

DECISION

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

60254

FILE: B-184296

DATE: November 28, 1975

MATTER OF: Berlitz School of Languages

97643

DIGEST:

1. Protest after bid opening against decision to set aside procurement for small business on basis that there was not sufficient number of small business competitors is untimely since protests based on alleged improprieties in solicitation which are apparent prior to bid opening must be filed prior to bid opening.
2. Protests against affirmative determinations of responsibility will not be reviewed unless fraud is alleged on part of procurement officials or solicitation contains definitive responsibility criteria which allegedly have not been applied.
3. Where contracting officer cancels small business set-aside invitation on mistaken belief that award may not be made when only one responsive bid is received, reinstatement of invitation and award thereunder is proper.
4. Review of protest that small business bidder on set-aside bid unreasonable price in view of lower bid on procurement and lower prior contract price of large business is confined to whether contracting officer acted reasonably in determining reasonableness of small business bid price.

Invitation for bids No. otr-50029 was issued by the Agency for International Development (AID) on a total small business set-aside basis for the procurement of an indefinite quantity of language training for itself and other Government agencies. The resultant contract was for 1-year, with two 1-year options being available to the Government. The determination to set the procurement aside for small business was made with the full concurrence of the Small Business Administration (SBA) representative assigned to AID.

Thirty requests for copies of the invitation were received by AID after the procurement was published as a small business set-aside in the Commerce Business Daily on March 25, 1975. The invitation was issued on April 7. Three bids were received by the April 30 bid opening date. The Berlitz School of Languages (Berlitz) bid was non-responsive as the bidder represented itself to be a large business. The other bidders, the International Center for Language Studies (ICLS) and the Lacaze Academy (Lacaze), represented themselves to be small businesses. On May 1, a bid was received from another firm which had represented itself to be a small business on prior procurements, but it was not considered because it was late.

On May 2 Berlitz, the incumbent contractor, protested to AID any award to ICLS, the low responsive bidder, basically on the grounds that the Berlitz bid was substantially less and that it doubted Lacaze was a small business and there was adequate justification for the set-aside. Although Lacaze was not the low bidder, the contracting officer requested the SBA to verify the Lacaze size status. Lacaze did not submit the necessary documentation to the SBA. As a result, the SBA found Lacaze to be other than a small business. Because of this, the ICLS bid was considered to be the only responsive one received on the procurement, and the invitation was canceled on the basis that there was a lack of competition. All parties were advised of the cancellation. Thereafter, because ICLS objected to the action, it was decided that the decisions of our Office would be reviewed to determine whether an award under a total small business set-aside was permissible where only one responsive bid was received. From this review, it was decided that an award could be made. In view of this and because the ICLS bid was determined to be reasonable, award was made to ICLS.

Counsel for Berlitz bases the protest filed with our Office on various grounds. First, it is contended that at the time the invitation was issued there were not sufficient competitors to support a reasonable expectation that bids would be obtained from a sufficient number of responsible small business concerns so as to ensure competition. Second, it is contended that the price offered by ICLS is unreasonable and that payment of the ICLS price would constitute an excessive expenditure. This contention is allegedly proved by the fact that the ICLS bid is about \$9,000 a year more than the Berlitz bid. This amount is computed by determining the number of hours of training that could be obtained for \$65,000 (the maximum value of services the Government may order from the contractor in any one year) from ICLS and from Berlitz at their respective bid

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prices. Since the contracting activity would receive less hours of training from ICLS, whose bid price was higher, the difference in cost is determined by multiplying the additional number of hours Berlitz would furnish by the ICLS bid price (i.e., the cost to the Government of obtaining the additional hours from ICLS). Thus, it is believed that the procurement as a total small business set-aside should have been canceled in view of the provision in Federal Procurement Regulations (FPR) § 1-1.706-3(b) (1964 ed. amend. 10) that a set-aside may be withdrawn before award because of an unreasonable price. Third, it is contended that once AID gave notice of the cancellation of the invitation it could not decide to make an award under the invitation. Finally, it is contended that ICLS is a nonresponsible bidder in that in order to perform the work it would have to hire persons employed by Berlitz.

The Interim Bid Protest Procedures and Standards, 4 C.F.R. § 20.2(a) (1974), and the current Bid Protest Procedures, 40 Fed. Reg. 17979 § 20.2(b)(1) (1975), both provide that protests based on alleged improprieties in a solicitation which are apparent prior to bid opening must be filed prior to bid opening. Therefore, the Berlitz contention after the opening of bids that the procurement should not have been a total small business set-aside is untimely.

As regards the issue of ICLS responsibility, this Office does not review bid protests against affirmative determinations of responsibility, unless fraud is alleged on the part of procurement officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Although we will consider protests against determinations of nonresponsibility to provide assurance against the arbitrary rejection of bids, affirmative determinations are based in large measure on subjective judgments which are largely within the discretion of procuring officials who must suffer any difficulties experienced by reason of a contractor's inability to perform.

With respect to the contention that once AID canceled the invitation it was barred from subsequently making an award under the invitation, this Office has held that it is proper to reinstate an invitation incorrectly canceled and to make an award thereunder. Spickard Enterprises, Inc., et al., 54 Comp. Gen. 145 (1974), 74-2 CPD 121.

In view of the foregoing, the crux of this case is whether the contracting officer correctly made award in light of FPR § 1-1.706-3(b), which states:

"If, prior to the award of a contract involving an individual or class set-aside for small business, the contracting officer considers the procurement of the set-aside portion from a small business concern would be detrimental to the public interest (e.g., because of unreasonable price), the contracting officer may withdraw * * * a * * * set-aside determination * * *."

Since this Office has recognized the right of the contracting activity to make an award under a total small business set-aside where there is only one responsive bid, B-173371, December 17, 1971, the resolution of this protest lies entirely with the contention that the bid submitted by ICLS is unreasonable.

ICLS bid \$7.23, \$6.49 and \$7.23 per hour (an average hourly rate of \$6.98) for individual instruction in the three major languages (French, Spanish, and Portuguese, respectively) vis-a-vis the Berlitz price of \$5.89 per hour for each language. ICLS and Berlitz both bid \$12.50 per hour for language instruction on a group basis. For individual instruction in the nineteen languages other than the three major languages, ICLS bid \$9.00 per hour whereas Berlitz bid \$9.00 per hour for seventeen of the languages and \$8.00 per hour for two of the languages (an average hourly rate of \$8.89). Bidders were advised in the invitation that:

"Award shall be determined on the basis of the 'average hourly rate' for instruction to one student in French, Spanish and Portuguese. This rate shall constitute 85% of the total basis of award. The 'average hourly rate' for instruction to one student in the remaining eighteen (18) languages [actually nineteen] shall constitute 5% of the total basis of award. The 'average hourly rate' for a one-hour class in group instruction shall constitute 10% of the total basis of award."

We have stated that while the provisions of the Small Business Act authorize the award of contracts to small business concerns at prices which may be higher than those obtainable by unrestricted competition, such authorization does not preclude the contracting

officer from withdrawing the set-aside when he considers the small business prices received under an invitation to be unreasonable. B-169008, April 8, 1970. Large business bids on small business set-aside procurements, while nonresponsive, are regarded as courtesy bids and may be considered in determining whether small business bids submitted on the procurement are reasonable. 49 Comp. Gen. 740 (1970). However, the contracting officer is not required to consider an offer from a large business concern, since it is incompatible with the Small Business Act and the set-aside program. Booz-Allen Applied Research, 53 Comp. Gen. 307 (1973).

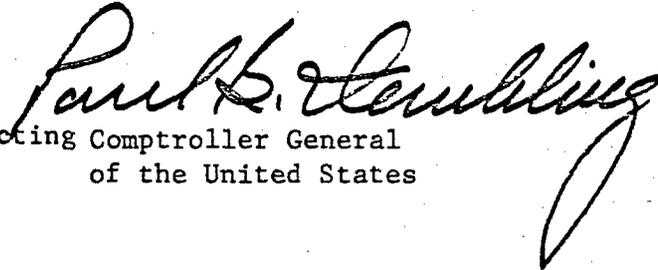
The record indicates that before an award was made to ICLS the contracting officer reviewed the bids received and the prior procurement history. The contracting officer found that the \$6.98 average hourly rate bid by ICLS represented a \$0.41 reduction below the price it bid on the prior procurement in 1973. Although this represented a \$1.09 increase over the prior price paid to Berlitz under the 1973 contract and the bid by it under the immediate invitation, the contracting officer considered that this was not significant because, while there was inflation in the interim, the ICLS 1975 bid was a reduction from the ICLS 1973 bid. Further, the difference of only \$0.11 an hour between the \$9.00 ICLS hourly bid and \$8.89 Berlitz hourly bid on the other language instruction was not considered significantly higher. In the circumstances, even though the Berlitz bid and prior contract price were less than the ICLS bid, the contracting officer considered the ICLS prices reasonable.

Although the difference when projected by the evaluation method for award included in the invitation is about 15 percent and may ultimately be about \$9,000 on an annual contract basis, instead of the \$983 estimated by the contracting officer, that does not mean the ICLS bid is unreasonable. A lower bid price by a large business does not per se mean that the award to the small business is at an unreasonable price. As indicated above, an award to a small business under a set-aside may be at a higher price to the Government than is otherwise obtainable. Although we have not objected to the withdrawal of set-asides where there have been differences of less than 15 percent, our review in these protest situations is confined to whether the contracting officer acted reasonably in the circumstances and not to second-guessing the contracting officer's determination, since FPR § 1-1.706-3(b) designates the contracting officer as the person to determine reasonableness of price. Therefore the determination must

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depend upon the analysis of the facts and circumstances by the contracting officer in each case.

We do not find that the contracting officer acted unreasonably in this case. Accordingly, the protest is denied.


Acting Comptroller General
of the United States