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DECISION



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

10, 742

FILE: B-192958

DATE: July 12, 1979

MATTER OF: Radio TV Reports, Inc.

DLC 02113

DIGEST: *[Protest of Army Contract Award to Competitor]*

1. Bid that does not reduce, limit, or modify requirement that prospective contractor provide tapes and transcripts of news broadcasts in four metropolitan areas is responsive to IFB.
2. Allegation based on evidence discovered after bid opening but prior to award that prospective contractor does not intend to perform in the manner indicated in its bid is a matter that bears on bidder responsibility, not bid responsiveness.
3. Provision requiring prospective contractor to furnish "acceptable evidence" of a commitment or explicit arrangement between it and subcontractor in event it intends to use subcontractor to perform work called for in IFB relates to matter of bidder responsibility and General Accounting Office will not review affirmative determinations of responsibility except under circumstances not applicable here.
4. Allegation that awardee has neglected its contractual duties is matter of contract administration not for resolution under GAO Bid Protest Procedures.
5. Protest asserting contract should be canceled because awardee's bid contained misrepresentations of fact is denied because record indicates contracting officer did not rely on representations when making contract award.

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ABC 0286

Radio TV Reports, Inc. (Radio TV) protests the award of a requirements contract to J. R. Birmingham Company (Birmingham) by the Department of the Army, Defense Supply Service, under invitation for bids (IFB) MDA903-78-B-0128 for the monitoring of radio and television broadcasts emanating from the greater Washington, D.C., New York, Chicago, and Los Angeles areas during the period October 1, 1978 through September 30, 1979. The protester, the second low bidder and incumbent contractor, presents four grounds of protest: (1) Birmingham's bid was nonresponsive to the solicitation; (2) Birmingham was not responsible; (3) Birmingham has conspicuously and continuously neglected its contractual obligations; and (4) Birmingham's bid contained misrepresentations of fact significant enough to warrant contract termination.

The material facts are not in dispute. The IFB called for furnishing audio recordings on magnetic tape and typewritten transcripts of television and radio news broadcasts emanating from the four metropolitan areas. The solicitation indicated that the Army anticipated awarding an indefinite quantity requirements-type contract with Washington, D.C., being the principal place of performance. The Army required that the successful contractor record daily broadcasts of 10 Washington radio stations and 7 television stations between the hours of 7 a.m. through 12 midnight. The Army further estimated that the contractor would be required to furnish 24 audio tape recordings of broadcasts in the Chicago and New York areas, 450 typewritten transcripts of Chicago and New York audio recordings, and courier services for their delivery. The Army required delivery of these tapes in Washington within 3 days under normal circumstances but within 2 hours under urgent circumstances.

The IFB required each bidder to furnish the necessary facilities as may be required to perform the specified monitoring, recording, and transcribing and to identify those facilities by listing the addresses of facilities it intended to use that were owned and operated by the bidder or his subcontractors. Further, the IFB contained the following instruction:

"By submission of this proposal, the offeror is certifying that he has sufficiently trained

personnel to perform the work required. In addition to the minimum standards for responsible contractors, the following additional standards will apply: to the extent that a prospective contractor proposes to perform the contract by subcontracting acceptable evidence of his 'ability to obtain' experience and pertinent skills shall be a commitment or explicit arrangement which must be in existence prior to being awarded a contract under this solicitation."

Radio TV and Birmingham each submitted bids in response to the IFB and the latter was evaluated low bidder. In its bid, Birmingham promised to perform all the work required and further indicated that it intended to use its owned and operated facilities in the four metropolitan areas for contract performance. However, prior to award, the Army learned that Birmingham did not own monitoring, recording, and transcribing facilities in Chicago and New York. When questioned about this, Birmingham provided the Army's preaward survey team addresses in the two cities, and explained it had representatives at those locations who could easily obtain the requisite tapes and transcripts from the broadcasting stations. On the basis of this information and the knowledge that the prospective contractor would only be required to furnish an estimated 24 tape recordings from the Chicago and New York areas over the term of the contract, the contracting officer awarded Birmingham the contract on September 15, 1978. Subsequent to award, the Army learned that Birmingham in fact had no facilities at the Chicago and New York addresses Birmingham provided.

With respect to the first allegation concerning the responsiveness of Birmingham's bid, the protester admits that Birmingham submitted a bid that was facially responsive to the terms and conditions of the IFB. By this we mean the bid, as submitted, did not reduce, limit, or modify the work requirements set out in the solicitation but, rather, was an offer to perform, without exception, the exact things called for in the IFB. Upon acceptance by the Army, Birmingham was bound to perform in accordance with the IFB's terms and conditions.

M-S and Associates, B-183282, May 14, 1975, 75-1 CPD 296;
Contra Costa Electric, Inc., B-190916, April 5, 1978, 78-
I CPD 268.

Radio TV contends, however, that the contract should be terminated because the Army awarded the contract knowing that Birmingham had no facilities in either Chicago or New York. In support of its position, the protester submits that the facts in this case are sufficiently similar to those in B-159560, October 7, 1966, where we recommended a contract be canceled, to warrant a similar result. In that case, the Navy awarded a contract following advertisement for trash removal services to a company knowing that the contractor planned to use a trash collection method which deviated from the specifications. We determined that although the contractor's bid appeared valid on its face, contracting officials, by making the award, in effect improperly agreed to waive the specifications requirements for the benefit of one bidder.

We do not believe the present case is sufficiently analogous to B-159560, supra, to warrant a similar result, because in our view, there was no Government waiver of a substantive contract provision for the benefit of Birmingham. For example, the IFB provision quoted above which the protester relies upon for the most part as his basis for protest does not require the contractor to perform the desired services either through the use of its own personnel or by subcontract. If, as Birmingham alleges, the materials can be obtained directly from the broadcasters who presumably make the recordings for their own purposes, we believe no subcontracts are involved and the clause requiring evidence of "a commitment or specific arrangement" is not called into play.

With regard to Birmingham's responsibility, Radio TV asserts that Birmingham is not a responsible bidder and disputes Birmingham's ability to obtain the materials from the New York or Chicago broadcasters. We have taken the position that we will not review a contracting officer's affirmative determination of responsibility in the absence of an allegation of fraud on

the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Data Test Corporation, 54 Comp. Gen. 499 (1974), 74-2 CPD 365; Yardney Electronics Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376. This policy was adopted by our Office because, normally, responsibility determinations are based in large measure on the general business judgment of the contracting officer and, being subjective, are not readily susceptible to reasoned review. Central Metal Products, Incorporated, 54 Comp. Gen. 66 (1974), 74-2 CPD 64. There has been no allegations of fraud and in our view there are no definitive responsibility criteria contained in the solicitation. Thus we find no basis to review the contracting officer's affirmative determination of responsibility in this case.

The protester's third ground of protest is that Birmingham has conspicuously and continuously neglected its contractual obligations. This is a matter of contract administration that is not for resolution under our Bid Protest Procedures, 4 C.F.R. Part 20 (1979), which are reserved for considering whether an award or proposed award of a contract complies with applicable statutory, regulatory, and other legal requirements. Nicolet Technology Corp., B-192895, September 28, 1978, 78-2 CPD 244. Accordingly, we will not consider this ground of protest on its merits.

Radio TV's last ground of protest is that Birmingham's contract should be canceled because its bid contained misrepresentations of fact concerning the existence of the Chicago and New York facilities. While we agree that that Birmingham made statements in its bid and to the preaward survey team conducting the responsibility investigation that were factually inaccurate, we do not believe, under the circumstances here, that contract cancellation is warranted. The record indicates that the Army did not consider Birmingham's lack of monitoring, recording, and transcribing facilities in Chicago and New York to be of importance once the contracting officer satisfied himself that Birmingham had representatives who could adequately perform the required work. Regardless of the representations, then,

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it is clear that the contracting officer did not rely on them when he made the affirmative determination that Birmingham was a responsible bidder.

The protest is denied.

R. S. Koffman
Deputy Comptroller General
of the United States