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Protest

DECISION



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

FILE: B-194218

DATE: August 30, 1979

MATTER OF: Hvide Shipping, Incorporated

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DIGEST:

[Protest of Sole-Source Procurement]

1. Protest against sole-source procurement, filed prior to closing date for receipt of initial proposals, under noncompetitive RFP, is timely under 4 C.F.R. § 20.2(b)(1) notwithstanding notice of intent to procure sole source was published in Commerce Business Daily (CBD) 4 months previously. Prior decisions cited by agency holding that protest must be filed within 10 working days of CBD notice are distinguished since they involved notice of award action, not intent to procure.
2. Procurement of retrieval of solid rocket boosters (SRB) from Space Shuttle on sole-source basis is not objectionable where agency has advanced reasonable basis for such action, i.e., contractor must have intimate knowledge of total SRB integrated mission requirement.

Hvide Shipping, Incorporated (Hvide), has protested the sole-source procurement by the National Aeronautics and Space Administration (NASA) of the Solid Rocket Booster (SRB) Retrieval Mission in support of the Space Shuttle Program. A portion of the contract has been awarded.

NASA proposes to award the remainder of the contract to United Space Boosters, Inc. (USBI), on a sole-source basis, while Hvide contends that Hvide and a number of other firms are capable of fulfilling NASA's needs.

NASA published a notice of its intent to conduct the noncompetitive procurement in the October 4, 1978,

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issue of the Commerce Business Daily (CBD), which advised that a request for proposals (RFP) would be issued within the following 3 weeks only to USBI. On December 21, 1978, a Justification for Noncompetitive Procurement (JNCP) was approved by the Administrator of NASA and on January 8, 1979, the RFP was issued to USBI with a proposal due date of May 1, 1979.

The initial issue for resolution is the timeliness of the protest. Hvide filed its protest with our Office on February 27, 1979. NASA argues that the protest should have been filed within 10 working days of when the basis of the protest was known or should have been known which, NASA contends, was the publication of the notice in the CBD. NASA cites our decisions in Delphi Industries, Inc. (B-193087, January 30, 1979, 79-1 CPD 67) and Technical Services Corp. et al. (B-190992, August 25, 1978, 78-2 CPD 145) for the proposition that publication in the CBD of notice of a sole-source procurement commenced the 10-day filing period under our Bid Protest Procedures (4 C.F.R. § 20.2(b)(2) (1979)).

Hvide has responded to this argument by citing 4 C.F.R. § 20.2(b)(1) which states that a protest based on improprieties contained in a solicitation shall be filed prior to the closing date for receipt of initial proposals.

In both of the cases cited by NASA, the CBD notices advised that award action had been taken. In Delphi, supra, the notice stated that a letter contract was being issued and in Technical Services Corp., supra, that task orders had been awarded. Therefore, we do not find those cases controlling.

In General Leasing Corporation (B-193527, January 5, 1979, 79-1 CPD 6), which we find controlling, a CBD notice advised of the issuance of an RFP, as here, which the protester believed violated a contract it currently held. The protester was furnished a copy of the RFP, as here also, and we held that the protest was against an impropriety in the solicitation and the

protest should have been filed prior to the closing date for receipt of initial proposals. Therefore, we find Hvide's protest to be timely and will consider it on the merits.

The proposed contract is for overall responsibility in locating and retrieving from the ocean the SRB casings, frustums and parachutes and delivering the items to the SRB Disassembly Facility. The contractor is also responsible for designing and obtaining two vessels suitable for the retrieval mission and furnishing crews to man the vessels. The current schedule does not call for these vessels to be ready until the fourth Shuttle flight and, in the interim, USBI will lease vessels with crews to fulfill the contract requirements.

Hvide's protest is based on the allegations that NASA failed to review potential competition prior to making the decision to procure sole source, that the JNCP is insufficient as a justification for the procurement and that the procurement violates NASA's regulations regarding component breakout. ✓

Hvide contends that it is fully qualified to perform the contract since it has provided retrieval operations and support to both NASA and the Air Force in the past and has participated in the Mercury, Gemini, Apollo and current Trident programs. Further, since 1974, Hvide has retrieved, on a test basis, the Space Shuttle SRB plug nozzle, frustum and parachute and has simulated towing of the SRB. Finally, Hvide states that it possesses extensive experience in vessel design and construction and more than 20 years' experience in supervising naval architects and shipyards during the construction of vessels, experience which USBI, as an aerospace contractor, does not have.

Hvide argues that in view of these qualifications, it is apparent that NASA did not conduct an adequate review of potential sources before proceeding sole source. Hvide points out that further evidence of this fact is shown by the issuance of an RFP by USBI to potential subcontractors, including Hvide, for the

initial provision and operation of the SRB retrieval vessels for the mission.

NASA's position regarding the protest and the decision to procure sole source is that while there are numerous firms, including Hvide, capable of performing the maritime portion of the retrieval mission, too great a risk would be introduced if the mission were not in control of a firm intimately familiar with the total SRB integrated mission requirement. The only firm possessing such expertise, in NASA's view, is USBI because of its work in other areas relating to the SRB. USBI holds contract No. NAS8-32000 with the Marshall Space Flight Center to provide system integration, manufacture, assembly and postlaunch refurbishment of the SRB. Under a Supplemental Agreement between USBI and Kennedy Space Center to the above contract, USBI provides the final assembly, stacking, integrated checkout, parachute facility activation and validation, launch operations, maintenance of retrieval equipment and postlaunch disassembly of the SRB.

In its report to our Office on the protest, NASA summarized its position as follows:

"In short, we believe the Government's minimum needs require the expertise of the aerospace contractor most familiar with the total system and not a ship operating contractor who knows little about the item to be retrieved. It is helpful to know that of the total SRB operation, the SRB Retrieval portion (instant RFP) represents approximately 10% of the total manning effort.

Approximately one-half of the manning effort for the retrieval portion consists of the actual shipboard operation. However, even though the SRB Retrieval effort covered by the RFP

is relatively small in magnitude, it is nevertheless very important to the overall success of the Shuttle Program. If the SRB is not successfully retrieved in a reusable condition, one of the basic principles of the Shuttle concept is jeopardized. It is, therefore, most important that the SRB Retrieval contractor be one that understands and has responsibility for the total system, not just the sea aspect. Consequently, it is totally inconceivable to consider a separate prime contractor for such a significant and potentially hazardous portion of the program who lacks intimate technical knowledge of, or responsibility for, approximately 95% of the total program effort."

Concerning the contention that NASA failed to adequately consider other potential contractors prior to deciding to pursue a sole-source procurement, Hvide states that following a Freedom of Information Act request to NASA for any documentation concerning such consideration, it was advised none existed. Hvide alleges this clearly demonstrates the lack of consideration given to Hvide and other firms. Further, Hvide contends it was never contacted by NASA regarding its qualifications to undertake the contract.

NASA has responded to this allegation by enumerating the various meetings and discussions it had with Hvide during the planning phase of the Shuttle mission and contends that because of these discussions and its familiarity with Hvide's past contract performance, it was well aware of Hvide's qualifications and its interest in the procurement. However, in view of its decision that a maritime firm could not perform the entire mission, NASA did not consider such firms for possible competition, but only the firm with knowledge of the total SRB mission, i.e., USBI.

Moreover, NASA states that its procurement regulations do not require that source consideration be

reduced to writing but only that the consideration given be reflected in the JNCP. This was complied with, according to NASA, by the statement in the JNCP "USBI is the only known source possessing this intimate knowledge of total SRB integrated mission requirements."

Because of the requirement for maximum practical competition, agency decisions to procure sole source must be adequately justified and are subject to close scrutiny. Precision Dynamics Corporation, 54 Comp. Gen. 1114 (1975), 75-1 CPD 402. Such decisions, however, will be upheld if there is a reasonable or rational basis for them. Winslow Associates, 53 Comp. Gen. 478 (1974), 74-1 CPD 14.

Here, NASA has determined that performance of the retrieval mission by other than a contractor with knowledge of the total workings of the SRB would introduce an unreasonable technical risk into the program.

We are unable to object to this conclusion. USBI is the firm charged with both the prelaunch preparation of the SRB and the post-recovery refurbishment. Since the basic concept of the Shuttle is the reusability of the craft and its components, the critical nature of the contract is apparent. Hvide concedes it does not possess the knowledge regarding the SRB which USBI has, but argues that, likewise, USBI does not possess its knowledge of maritime functions. Therefore, the question is which discipline should have the prime responsibility for fulfilling the requirement and NASA has decided the aerospace function is the most important. We cannot say this is an unreasonable conclusion.

Regarding the review of potential sources, we believe, in the factual situation here, NASA performed an adequate survey in view of its determination that knowledge of the SRB was required by prospective offerors. With respect to the protester, the above recitation shows NASA was aware of Hvide's qualifications and capabilities.

Furthermore, almost 4 months prior to the CBD notice, Hvide advised congressional representatives that a proposal would be submitted to NASA within 1 week. Also, NASA furnished Hvide with a copy of the RFP and advised Hvide that it could submit an unsolicited proposal if it desired. Hvide chose not to submit a proposal because of the existence of the JNCP, which it contends would have placed its proposal at a disadvantage to USBI's because of the negative presumption caused by the JNCP. While this might have been the case, we cannot ignore the extending of the opportunity to Hvide to demonstrate the merits of its approach.

As we have found NASA's determination to procure sole source to be reasonable, we also find the JNCP, which summarized the determination, to be adequate.

Finally, Hvide alternatively argues that the maritime function should have been broken out and procured competitively from firms possessing experience in the design and building of vessels and in managing retrieval operations. NASA contends that the breaking out of the maritime function and the award of a second prime contract for that portion of the requirement is not feasible because USBI would lose control over the maritime contractor, which is avoided by USBI's direct subcontract award, and it would create another Government/contractor interface. We observe here that Hvide apparently has been given, but failed to take advantage of, the opportunity to compete under the initial USBI subcontract.

We have recognized that the determination to procure by means of a package approach rather than by separate procurements for divisible portions of a total requirement is primarily a matter within the discretion of the procuring activity and will be upheld so long as some reasonable basis exists. Systems Engineering Associates Corporation (B-189260, October 3, 1977, 77-2 CPD 255).

While we are not impressed by the last point put forth by NASA, another Government/contractor interface, we find NASA had a reasonable basis for procuring through one contractor the services it required in connection with the SRB. NASA believes it is critical to the mission's success that the contractor with knowledge of the SRB have overall operational responsibility for the retrieval as well as the prelaunch and postrecovery operations. While Hvide contends that it has taken directions from aerospace contractors under other contracts which it has held with the Air Force and experienced no difficulty, we do not find this controlling. The fact that one procurement agency chooses to use one approach (total package) while another agency chooses a different approach (breakout) is not determinative of the propriety of either approach. Each agency must determine its particular minimum needs (53 Comp. Gen. 270, 276 (1973)), so long as that determination is reasonable as here.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States