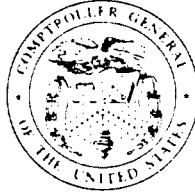


DECISION



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

60039

FILE: B-184086

DATE: October 9, 1975

MATTER OF: Brady & Maxwell Reporters

97837

DIGEST:

1. Solicitation calling for submission and evaluation of bids on the basis of the offered single percentage to Government established price list which resulted in the lowest overall price did not preclude consideration of additional prompt payment discount, because GSA Form 1424, incorporated into solicitation, provided that eligible prompt payment discounts would be applied after the evaluated price was computed from the application of the single percentage.
2. Question of successful bidder's small business status under small business set-aside is for determination by SBA, such determination being conclusive upon contracting agency.
3. Absent allegation of fraud by contracting officials, or definitive responsibility criteria in solicitation, this Office does not review protests against affirmative determinations of responsibility.

The foregoing concern has protested the award of contracts by the General Services Administration (GSA) to L. Lee Lawson and Associates, Inc. and Monick Stenographic Service under invitation for bids AT/FS 18296, issued by the GSA's Federal Supply Service.

The subject solicitation, a total small business set-aside, sought bids for a requirements contract to furnish transcription services for court reporting, personnel grievance and appeal hearings, for the period of June 1, 1975, or date of award, whichever is later, through February 29, 1976. The bid schedule was so constituted that various geographical areas and cities therein were enumerated with Government-established price lists for each city. The submission of bids for each location was to take the form of an inserted percentage, either plus or minus, to be applied to the price set forth by the Government for each location. The "Method of Award" provision on page 6 of the solicitation specified that award would be made in the aggregate by

each category within each geographical area to the responsive and responsible bidder offering the lowest price in the form of a single percentage as a deductive from, or additive to, specified items.

Bids were opened on April 30, 1975, and separate awards were subsequently made to Lawson and Monick for various item categories. Brady has objected to the evaluation of Lawson's bid price in which GSA considered Lawson's offered prompt payment discount of 10 percent for 20 days. Brady, who failed to offer a prompt payment discount, contends that the requirement of the "Method of Award" provision that award be made to the bidder offering the lowest price in the form of a "single percentage," precludes consideration of an additional prompt payment discount. Brady concedes that if the "Method of Award" clause had explicitly stated that prompt payment discounts were to be considered in addition to the single percentage, its argument would be moot. However, in the absence of such language, Brady argues that the awards to Lawson were on a basis other than set forth in the solicitation.

Brady also protests the awards to Monick, contending that Monick cannot qualify as a small business for this set-aside, and further alleges that Monick cannot be considered a responsible bidder due to a lack of plant facilities sufficiently propinquant to GSA Region 4 to permit the supply of next day or same day transcription.

With regard to the consideration of the prompt payment discount offered by Lawson, in addition to the referenced provisions concerning the method of award the solicitation also incorporated by reference both Standard Form 33A (1969 ed.) and GSA Form 1424, which provide in part as follows:

"9. DISCOUNTS. (a) Notwithstanding the fact that a blank is provided for a ten (10) day discount, prompt payment discounts offered for payment within less than twenty (20) calendar days will not be considered in evaluating offers for award, unless otherwise specified in the solicitation. However, offered discounts of less than 20 days will be taken if payment is made within the discount period, even though not considered in the evaluation of offers." (Standard Form 33A (1969 ed.))

"51. PROMPT PAYMENT DISCOUNT

For the purpose of bid evaluation, any prompt payment discount which is eligible (i.e. for a period of 20 days or more) for consideration in the evaluation of offers pursuant to Article 9(a) of SF 33-A will be applied directly to the price offered. Where a single percentage either as a deduction from or as an addition to the prices is offered under the price list method of making awards, such percentage will be applied first to determine the evaluated price offered, then that price will be reduced by any eligible prompt payment discount offered. * * * (GSA Form 1424) (Emphasis added.)

It is our conclusion that these provisions, when considered in their entirety and with special regard to the emphasized language in Section 51 of GSA Form 1424, provide for the consideration of prompt payment discounts of 20 days or more in the evaluation of bids, and such consideration is not inconsistent with the provision that awards are to be predicated upon the lowest price in the form of a "single percentage." Accordingly, we cannot conclude that the provision for a best single percentage was intended, or could reasonably be interpreted, to preclude consideration of eligible prompt payment discounts. See B-175140, June 1, 1972. We therefore interpose no legal objection to the consideration of Lawson's prompt payment discount in the evaluation of its bid price.

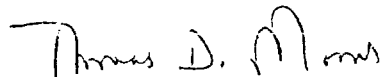
Concerning the issue of Monick's size and its eligibility to participate in the small business set-aside, the contracting officer forwarded Brady's protest to the Philadelphia Regional Office of the Small Business Administration (SBA), which determined that Monick qualified as a small business concern under the size standards made applicable to this procurement.

Under 15 U.S.C. § 637(b)(6) (1970), it is the duty of the SBA, rather than this Office, to determine whether a concern is small business for purposes of a particular procurement, and SBA's determination is conclusive upon the procurement agency involved. See Old Atlantic Services, Inc., B-182559, December 12, 1974, 74-2 CPD 332. In view thereof, we must decline to consider this contention on the merits.

The issue of whether Monick has the requisite facilities to satisfactorily perform its contract is a matter of bidder responsibility which the agency has resolved in Monick's favor.

This Office does not review protests against affirmative determinations of responsibility, unless either fraud is alleged on the part of procuring officials or where the solicitation contains definitive responsibility criteria which allegedly have not been applied. See Central Metal Products, Inc., 54 Comp. Gen. 66 (1974). Affirmative determinations are based in large measure upon 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. However, we will continue to consider protests against determinations of non-responsibility to provide assurance against the arbitrary rejection of bids. In the absence of an allegation of fraud or definitive responsibility criteria concerning plant facilities in the solicitation, this aspect of the protest is dismissed.

Acting


Comptroller General
of the United States