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DECISION

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

24899

FILE: B-209202; B-209202.2 DATE: April 14, 1983

MATTER OF: Go Leasing, Inc.; Sierra Pacific Airlines

DIGEST:

While the issuance of a certificate of competency is conclusive as to matters of responsibility, it does not preclude the subsequent cancellation of a solicitation that contains defective evaluation provisions which provide no assurance that award would be made on the basis of the most favorable cost to the Government.

Go Leasing, Inc. and Sierra Pacific Airlines protest the United States Marshals Service's cancellation of invitation for bids (IFB) No. 2M-10540 for air charter transportation services to move prisoners under Federal custody. We deny the protests.

The Go Leasing Protest

Go Leasing contends that it was the low, responsive bidder under the solicitation; that the Small Business Administration (SBA) duly issued a certificate of competency (COC) to Go Leasing; and that therefore the Marshals Service was obligated by the Small Business Act to award the contract to Go Leasing.

The solicitation, which contemplated a fixed price, indefinite quantity contract, required that a bidder be a "commercial operator or an air carrier within the meaning of the Federal Aviation Act of 1958 (49 U.S.C. 1301)." Bidders were also required to have been regularly engaged in providing air transportation similar in character and scope to the anticipated contract services. In this regard, the solicitation contained several provisions which required that aircraft, flight crew composition, and aircraft maintenance comply with the requirements of Part 121 of the Federal Aviation Administration's (FAA) regulations, 14 C.F.R. Part 121 (1982). The solicitation's evaluation provisions provided that award would be made to the "responsive, responsible offeror submitting the offer most advantageous to the Government, price and other factors considered." The evaluation scheme itself was based on a

combination of charge per flight hour, charge per overnight stop, and charge per flight arrival and departure. The IFB stated that offers would be evaluated for award by adding the total extended prices for the base and option periods, based on the maximum estimated quantities set forth in the solicitation.

Three bids were received. Go Leasing submitted the lowest total bid for the base and option periods: $1,500 per flight hour; $300 per overnight stop; and $200 per flight arrival and departure. Sierra Pacific bid $1,675 per flight hour; $150 per overnight stop for the base year and $200 for the option year; and $50 per arrival and departure for the base year and $75 for the option year.

After bids were received, agency personnel realized that selection under the solicitation's evaluation provisions, largely dependent on charge per flight hour, did not accurately measure the true cost of accepting each bid, since Go Leasing and Sierra Pacific offered to perform the required services with aircraft of different cruising speeds. Aircraft with greater cruising speeds obviously require less flight hours than do slower aircraft to travel from point to point and can result in a lower cost to the Government. For example, because of the differences in the types of aircraft offered, the evaluators found that in the initial year Go Leasing would require 11.61 flight hours for certain trips while Sierra Pacific only required 10.49 flight hours. Based on a detailed analysis, the evaluators found that when cruising speed of the aircraft was factored into the solicitation's evaluation scheme, Sierra Pacific's bid was less costly.

On May 27, 1982, the agency's Contract Review Committee (CRC) found any evaluation that included aircraft cruising speed to be improper because it was based on a factor other than those stated in the solicitation. The CRC, therefore, did not permit an award to Sierra Pacific as the true lowest cost bidder, but rather insisted that Go Leasing be considered the low bidder consistent with the stated evaluation scheme. The CRC, however, did note that the contracting officer was vested with discretionary authority to cancel the solicitation.

Instead of canceling the solicitation, the contracting officer determined Go Leasing to be nonresponsible because the contracting officer did not believe Go Leasing to be an operator certified under Part 121 of the FAA regulations, which applies to air carriers and which, in his judgment, was required by the solicitation. He also determined that Go Leasing did not meet certain experience requirements. Go Leasing did in fact hold an operating certificate from the FAA under Part 125, which prescribes regulations covering commercial operators of large aircraft (other than air carriers). On July 19, the contracting officer, aware of the defects in the solicitation, nevertheless referred the question of Go Leasing's nonresponsibility to the SBA for processing under COC procedures. The contracting officer states that he referred the matter to the SBA because he believed that a COC would not be issued and award could then still be made under the "flawed" solicitation to the true lowest cost bidder, Sierra Pacific, thereby obviating the need for a disruptive cancellation.

On September 9, the SBA issued a COC on behalf of Go Leasing. In part, the SBA based its determination on the fact that the solicitation "repeatedly refers to 'air carriers or commercial operators' which would indicate that either a commercial operator or an air carrier would be acceptable." On September 21, the contracting officer, unable to award to the true lowest cost bidder, canceled the solicitation because: (1) the solicitation contained defects in its evaluation provisions; (2) the solicitation was ambiguous, in view of the SBA's position, as to whether a Part 125 operator met the Part 121 qualification requirements of the solicitation; and (3) all bids allegedly had expired (Go Leasing's bid expired on September 15, 2 days after the COC was received by the contracting agency).

Go Leasing contends that the contracting officer's "belated perception" that the solicitation was defective so as to justify cancellation is of no consequence since the Small Business Act, 15 U.S.C. § 637(b)(7)(c) (Supp. IV 1980), states that once a small business concern is certified to be responsible, the contracting officer "shall let such Government contract" to that firm "without requiring it to meet any other requirement of responsibility or eligibility." Thus, Go Leasing argues that a contracting officer's discretionary authority to cancel a solicitation ceases upon the issuance of a COC by the SBA. Based on its understanding of Federal aviation law, Go Leasing also disputes the existence of any ambiguity in the solicitation concerning the acceptability of commercial operators

as opposed to air carriers. Further, as the low bidder under the solicitation's evaluation scheme, Go Leasing characterizes the contracting officer's contention that its bid had expired on September 15 as a "pure make-weight" argument since the Government could have awarded the contract on September 14, 1 day after the issuance of the COC.

Issuance of a COC, however, does not bar a contracting officer from canceling a solicitation when valid reasons exist for cancellation other than his judgment about the nonresponsibility of the low bidder. While the Small Business Act does require an award after issuance of a COC without a small business concern having to meet any other requirement of responsibility or eligibility, we have held that COC issuance simply does not compel the Government to make an award under a defective solicitation. See Ikard Manufaturing Company, B-192248, September 22, 1978, 78-2 CPD 220. We therefore find no merit in Go Leasing's argument that the Government could not cancel the solicitation.

Concerning the justification for the cancellation in this case, we have often stated that a solicitation may be canceled after bid opening only when there is a compelling reason to do so. See 52 Comp. Gen. 285 (1972). In determining whether such a reason exists, the two basic factors that must be considered are whether the best interest of the Government would be served by making an award under the initial solicitation, and whether bidders would be treated in an unfair or unequal manner if award were made. Haughton Elevator Division, Reliance Electric Company, 55 Comp. Gen. 1051, 1058 (1976), 76-1 CPD 294; Edward B. Friel, Inc., 55 Comp. Gen. 231, 237 (1975), 75-2 CPD 164.

During the bid protest conference, the protester acknowledged that it would not have contested a good faith cancellation of the solicitation immediately after bid opening because of the obvious defects in the solicitation's evaluation scheme for determining the actual low bidder. (As stated above, Go Leasing asserts that since the contracting officer, aware of the defects in the solicitation, knowingly referred the matter to the SBA, he nonetheless was thereafter obligated to award the contract to Go Leasing.)

All parties thus agree that strict adherence to the method of evaluation set forth in the IFB, which gives no

consideration to cruising speed, provides no assurance that award would be made to the bidder offering the lowest cost to the Government. The evaluation provisions therefore clearly were materially defective, since award in a formally advertised procurement must be based on the most favorable cost to the Government. See Crown Laundry and Dry Cleaners, B-196118, January 30, 1980, 80-1 CPD 82. Also, to evaluate bids by considering aircraft speed factor would prejudice firms that bid consistent with the evaluation scheme set out in the solicitation; Go Leasing, for example, may well have selected a faster aircraft if it had known that this matter would affect the evaluation of bids. We therefore conclude that the solicitation was so defective that cancellation was not only proper but was required. See Ikard Manufacturing Company, supra. Thus, we need not consider the question of the alleged ambiguities in the solicitation that also formed the basis for cancellation.

We are compelled to point out, however, that the actions of the contracting officer did not enhance the integrity of the competitive procurement process. A cancellation of a solicitation and resolicitation should be effected as soon as possible after bid opening. See Freund Precision, Inc., B-199364; B-200303, October 20, 1980, 80-2 CPD 300. By not promptly canceling the solicitation, the contracting officer unnecessarily induced Go Leasing to extend its bid and go through the COC application process, only to have its bid rejected upon cancellation after issuance of the COC. We do not believe that the contracting officer followed sound judgment in the above respect, with the result that his conduct engendered unnecessary suspicions and allegations of unfairness and favoritism. By separate letter, we are advising the Attorney General of our view.

The Sierra Pacific Protest

Sierra Pacific advances numerous contentions as to why the solicitation should not have been canceled. Basically, Sierra Pacific believes it deserves award as the "most cost effective offer[or]" and argues that the SBA improperly "overruled" the Marshals Service by issuing the COC to Go Leasing.

We have already concluded in connection with Go Leasing's protest that the solicitation was so defective that cancellation was not only proper but was required.

Thus, any award under the solicitation would be improper notwithstanding Sierra Pacific's protest, so that our consideration of the matters raised would serve no useful purpose.

The protests are denied.

for Milton J. Socolar
Comptroller General
of the United States