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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-199407 **DATE:** September 21, 1981

MATTER OF: Consolidated Service, Inc.
of Charleston

DIGEST:

1. Agency decision to procure design/engineering services and installation/fabrication services under single solicitation rather than to procure services separately cannot be questioned since protester has failed to show decision was unreasonable.
2. Agency's decision to evaluate offerors' recent contract experience (for years 1977-1979) cannot be questioned, particularly since procurement requires design and installation of "latest, state-of-the-art" electronic systems.
3. Since pertinent procurement regulation permits use of "time and materials" contract for type of procurement which is subject of protest and because procuring agency has otherwise justified use of contract, protest against use lacks merit.
4. Based on review of record, GAO concludes protester has not proven allegation concerning possible conspiracy to control award selection. If allegation involves suggestion of criminal conduct, protester should bring allegation to attention of criminal law enforcement agencies.

Consolidated Service, Inc. of Charleston (CSI) protests request for proposals (RFP) No. N00612-80-R-0230 issued by the Naval Supply Center (Navy), Charleston, South Carolina. The RFP is a small business set-aside (\$7.5 million small business size standard) for "services and materials [involving] design/engineering, installation, repair, overhaul, and field changes of electronic and electrical equipment and systems."

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The services and materials are to be furnished under an "indefinite quantity time and materials" contract. The Navy reports that the RFP was issued following cancellation of an earlier solicitation for similar services--which did not, however, require engineering design--because the Navy decided that "it would be more advantageous to combine the two requirements, that is, the engineering design with [all other requirements] to make a 'turn-key' type effort."

CSI considers the solicitation to be unduly restrictive of competition for several reasons. The company objects to: (1) the inclusion in the RFP of the engineering design requirement, which had been previously procured separately in earlier years; (2) the de-emphasis on price (worth 20 percent of the total evaluation scoring) and the stress on corporate experience (worth 50 percent of the scoring) which, under the RFP, was to be demonstrated by offerors listing relevant contract experience for the past 3 years (1977-1979); (3) the \$7.5 million small business size standard; (4) the Navy's use of a "time and materials" contract; and (5) the alleged existence of a "conspiracy to control the selection of a specific offeror."

We are denying the protest because CSI has failed to show that the Navy lacked a reasonable basis for including the engineering design requirement as part of the solicitation. The presence of this requirement, in our view, justified the stress on recent experience and, under pertinent regulations, the increase in the small business size standard from the size standard (\$2 million) set forth in the canceled solicitation. Consequently, we do not find the RFP unduly restrictive of competition. Moreover, we find that CSI has failed to show either the impropriety of the Navy's contract type or the existence of a conspiracy to control the award of the contract.

Engineering Design Requirement and Stress
on Corporate Experience

CSI's principal objection is that the Navy's inclusion of the engineering design requirement and the stress on its evaluation in the RFP weaken CSI's

competitive position. CSI held a previous contract (1975-1976) for other services similar to the current RFP in all respects, save the included requirement. CSI argues that the included requirement (constituting approximately 30 percent of the total requirement) should be procured separately.

The Navy reports that the aim of consolidating the requirements was a "'turn-key' type job 'utilizing' a single contractor's effort from the preplanning/ installation design phase through the installation and check-out phase." The contracting officer states that, by combining the design/engineering and the installation/fabrication efforts, the liability and responsibility for both efforts will lie with one contractor and will eliminate any possible misinterpretation by the installation/fabrication contractor of the drawing/procedures developed by the engineering/design contractor if they were separate contractors. Further, the contracting officer states that combining the requirements will produce a savings in administrative costs that results from having one contract to manage instead of two.

As to CSI's related ground of protest concerning the stress on corporate experience, the Navy reports that it is standard practice at the contracting activity to require that offerors list similar contracts over the past 3 years. It is done to insure the Navy of a "current and accurate picture of the offeror's present capability based on experience." The Navy believes this "picture" is particularly important when the contract involves the design and installation, as here, of the "latest, state-of-the-art" electronic systems. CSI has taken exception to the Navy's characterization of the past 3-year contracting listing provision as a "standard practice." In support of its position, CSI cites two current negotiated contracts where the practice was not followed.

In reply, the Navy states that, although use of a 3-year experience provision is a standard practice of the contracting activity, use of the provision is not "required"; therefore, the provision is employed only when it is considered necessary. For example, it was not employed in the two contracts cited by CSI

because in both cases award was based only on total evaluated price and technical proposals were not required, unlike the circumstances here. The Navy has also cited several current negotiated contracts where the provision was used.

The determination of the Government's minimum needs and the means of accommodating them is primarily the responsibility of the contracting agency. Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181. The decision whether to procure by means of a "total package" approach, as opposed to the separate procurements of specific items or services, is a determination for the contracting agency which GAO will not disturb in the absence of a clear showing that the determination lacked a reasonable basis. Eric P. Schellin, B-189763, October 12, 1977, 77-2 CPD 285. Moreover, the contracting agency is not required to equalize competitive advantages accruing to firms as a result of their own incumbency or particular circumstances so long as the firm's advantage is not the result of preferential or unfair treatment. Aerospace Engineering Services Corporation, B-184850, March 9, 1976, 76-1 CPD 164.

CSI has failed to show that the Navy determination to combine the requirements lacks a reasonable basis or that the determination was motivated by a desire to give preferential treatment to any offeror. Further, we see no reason to object to the RFP's emphasis on recent experience and de-emphasis on price given the Navy's above justification.

Increase in Small Business Size Standard

The Navy reports that the small business size standard had to be increased as a result of its decision to combine the requirements. Specifically, Defense Acquisition Regulation (DAR) § 1-701.1(a)(2)d.2 (Defense Acquisition Circular No. 76-24, August 28, 1980) assigns a small business size standard of \$7.5 million to engineering services contracts.

Since we cannot question the combination of these requirements into one procurement and because the cited

regulation specifically provides for the size standard which CSI protests, we deny this ground of the protest.

Contract Type

CSI "protests against [the use of a 'time and materials'] contract mainly because it is the poorest type of contracting known in the contracting community." In CSI's view, the purpose of this contract type "is not to expedite the job, and not to save money, but to eliminate effort on the part of Government personnel." CSI complains that this contract type is becoming the "major contracting vehicle for this entire Command." CSI also argues that the shift to this contract type has reduced the number of fixed-price contracts awarded.

The Navy reports that this contract type is appropriate here because "there is a known requirement, but the extent and duration, and the precise quantities of work are unknown." According to the Navy, the work here often arises in an urgent and unexpected manner making it impossible to definitely estimate the hours required to accomplish a task. Moreover, the "time-sensitive" tasks "preclude the normal 60-day administrative leadtime [associated with the award of] firm-fixed price contracts."

DAR § 3-406.1(b) (1976 ed.) provides that "time and materials" contracting is to be:

"* * * used only where it is not possible at the time of placing the contract to estimate the extent or duration of the work or to anticipate costs with any reasonable degree of confidence. * * *"

The cited regulation further provides examples of procurements where this type of contract may be used:

- "(i) engineering and design services in connection with the production of supplies;
- "(ii) the engineering, design and manufacture of dies, jigs, fixtures, gauges, and special machine tools;

"(iii) repair, maintenance or overhaul work; and

"(iv) work to be performed in emergency situations."

Since DAR § 3-406.1(b), above, specifically permits use of this contract type for the services being procured here, and because we cannot question the Navy's other reasons advanced for using this contract type, we deny this basis of protest.

Possible Conspiracy to Control Selection

CSI argues that there may be a "conspiracy" to control the procurement in a manner that insures the selection of an unidentified offeror. This argument is premised upon CSI's interpretation of an internal Navy procurement document, the RFP's evaluation criteria checklist, designed for the use of Navy evaluators in the course of evaluating the technical proposals submitted. The Navy reports that one of CSI's specific arguments concerning resume scoring has been rendered academic, in effect, since the "award of points for the best resumes is not applicable based on the revised evaluation criteria." As to other CSI arguments, the Navy has replied as follows:

"* * * The protester's statement that the employee requirements of the solicitation based on 2080 hours equals only 73 people per year is erroneous. The employee requirements were based on 2000 hours per year (which takes holidays in consideration) and the number of estimated hours given in the RFP which results in a minimum number of ninety-six (96) resumes required.

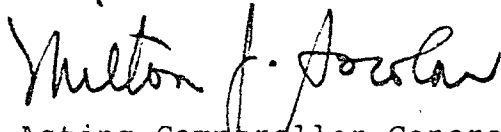
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"The protester's comments concerning the price are not correct, as price makes up twenty percent (20%) of the evaluation. Amendment 0004 confirms this by stating that other factors will be weighed approximately four (4) times as much as price.

"The protester's statement that the evaluation criteria were elaborately structured to correlate with the solicitation is true. The entire basis of the evaluation is set forth in the RFP to ensure that each offeror knows on what basis his proposal will be evaluated. The protester's statement that [the criteria] surreptitiously ensured the selection of the pre-determined contractor is not true and not supported."

It is the protester's responsibility to present evidence sufficient to establish its position. Phelps Protection Systems Inc., B-181148, November 7, 1974, 74-2 CPD 244. GAO does not conduct investigations under its bid protest function for the purpose of establishing the validity of a protester's speculation. Mission Economic Development Association, B-182686, August 2, 1976, 76-2 CPD 105. Based on our review of the record, we conclude that the protester has not proven the validity of its "conspiracy" charge. If, however, the protester is actually suggesting that criminal law violations are involved, it should bring its contentions to the attention of appropriate law enforcement agencies and not our Office which does not have a criminal law enforcement responsibility.

Accordingly, the protest is denied.



Acting Comptroller General
of the United States