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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Rand & Jones Enterprises Company, Inc.

File: B-296483

Date: August 4, 2005

Robert J. Symon, Esq., Spriggs & Hollingsworth, for the protester.
Kenneth B. MacKenzie, Esq., and Phillipa L. Anderson, Esq., Department of
Veterans Affairs, and John W. Klein and Kenneth Dodds, Small Business
Administration, for the agencies.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency lacked a reasonable basis to cancel a request for proposals (RFP) after disclosure of the offerors' proposed prices where the RFP provided only for a price competition and did not contain technical evaluation factors, the agency intends to issue an invitation for bids for this same requirement, and there is no basis to find the government or the integrity of the procurement system would be prejudiced if the RFP were not cancelled.

DECISION

Rand & Jones Enterprises Company, Inc. protests the cancellation of request for proposals (RFP) No. 10N3-215-04, issued by the Department of Veterans Affairs (VA) for construction services at the agency's Medical Center in Northport, New York.

We sustain the protest.

The RFP, issued August 2, 2004, provided for the award of a fixed-price contract for the expansion and renovation of the VA's Medical Center in Northport. Offerors were requested to propose fixed prices for a base contract line item number (CLIN) and for several alternate CLINs, each of which reflected deletions from the required work. Offerors were also required to propose fixed prices for the maintenance of controls and instrumentation for the project. Offerors were informed that a "single award will be made on the base bid, but in the event the offer exceeds the funds available, a single award will be on alternate number 1." RFP at 1.

The RFP incorporated the standard “Instructions to Offerors--Competitive Acquisition” clause of Federal Acquisition Regulation (FAR) § 52.215-1 that informed offerors that the agency would award a contract to the responsible offeror whose proposal represented the best value to the government considering the factors and subfactors identified in the solicitation. No technical or non-price related evaluation factors were identified in the solicitation.

The RFP also contained the standard “Notification of Competition Limited to Eligible 8(a) Concerns” clause of FAR § 52.219-18, which informed offerors that the solicitation was set aside for small business concerns certified by the Small Business Administration (SBA) for participation in SBA’s section 8(a) program.¹ VA did not, however, offer the procurement to the SBA for award under the section 8(a) program as was required by SBA’s regulations, and therefore the competition was not in fact set aside for section 8(a) concerns.² SBA Report at 2.

On September 2, the contracting officer was notified by VA’s Acquisition Assistance Division that the RFP did not provide any technical evaluation factors. Thereafter, the RFP was amended to require the submission of a bid bond. The agency did not, however, amend the solicitation to provide any technical evaluation factors.

On September 14, VA received proposals from four firms, including Rand & Jones and Arrow Construction/BKC, Inc. VA publicly opened the proposals and disclosed the firms’ proposed prices.³ Arrow was the apparent low offeror for the base CLIN. However, Arrow notified the agency that it had made a mistake in its offered price, and requested either an upward price adjustment or the withdrawal of its offer. The contracting officer forwarded Arrow’s request to VA’s Acquisition Program Management Division, which informed the contracting officer that she could conduct discussions with Arrow and other offerors. This VA office also again informed the contracting officer that the solicitation did not include any technical evaluation factors. VA then discovered that a number of the solicitation’s construction drawings required revisions. In addition, the proposals expired. On March 3, 2005, VA again amended the RFP to provide a new set of construction drawings (but did not add technical evaluation factors) and to establish March 24 as a new closing date for submission of offers.

¹ The procurement was also identified on the agency’s electronic business opportunities system as being set aside for a competitive section 8(a) award.

² SBA’s regulations provide in pertinent part that “[a]ny competition conducted without first obtaining SBA’s formal acceptance of the procurement for the 8(a) [business development] program will not considered an 8(a) competitive requirement.” 13 C.F.R. § 124.504(b)(1) (2005).

³ The disclosure of offerors’ proposed prices in a negotiated procurement prior to award, as was done here by VA, is prohibited. See FAR §§ 3.104-3(a), 3.104-4.

VA received revised proposals from the four firms, and again publicly opened the proposals and disclosed the firms' proposed prices. Rand & Jones was found to have proposed the lowest price for the base CLIN, for which there was apparently available funding. Arrow, which submitted the second lowest price for the base CLIN, protested to VA that Rand & Jones had graduated from SBA's section 8(a) program and was therefore not eligible to receive award under the RFP.⁴ VA forwarded Arrow's challenge to SBA. SBA took no action in response to the challenge. VA subsequently "withdrew" the challenge to Rand & Jones section 8(a) eligibility.

Instead, the contracting officer cancelled the RFP because it failed to contain any technical evaluation factors and informed the offerors that the agency would issue an invitation for bids (IFB) for this requirement.⁵ See, e.g., Agency Report, Tab 15, VA Letter to Arrow. This protest by Rand & Jones of the cancellation of, and the failure to make award under, the RFP followed.

As a general rule, in a negotiated procurement the contracting agency need only demonstrate a reasonable basis to cancel a solicitation after receipt of proposals, as opposed to the "compelling reason" required to cancel an IFB where the bids have been opened. See FAR § 14.404-1(a)(1); CFM Equip. Co.--Recon., B-251344.2, Aug. 30, 1993, 93-2 CPD ¶ 134 at 3. The standards differ because, in procurements using sealed bids, competitive positions are exposed as a result of the public opening of bids, while in negotiated procurements there is no public opening. CFM Equip. Co.--Recon., supra. In situations like this one, our Office has stated that cancellation of an RFP, even after one or more of the offerors' prices have been revealed, is proper where the agency has a reasonable basis to cancel, and the record contains plausible evidence or a reasonable possibility that a decision not to cancel would be

⁴ As noted above, the procurement was not in fact set aside for section 8(a) concerns. In any event, SBA advises that Rand & Jones was an eligible section 8(a) participant on the date that initial offers were submitted, and would therefore have been eligible for an award under the section 8(a) program, despite the firm's later graduation from the program. SBA Report at 3; see 15 U.S.C. § 637(a)(1)(C)(ii) (2000); 13 C.F.R. § 124.507(d).

⁵ In response to our inquiry, VA informed us that it intends to set aside the IFB for service-disabled veteran-owned small businesses. Under FAR § 19.1405, an agency is permitted to set aside acquisitions exceeding the micro-purchase threshold for service-disabled veteran-owned small businesses where offers are expected from two or more service-disabled veteran-owned small businesses and award is expected to be made at a fair market price. The agency does not assert, and the record does not indicate, that this proposed service-disabled veteran-owned small business set-aside was the reason the RFP was cancelled.

prejudicial to the government or the integrity of the procurement system. See Noelke GmbH, B-278324.2, Feb. 9, 1998, 98-1 CPD ¶ 46 at 3-4.

Here, the record contains no evidence, or even argument, that the government or the integrity of the procurement system would be prejudiced if the RFP were not cancelled and award were made thereunder. VA's only asserted basis for cancellation is that the RFP did not contain evaluation factors.⁶ However, where, as here, a negotiated procurement does not provide technical evaluation factors, award is to be made to the responsible offeror with the lowest-priced, technically acceptable offer. See Omatech Serv. Ltd., B-254998, B-254998.2, Dec. 17, 1993, 93-2 CPD ¶ 329 at 3. Thus, the competition for award under the RFP was solely based on price. The agency does not assert that it will change any of its requirements but will issue an IFB, under which the sole basis for award is price, for the same requirements. Thus, since the basis for award under the RFP and IFB would be the same, the agency lacks a reasonable basis to cancel the RFP. Moreover, not only is neither the government nor the integrity of the competitive procurement system prejudiced by not cancelling the RFP here, but Rand & Jones, whose low competitive price for this same requirement has been publicly disclosed, would be prejudiced if this requirement were recompeted on the basis of price.

We sustain the protest.

We recommend that VA award a contract to Rand & Jones under the RFP, if Rand & Jones is found to be responsible and if there is sufficient funding. We also recommend that Rand & Jones be reimbursed its cost of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(2)(1) (2005). In accordance with 4 C.F.R. § 21.8(f)(1), the protester's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

Anthony H. Gamboa
General Counsel

⁶ The RFP also did not request technical proposals.