constitutes the best value to the government.

The record here shows that, in making this determination, the contracting officer cited the complexity of the project and the need for an accelerated schedule to complete the project. AR, Tab B, Contracting Officer's (CO) Statement, at 10. In addition, the Corps' Lead Structural Engineer submitted an affidavit explaining that the awardee must, among other activities, coordinate multiple crews within a narrow space, keep the main evacuation route out of New Orleans open throughout construction, schedule work to avoid interfering with completion of the pumping station, and maintain existing structures while building new ones in close proximity. AR, Tab N, Affidavit of Corps Lead Structural Engineer, at 2. The Lead Engineer also explains that the contractor will have to do all of these things while operating under a compressed time schedule. *Id.* at 5. Because of the need to mitigate the risk of further flooding in an area that was so recently devastated by Hurricane Katrina, and to encourage redevelopment, the Corps decided to shorten the construction timeframe by almost 9 months, and to include a duration evaluation factor to encourage offerors to propose even shorter timeframes. AR, Tab B, CO Statement, at 10-12; RFP amend. 1 at 2.

² For example, we have sustained challenges to an agency's use of negotiated procedures where the procurement did not anticipate the use of non-price evaluation factors. See, e.g., Northeast Constr. Co., B-234323, B-234406, Apr. 24, 1989, 89-1 CPD ¶ 402 at 3.

Under these circumstances and as explained below, we find that the Corps reasonably concluded that selection of a contractor here requires the use of negotiated procedures. First, we note that the fact that previous canal construction projects have been awarded without using non-price evaluation factors is not dispositive on the issue of whether the agency can properly use non-price evaluation factors now. See Comfort Inn South, B-270819.2, May 14, 1996, 96-1 CPD ¶ 225 at 3. In addition, the need to move quickly to restore and improve flood-control capabilities in a hurricane-stricken area, the relatively complex coordination and scheduling requirements of doing so, coupled with the compressed time frames in which the work is to be completed, provide reasonable support for the agency's determination to consider non-price factors in evaluating proposals for award. See TLT Constr. Corp., B-286226, Nov. 7, 2000, 2000 CPD ¶ 179 at 3 (complex coordination and scheduling requirements provided reasonable support for negotiated procurement); W.B. Jolley, B-234490, May 26, 1989, 89-1 CPD ¶ 512 at 4-5 (decision to consolidate numerous, diverse services into one contract created a complex procurement justifying use of negotiated procurement procedures).³

To the extent that Ceres argues that the Corps failed to provide an adequate legal analysis for its decision to use negotiated procurement procedures, Ceres correctly noted that the Corps did not explicitly mention the requirements of 10 U.S.C. § 2304(a)(2) in its acquisition plan. Nonetheless, the Corps sufficiently addressed the factors that influenced its decision to use negotiated procurement procedures in its acquisition plan and other documentation provided with the agency report, which satisfies the CICA requirements.

The protest is denied.

Gary L. Kepplinger
General Counsel

³ To the extent that Ceres also argues that the procurement does not require the Corps to engage in discussions with offerors and thus is not a reason for the agency to use negotiated procedures, we need not consider this issue given our conclusion that the Corps reasonably decided that circumstances here require the evaluation of non-price factors and thus the use of negotiated procedures for this work. See Enviroclean Sys., Inc., B-278261, Dec. 24, 1997, 97-2 CPD ¶ 172 at 3.