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William Witherspoon
Pres. I



DECISION

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

FILE: P-186873

DATE: January 24, 1977

MATTER OF: California Stevedore and Ballast Company

DIGEST:

1. Protest of cancellation of request for proposals after extensive negotiations upon determination by contracting officer that sole offeror's best and final offer was not fair and reasonable is denied since determination of price reasonableness is business judgment requiring exercise of broad discretion which will not be questioned absent a showing of clear abuse of discretion which is not apparent from present record.
2. Protest of solicitation and award under basic agreement for stevedoring and related services based upon alleged improprieties in such use of basic agreement apparent prior to closing date for receipt of proposals is untimely and not for consideration, as it was filed after closing date for receipt of proposals contrary to GAO Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1).

Request for proposals (RFP) No. DANC23-76-R-0018 was issued by the United States Army Military Traffic Management Command, Western Area, Oakland, California (MTMC) on April 2, 1976, for the provision of stevedoring and related services at the Military Ocean Terminal, Bay Area (MOTBA), under a 2-year contract.

The California Stevedore and Ballast Company (CS&B), the incumbent contractor under the then current 2-year contract expiring on June 30, 1976, was the sole offeror. After repeated negotiations the contracting officer determined that CS&B's best and final offer was not fair and reasonable, and canceled the solicitation. CS&B was notified of this action orally on June 24, and by letter dated June 25, 1976.

On June 21, the contracting officer, realizing that the current contract would expire before a full RFP resolicitation could result in a new contract, solicited proposals for the

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provision of stevedoring services for a 90-day period under basic agreements previously entered into with CS&B and Marine Terminals Corporation (MTC). These basic agreements are written understandings between a procuring agency and a contractor setting forth basic contract clauses which shall be applicable to procurements entered into during the term of the agreement. See Armed Services Procurement Regulation (ASPR) 3-410.1(a) (1975). Both CS&B and MTC submitted offers on June 25. The contracting officer determined that MTC's low offer was more advantageous to the Government, and placed an order under the basic agreement, which MTC accepted on June 29, with performance beginning on July 1, 1976.

By letter dated June 30, 1976, CS&B protests the cancellation of the RFP, and the award to MTC under the basic agreement. CS&B's grounds for protesting the cancellation of the RFP are: (1) that the contracting officer's determination that CS&B's best and final offer was not fair and reasonable was in error, and, therefore, an award should have been made; (2) that no reason was given for the rejection of CS&B's offer in the written notification of rejection, and (3) that CS&B's current contract should have been extended to allow negotiations to proceed further.

The contracting officer's determination that CS&B's best and final offer was not fair and reasonable was based on his comparison of the price and supporting cost data of CS&B's proposal, its current contract, and the Government estimates. CS&B's proposed prices were substantially higher than both the Government estimates and the prices under its then current contract for similar services. For example, the contracting officer noted the following percentage increases for specific services over the current CS&B rates: terminal services - 85.5 percent; commodity schedules - 40.2 percent; stevedoring and car, barge and truck services - 28.9 percent, and profit allowance - 33 percent. CS&B's best and final offer was 22.14 percent above its current rates, while the Government's final counteroffer was 6.95 percent above those rates. The contracting officer determined that these increases were unjustified as the contract was for similar services, and the prices were based upon the same union wage scale and level of employee fringe benefits as the previous contract.

CS&B does not directly dispute the above findings of price increases, but rather claims that they are justified. CS&B argues that the Government has required new services, the costs of which are not reflected in either the then current contract, or the

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Government estimate. CS&B also argues that many of its costs are fixed, regardless of the level of cargo tonnage handled, and that the projected drop in tonnage under the new contract has inflated the unit costs of these required services. Additionally, CS&B contends that the Government's price estimates do not include recently increased employee fringe benefits.

A careful review of the record indicates that the contracting officer was aware of new services required by the Government, and that these services were considered in the evaluation of CS&B's proposal. The contracting officer also considered the decreased productivity resulting from CS&B's fixed costs, and determined that the Government could not be expected to pay for a level of staffing that it could not use. The issue of whether increased employee fringe benefits were included in the Government estimate is not resolved by the record, but it does not appear to have been a determinative factor in the contracting officer's decision.

Regarding price negotiation policies, ASPR 3-801.1 (1975) provides, in pertinent part:

"* * * It is the policy of the Department of Defense to procure supplies and services from responsible sources at fair and reasonable prices calculated to result in the lowest ultimate cost to the Government. * * *"

ASPR 3-801.2(c) (1975) states:

"* * * When the contractor insists on a price or demands a profit or fee which the contracting officer considers unreasonable, the contracting officer shall (1) determine the feasibility of developing an alternate source of supply, or (2) take any other action within his authority. * * *"

Additionally, ASPR 2-404.1 (1975) permits contracting officers to cancel a solicitation prior to award if, among other reasons, all otherwise acceptable bids received are at unreasonable prices. While this section by its terms applies only to formally advertised procurements, this Office has long recognized that the principle stated therein also applies to negotiated procurements. See Microfilm Communication Systems, Incorporated, B-180465, September 4, 1974, 74-2 CPD 140; B-178282, July 27, 1973.

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The determination of price reasonableness is basically a business judgment requiring the exercise of broad discretion. See Park Manufacturing Company; Century Tool Company, B-185330, B-185331, B-185776, April 16, 1976, 76-1 CPD 260. The determination is to be made by the contracting officer and our Office will not interfere absent a showing of a clear abuse of discretion. See J. H. Rutter Rex Manufacturing Company, Inc., B-184157, February 23, 1976, 76-1 CPD 122; Park Manufacturing Company; Century Tool Company, supra.

In the instant case, while there is a dispute between CS&B and the contracting officer over the cost justification for CS&B's increase in price, there is substantial evidence in the record supporting the contracting officer's position. Therefore, we cannot say that the record shows a clear abuse of discretion on the part of the contracting officer.

CS&B also complains that the written notification that the RFP was being canceled did not state any specific reasons for the cancellation. The contracting officer admits this fact, but points out that it was clear in the final negotiating session that CS&B was quite aware that its proposal was considered unreasonably priced. This appears to be a correct assessment as evidenced by the memorandum of the negotiating session in the record. Our Office has held that notice of the unacceptability of a proposal is a technical requirement, and that the result of a solicitation will not be disturbed due to lack of notice or faulty notice. See Computer Machining Technology, B-181233 March 6, 1975, 75-1 CPD 134; Galler Associates, Incorporated, B-181728, November 26, 1974, 74-2 CPD 292. In the instant case, since CS&B had knowledge of the reason for rejection of its proposal, and since such notice is a technical requirement, the cancellation of the RFP should not be disturbed for this reason.

CS&B also argues that its then current contract could have been extended, so that negotiations could continue past the expiration date of that contract. As the contracting officer properly pointed out, the conditions imposed by CS&B for extension of the contract, that CS&B be compensated at the proposed rates; that the Government negotiate only with it; that no solicitation be made from any other stevedoring firms; and that award be made to CS&B at the end of the extension period, are extremely restrictive of the Government's rights. We find nothing requiring that the Government extend CS&B's contract, rather than solicit proposals under the basic agreement, as was done.

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CS&B protests the solicitation and award to MTC under the basic agreement on the following grounds: (1) the time allowed for preparation of bids was inadequate; (2) the basic agreement provides for services to be performed at "Commercial Facilities: San Francisco Bay Area and Port of Sacramento, California," while the solicitation specified work to be done at MOTBA; (3) the basic agreement does not contain a hardship clause; (4) the basic agreement is not a valid bilateral contract, and (5) other unspecified deficiencies in the basic agreement.

Our Bid Protest Procedures, specifically 4 C.F.R. § 20.2(b)(1), provide, in pertinent part:

"Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals. * * *"

It appears that all of CS&B's grounds for protesting the solicitation and award under the basic agreement come within the above-quoted provision. All grounds cited by them involve alleged improprieties in the method of solicitation, and all alleged improprieties were apparent prior to the closing date for receipt of offers. CS&B's protest was not filed until after the date of award and is consequently untimely, and not for our consideration.

In accordance with the above, CS&B's protest of the cancellation of the RFP and subsequent solicitation and award under the basic agreement is denied.

Deputy

R. J. K. [Signature]
Comptroller General
of the United States