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United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Brickwood Contractors, Inc.

File: B-292171

Date: June 3, 2003

Veron L. Kalos for the protester.

Julia L. Perry, Esq., Federal Highway Administration, for the agency.

Tania Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably concluded it had a compelling reason to cancel invitation for bids after bid opening where the solicitation's language was ambiguous concerning certain certification requirements associated with the application and removal of paint from the steel structures of a bridge, creating a competition conducted on an unequal basis, and where one of the reasonable interpretations of the certification requirements would not meet the agency's actual needs.

DECISION

Brickwood Contractors, Inc. protests as improper the cancellation of invitation for bids (IFB) No. DTFH71-03-B-00019, issued by the Department of Transportation, Federal Highway Administration (FHWA), for cleaning and painting the structural steel of a bridge on the George Washington Memorial Parkway in Arlington County, Virginia.

We deny the protest.

The principal purpose of this solicitation was to obtain the services of a firm to clean and paint all of the bridge's exposed steel surfaces. In addition to the tasks of surface preparation and painting, the work included the containment and collection of surface preparation debris, the disposal of surface preparation debris, and a worker health protection program. Accordingly, two of the solicitation's line items were for "surface preparation and painting, steel structure" and "containment system and worker protection plan." Bid Schedule at 4. The solicitation included the clause at Federal Acquisition Regulation § 52.236-1, "Performance of Work by the Contractor," which requires the contractor to perform on the site, and with its own

organization, at least 50 percent of the total amount of work to be performed under the contract. IFB § I.

Among the IFB's Special Contract Requirements were two provisions associated with certification requirements established by the Society for Protective Coatings, formerly known as the Steel Structures Painting Council (SSPC). The SSPC, a non-profit professional society concerned with the use of coatings to protect industrial steel structures, administers a nationally recognized independent contractor certification program that serves as a pre-qualification tool for facility owners and others who hire industrial painting contractors. See SSPC Internet Site at <www.sspc.org>. Among other things, the program includes the "QP 1" category, which evaluates contractors who perform surface preparation and industrial coating application on steel structures in the field, and the "QP 2" category, a supplement to the QP 1 category, which evaluates the contractor's ability to perform industrial hazardous paint removal in a field operation. Id. at <www.sspc.org/site/cert.html>.

IFB Special Contract Requirements section 563.05 stated:

SSPC Painting Contractor Certification Program (PCCP)

Requirements. All contractors and subcontractors that perform surface preparation shall be certified by the [SSPC] to the requirements of SSPC-QP 1 prior to the contract award, and shall remain certified while accomplishing any surface preparation.

All contractors and subcontractors that perform paint removal containing lead or other hazardous materials shall be certified by the [SSPC] to the requirements of SSPC-QP 2 prior to the contract award, and shall remain certified while accomplishing any paint removal. The painting contractors and painting subcontractors must remain certified for the respective work for the duration of the project.

IFB Special Contract Requirements section 563.06 stated:

SSPC Painting Contractor Certification Program (PCCP)

Requirements. All contractors and subcontractors that perform paint application shall be certified by the [SSPC] to the requirements of SSPC-QP 1 prior to the contract award, and shall remain certified while accomplishing any paint application. The painting contractors and painting subcontractors must remain certified for the respective work for the duration of the project.

Brickwood was the apparent low bidder with a price of \$834,110. The apparent second-low bidder filed an agency-level protest arguing that Brickwood was not an SSPC-certified firm, and the FHWA asked Brickwood to provide the required certification. The certifications Brickwood provided were for not for the firm itself but, instead, for its subcontractor. After discussions with the SSPC, the agency determined that there was no prohibition to having a subcontractor perform the

paint removal and paint application as long as it was certified, even if the prime contractor—in this case, Brickwood—was not certified.

As noted above, however, the solicitation also included the limitation on subcontracting clause at FAR § 52.236-1, which requires a prime contractor to perform at least 50 percent of the work with its own forces. The agency determined that, if Brickwood's subcontractor was performing all of the work in connection with the paint removal and paint application, there would be insufficient work remaining in the contract for Brickwood's forces to be performing at least 50 percent of the work. In this regard, Brickwood's bid for the two line items related to "surface preparation and painting, steel structure" and "containment system and worker protection plan" totaled \$628,000 of its \$834,110 overall price, indicating that the firm planned to subcontract approximately 75 percent of the work. As a result, the FHWA informed Brickwood that its bid was nonresponsive because it either failed to meet the solicitation's certification requirements or failed to comply with the limitation on subcontracting clause.

Brickwood objected to the agency's method of determining that it failed to comply with the limitation on subcontracting clause. The firm explained that it was subcontracting only 30 percent of its total contract price, not 75 percent, because its prices for the "surface preparation and painting, steel structure" and "containment system and worker protection plan" line items included the costs of various services its forces would perform. Brickwood stated that it would provide daily recycled grit equipment operators, daily forklift operators for steel grit recycling, daily dust collector operators, crane operators and daily rigging of work platforms, daily building of containment, moving, and traffic control for moving of both containment and work platforms, truck drivers, and all daily general labor work. Brickwood stated that its subcontractor would have one supervisor and three blaster/painters on site, while it would have one supervisor, one traffic safety supervisor, and five equipment operators and laborers on site.

Around this same time, the apparent second-low bidder gave the FHWA information from the SSPC indicating that the certified entity had to have, at a minimum, supervisory responsibility over any entity performing related work, including set-up and clean-up tasks. Specifically, the FHWA was given a copy of an SSPC alert expressing concern about certified contractors who were subcontracting out work to non-certified contractors as a practice that undermined the intent of the SSPC contractor certification program and did not provide the facility owner with the product expected—an SSPC-certified contractor. The alert went on to say that, in cases where a certified contractor had to hire a non-certified contractor, and was not prohibited from doing so, it remained responsible for the actions of the non-certified firms to ensure that they performed in accordance with the QP 1 and QP 2 quality programs. Tasks for which the certified contractor would remain responsible included cleaning, surface preparation and painting, erecting and moving

containment/scaffolding, and equipment maintenance. Agency Report (AR) Tab 6, SSPC Painting Contractor Certification Program, Application Form and Instructions, at 27.

After further discussions with the SSPC, the contracting officer decided to cancel the solicitation, pursuant to FAR § 14.404-1(c)(1), because the specifications were ambiguous. As she explained in her letter to Brickwood and to the apparent second-low bidder,

the language in the Solicitation, at [sections] 563.06 and 563.05 respectively, which states that ‘All contractors and subcontractors that perform paint application shall be certified by the [SSPC] . . .’ and ‘All contractors and subcontractors that perform paint removal containing lead and other hazardous materials shall be certified by the [SSPC] . . .’ [is] ambiguous. Specifically, the terms ‘that perform paint application’ and ‘that perform paint removal’ are ambiguous as to whether they include actions necessary to set up for and clean up after the paint removal and paint application. The Bidders have offered differing interpretations, each of which could be supported by the language appearing in the contract. Brickwood has validly indicated that the language does not specifically prohibit them from doing the set up and clean up work, even though they are not certified. And [the second low bidder] has validly indicated that the SSPC interpretation of its certification requires supervision of the set up and clean up by the certified entity. The language appearing in the Contract is not definitive as to whether or not Brickwood’s performance of the set up and clean up after paint removal and paint application would be consistent with the certification requirement, since the supervision would have to be provided by a subcontractor over which the Government has no privity of contract. Therefore, we have an obligation to cancel the solicitation and resolicit with a clarification to the Solicitation.

Agency’s Letter of Mar. 31, 2003, at 1-2.

After the agency denied Brickwood’s agency-level protest of the cancellation decision, the firm filed this protest in our Office. Brickwood primarily argues that the specification is not ambiguous because both it and the apparent second-low bidder agree that the solicitation requires SSPC certification; that it is unreasonable to require a certified contractor to supervise such work as rigging the work platforms; and that the agency cannot cancel the solicitation based upon the apparent second-low bidder’s interpretation because that firm did not timely protest any ambiguity in the solicitation.

A contracting agency must have a compelling reason to cancel an IFB after bid opening because of the potential adverse impact on the competitive bidding system

of resolicitation after bid prices have been exposed. FAR § 14.404-1(a)(1); HDL Research Lab, Inc., B-254863.3, May 9, 1994, 94-1 CPD ¶ 298 at 5. Where a solicitation contains inadequate or ambiguous specifications, or otherwise does not contain specifications that reflect the agency's actual needs, the agency has sufficient reason to cancel. FAR § 14.404-1(c)(1); Days Inn Marina, B-254913, Jan. 18, 1994, 94-1 CPD ¶ 23 at 2. Contracting officials have broad discretion to determine whether a compelling reason to cancel exists, and our review is limited to considering the reasonableness of their decision. Chenega Mgmt., LLC, B-290598, Aug. 8, 2002, 2002 CPD ¶ 143 at 2. Our review of the record here shows that the FHWA reasonably concluded that it had a compelling reason to cancel the solicitation because it both included ambiguous specifications and failed to reflect the agency's actual needs.

Specifications must be sufficiently definite and free from ambiguity so as to permit competition on an equal basis. Hebco, Inc., B-228394, Dec. 8, 1987, 87-2 CPD ¶ 565 at 2-3. An ambiguity exists if a solicitation requirement is subject to more than one reasonable interpretation when read in the context of the solicitation as a whole. Phil Howry Co., B-245892, Feb. 3, 1992, 92-1 CPD ¶ 137 at 2-3. Here, there is no question but that the certification requirements in the solicitation were susceptible to more than one reasonable interpretation.

As the FHWA explained in its notice of cancellation, Brickwood reasonably interpreted the solicitation's language as permitting it to perform the set-up and clean-up work associated with the paint removal and application tasks, even though the firm is not an SSPC-certified firm. On the other hand, the apparent second-low bidder, relying on the SSPC's published guidance, reasonably interpreted the solicitation's language as requiring that, at a minimum, a certified firm must be responsible for ensuring that the set-up and clean-up work associated with the paint removal and application tasks be done in accordance with the QP 1 and QP 2 quality programs. The fact that these two bidders so interpreted the IFB is an indication of the ambiguity of the requirement and that the competition was conducted on an unequal basis. This, in our view, warrants the agency's cancellation of the solicitation. Brickwood's argument that there is no ambiguity because both bidders agree that SSPC certification is required by sections 563.05 and 563.06 is misplaced. The question is not whether SSPC certification is required at all, but to what extent an SSPC-certified firm must perform the work encompassed in the paint removal and application tasks.

The record also shows that the solicitation's requirements fail to reflect the agency's actual needs. As the FHWA explains, when it issued the solicitation, it expected the prime contractor to perform all work in connection with the paint removal and paint application, including the set up and clean up, since that work constituted the majority of the work. The FHWA also explains that, based on the requirements in sections 563.05 and 563.06, it expected any prime contractor bidding on the work to be an SSPC-certified firm. The FHWA states that Brickwood's approach of subcontracting the work to a certified firm, while not prohibited by the solicitation,

is nonetheless inconsistent with its expectations. As the agency explains, the certification process was established to protect against the improper release of lead paint and other pollutants into the air and the nearby water sources, so set-up and clean-up are crucial aspects underlying the intent of the certification requirement. Neither the solicitation's language nor Brickwood's bid were definitive as to whether the firm's performance of the set-up and clean-up work would be consistent with the purpose of the certification requirement. As the FHWA explains, one reason for the inclusion of the certification requirement is that the agency has no staff with sufficient expertise to oversee such operations.¹ Since the supervision of Brickwood's work would have to be provided by the certified firm—in this case a subcontractor with whom the government has no privity of contract—the agency believed that it would have no method to ensure that the work was performed in accordance with the SSPC standards.

Brickwood argues that it is unreasonable to require the contractor who performs such set-up tasks as rigging the work platforms with enclosures and ventilation to be SSPC-certified. The agency has not taken this position. Instead, the agency's position is that such work activities must, at a minimum, be supervised by an SSPC-certified firm in order to ensure that the activities are performed in accordance with the QP 1 and QP 2 quality programs, a view that is consistent with the SSPC's own requirements. We do not find this position to be unreasonable.

As a final matter, Brickwood argues that the agency cannot base its decision to cancel the solicitation on the interpretation of the apparent second-low bidder because that firm failed to timely challenge the solicitation's terms as ambiguous. However, the ambiguity present in this solicitation is not a patent one, which should have been obvious from the face of the solicitation, but a latent one, whose existence only became known after bid opening. In any event, a procuring agency is not precluded from canceling a solicitation based upon the post-opening discovery of a sufficient reason to cancel. Phil Howrey Co., *supra*, at 3; Ace-Federal Reporters, Inc., B-237414, Jan. 31, 1990, 90-1 CPD ¶ 144 at 3.

The protest is denied.

Anthony H. Gamboa
General Counsel

¹ The fact that the agency will incur costs to administer the contract does not, as Brickwood argues, mean that it has staff with expertise to ensure that the removal and application of paint in this project are performed in accordance with SSPC standards.