DECISION

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

60254

FILE: B-184157 DATE: February 23, 1976 98569

MATTER OF: J. H. Rutter Rex Manufacturing Company, Inc.

DIGEST:

1. Protest against propriety of setting aside procurement for small business concerns is untimely under GAO Bid Protest Procedures since protest was filed after bid opening.

2. Protest that award under small business set-aside was detrimental to public interest due to unreasonable price is denied since additional contract requirements merited price differential over past procurement, contract resulted from adequate competition, and inflation increased labor, overhead, and material costs.

J. H. Rutter Rex Manufacturing Company, Inc. (Rutter Rex), protests the award to the Martin Manufacturing Company for men's cotton durable press shirts under invitation for bids (IFB) DSA100-75-B-0890, issued by the Defense Personnel Support Center, Philadelphia, Pennsylvania as a total small business set-aside. The issuance of the IFB, including the total set-aside, was synopsized in the Commerce Business Daily issue of March 11, 1975. Bids were opened April 28, 1975, and award was made to Martin, the low bidder, on May 30, 1975.

By telegram of June 10, 1975, received at our Office on the same day, Rutter Rex filed this protest. Its grounds of protest are that the IFB's small business set-aside was not consistent with national policy and that the award to Martin was detrimental to the public interest as representing too high a price. In this connection, Rutter Rex states that it was not a "small business" for the purposes of this procurement, but that it is entitled to raise this matter because it inquired into this IFB as a qualified manufacturer and because the propriety of the very restriction which prevented it from bidding is subject to question. As a remedy, Rutter Rex asks that the Martin contract be "rescinded", that the set-aside be revoked, and that the requirement be resolicited on an unrestricted basis.

Pursuant to section 20.2(b)(1) of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975), protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening shall be filed prior to bid opening. Consequently, Rutter Rex's protest against the set-aside is untimely since it should have been made prior to bid opening; therefore it will not be considered on the merits.

Rutter Rex also contends that Martin's allegedly unreasonable bid price renders the award nugatory under Armed Services Procurement Regulation § 1-706.3(a) (1974 ed.), which provides in part that a small business set-aside may be withdrawn if a procurement thereunder would be detrimental to the public interest, e.g., because of unreasonable price. Under this procurement, DSA is procuring 150,000 durable press utility shirts at a price of $5.97 per shirt. Rutter Rex alleges that a contract award under a recent procurement (IFB No. DSA100-75-B-0702) for a utility shirt without durable press was made at a cut, make and trim (CMT) cost of $1.55, while the CMT cost under IFB-0890 was $3.57. Since Rutter Rex believes that most, if not all, of the price difference between the two procurements was due to the durable press treatment, and since it calculates the durable press treatment to cost $.20 per unit (CMT), it alleges that the award price to Martin is unreasonably high.

DSA insists that the award price was reasonable. In this connection, the contracting officer prepared the following price analysis for this procurement:

> "1. Solicitation DSA100-75-B-0890 and Amendment 1 and 2 is for the procurement of 150,000 each Shirt, Utility, Durable Press Army Shade 507. The Procuring Contracting Officer solicited fifty-five (55) firms listed on bidder's list as having the skill and know-how to manufacture subject procurement item. This procurement was advertised under adequate competition. Cost and pricing data is not required since award is based on adequate competition in accordance with the guidelines provided in ASPR 3-807.3(f).
>
> "2. There isn't any prior procurement history because subject requirement is a new item. The competitive prices offered ranged from a low of $4.85 to a high of $10.07. The low offered

price of $4.85 is not acceptable due to quantitative restrictions imposed by the bidder (maximum quantity 25,000 each). The quantity of subject requirement is relatively small for this type of item, therefore the offeror is required to have amortized the expanded first article quantity over the total requirement quantity. The proposed Contractor must warrant and review the specification for adequacy, therefore there is an unknown risk factor injected into the proposed unit price. During the past year the economy has undergone a period of spiral inflation with the concomitant increases to manufacturers for labor, overhead and material costs. The minimum wage has increased by $.40 per hour. This rise has a definite impact on all manufacturers.

"3. Independent Cost/Price Analysis is waived for this procurement based on the above factors and the fact that adequate competition exists. I hereby determine the proposed award price to be fair and reasonable."

Rutter Rex, however, takes the position that the approach used in the contracting officer's price analysis was inadequate. It argues that the contracting officer's price analysis based on total unit prices must be considered inaccurate due to the absence of a comparable price history, a 100 percent difference in the various bids received, an unknown risk factor, and an unspecified inflationary effect in price. Under these circumstances, the protester argues that comparisons based on unit prices are unacceptable and therefore inadequate, but that a comparison based on the CMT cost would generate quantifiable factors which would form the basis for a reasoned judgment.

With respect to comparing the CMT price on the two procurements, the record indicates that the award prices on IFB-0702 were between $4.68 and $4.83. DSA contends that there was no actual breakdown between cut, make and trim and other costs on that procurement. While apparently conceding that IFB-0702 did list a CMT cost of $1.55, DSA advises that this cost was listed only for the Government-furnished material thereunder and only for administrative purposes, that $1.55 cannot be assumed to be the actual CMT cost under IFB-0702, and that each contractor's CMT can differ for any number of reasons.

Additionally, both DSA and Martin have advised this Office of a number of basic differences between the prior contract and this contract. They indicate that IFB-0702 was a supply-type contract, with GFM fabric, wherein the Government also furnished the specifications and a warranty that an acceptable end item could be produced therefrom. Under the Martin contract, however, the Government does not warrant the adequacy of the specification; thus the contractor is under an affirmative duty to discover specification defects, and any resulting modifications are incorporated into the contract at no additional cost to the Government. Both Martin and DSA consider these extra requirements to be an economic risk warranting a price differential. As additional reasons to support a price differential, DSA and Martin explain that the contractor here is not provided the fabric as was previously done; that the cloth in the earlier procurement was not required, as here, to be treated with a special resin; that the nature of this cloth increases the labor costs for fabrication; that this procurement also requires a special durable press treatment; and that the durable press treatment requires more stringent inspection procedures.

Whether a bid is reasonable as to price is a determination to be made by the procuring agency, and our Office will not interfere absent a showing that the determination is arbitrary. B-178089, June 26, 1973; B-177464, May 14, 1973. With respect to DSA's determination of the reasonableness of Martin's price, the record indicates that the eight responsive bids received were the result of adequate competition, and that Martin's bid was preceded in price by only one other bid (which had a quantity limitation). Moreover, the record establishes that the provisions and requirements of this contract merited a price differential over IFB-0702, that the unit prices on IFB-0702 ranged from $4.68 to $4.83, and that inflation has required increases in the costs of labor, overhead, and material costs. Based on our review of the record we do not find that the contracting officer's determination of price reasonableness was arbitrary. Accordingly, the protest must be denied. Development Associates, Inc., et al., B-183773, August 18, 1975, 75-2 CPD 112.

R. F. Keller

Deputy Comptroller General
of the United States