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DECISION



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

FILE: B-183364, B-187104 DATE: November 9, 1977
MATTER OF: IMBA, Incorporated

DIGEST:

1. Protest founded on premise that agency is obliged to exceed its minimum requirements in order to neutralize advantage of incumbent is denied.
2. Allegation of "buying in" presents no legal basis upon which an award may be disturbed.
3. Where specification sets out detailed design characteristics and also states that equipment furnished shall be of commercial type, use of term "commercial type" did not mean, as contended by protester, that bidders were being asked to furnish equipment exceeding the design characteristics. However, recommendation is made that term "commercial type" be defined in future solicitations.
4. Whether bidder will furnish equipment which will conform to specification requirements is matter of responsibility, and agency's affirmative determination in this regard will not be reviewed by GAO except in limited circumstances. Moreover, whether or not equipment actually furnished under the contract conforms to the specification requirements is a matter of contract administration which will not be reviewed by GAO.
5. Claim for bid preparation costs is denied where GAO has not concluded that agency has acted improperly. Also expenses incurred in pursuing protest are noncompensable.

IMBA, Incorporated (IMBA), protests the award of a contract to Alliance Properties, Inc. (Alliance) for furnishing, installing and maintaining washer-dryer services at Fort Campbell, Kentucky under invitation for bids (IFB) DAKF 23-77-B-0019 (IFB-19) (B-188364). This solicitation represents the second effort at fulfilling Fort Campbell's washer-dryer service requirement. The first solicitation, IFB DAKF 23-76-B-0164 (IFB-164), was canceled in the wake of a prior IMBA protest (B-187404). IMBA also protested the cancellation of IFB-164 (B-187404). The IMBA contentions have throughout centered on the nature of the specifications used to describe the Army's requirement. IMBA takes the position that the

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specifications are both restrictive and defective. IMBA has argued that the specifications restricted competition in two ways; first, by allowing an unduly short installation period under IFB-164 and second, under both IFB-164 and IFB-19 by allowing bidders to provide the required services utilizing other than new equipment (i. e., used or refurbished). IMBA has likewise argued that the specifications were defective in two ways; first, IMBA claims IFB-164 was defective to the extent that the cost of on-base office and storage space was not indicated and second, both IFB-164 and IFB-19 were defective in the description of what would constitute acceptable items of equipment. The Army canceled IFB-164 because it agreed with IMBA's contention that the installation period allowed was restrictive of competition. Moreover, the second solicitation, IFB-19, cured the defect regarding the cost of on-base office and storage space. IMBA, however, protested the cancellation of IFB-164 on the ground that the Army should have examined the balance of the issues IMBA presented in its first protest.

We have for consideration IMBA's arguments that IFB-19 improperly permitted the use of used equipment and did not adequately describe what constituted acceptable equipment.

IMBA's contention, that an IFB which allows the use of other than new equipment is restrictive of competition, is reflective of the peculiarities of washer-dryer service procurements. The successful contractor is expected to provide a large quantity of equipment for Government use, in this case approximately 380 washing machines and 380 dryers. IMBA states that this necessitates a large initial investment in equipment which must be amortized over the term of the contract. Where the Government uses a one year contract with an option to extend to a maximum of three years, a new bidder, competing with an incumbent, may be forced to assume the risk of spreading the recovery of its initial investment over a three-year period instead of a one-year period, in order to offer the Government a competitive price. There is of course the danger that the Government will not exercise the options. IMBA, in urging the Army to require new equipment, has presented a corollary argument in which IMBA takes the position that the Government's use of one year contracts with two year options forces the new bidder to "buy in." We will discuss the corollary argument first and then examine IMBA's principal argument that permitting the use of new equipment is restrictive.

IMBA's competitor, Alliance, has offered new equipment which IMBA calculates Alliance can not amortize in only

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one year at its bid price. IMBA believes that Alliance's bid constitutes a "buy in" and that such a bid is prohibited by Armed Services Procurement Regulation (ASPR) § 1-311 (1976 ed.) which states that the Department of Defense does not favor "buying in." We note that title to the equipment remains with the contractor so that after the contract term has ended it may either sell the equipment or put it to use in its business. Moreover, if the options are exercised, the contract has predetermined the amounts Alliance may be paid in the subsequent option years. In any event, we may not legally object to the award of a contract even if it were established that the successful contractor had in fact "brought into" the procurement. See 52 Comp. Gen. 653, 660 (1973) and cases cited therein.

Further, we are not persuaded by IMBA's principal argument to the effect that specifications which allow the use of used or refurbished equipment are unduly restrictive of competition. It may be that an incumbent having already amortized the cost of his now used equipment has an advantage over other competitors. Forcing an incumbent to bid new equipment would remove this competitive advantage. However, specifications are only supposed to prescribe the minimum standards to which articles required by the Government shall conform. B-161839, November 2, 1967. The Army has indicated that it does not need new machines and that any machine which is in working order and will meet the specification requirements will do. We are of the opinion that the Government is not obliged to equalize the competitive positions of all potential bidders. Price Waterhouse & Co., B-186779, November 15, 1976, 76-2 CPD 42. The purpose of competitive procurement is not to insure that all bidders face the same odds in competing for Government contracts. Rather, the purpose is to insure that the Government obtains its minimum requirements at the most favorable price. We do not think that the position IMBA espouses would lead to this result.

IMBA also argues that IFB-19 is defective, in that it fails to adequately describe what would constitute acceptable equipment. The equipment specifications in IFB-19 read, in part, as follows:

"2. MACHINES:

a. Machines furnished under this contract shall be of a commercial type and shall conform to the following description. Machines may exceed this

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description in one or more features; however, for the purpose of evaluating offers in response to this solicitation, such machines will be considered equal with respect to machines which conform to the requirements stated.

b. All machines installed under this contract shall be without mechanical or other defects which will adversely affect operation of the machines.

"3. WASHERS: Washers shall be electric, automatic, nonvibrating, 15 lbs minimum capacity, 1/3 HP motor, 115 volts, 60 cycle, AC 3 prong cord, with porcelain or acrylic enamel finish cabinet.
* * *

"4. DRYERS: The dryers shall be electric, automatic, nonvibrating, 16 lbs minimum capacity, 1/6 HP motor, 115 volts, 60 cycle, with heating element 208-240 volts and 4750-5200 watts, UL listed for all electric systems, porcelain or acrylic finish cabinet.

* * * * *

IMBA contends that the Army in fact expressed a desire for commercial equipment as opposed to domestic equipment at an August 26, 1976 conference in connection with IFB-164. However, IFB-19 retained the 15/16 pounds minimum capacity and 1/3 / 1/6 horse power motor requirements for the washers and dryers which continued to indicate to IMBA the acceptability of a domestic machine.

IMBA contends that the above quoted specification language creates a conflict because paragraphs 3 and 4 describe what IMBA contends are domestic type machines while paragraph 2(a) requires heavy duty machines capable of commercial type work as opposed to household performance. IMBA, prior to bid opening of IFB-19, timely protested this aspect of the solicitation urging that the detailed requirements of paragraphs 3 and 4, quoted above, were in conflict with the more general term "commercial type" found in paragraph 2(a). IMBA argues that, in the trade, the term "commercial type" has design connotations which, when read together with the design criteria expressly set out in paragraphs 3 and 4, create an ambiguity.

In this regard the Army contends that the term "commercial type" as used in the specification does not necessarily mean the

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same as "heavy duty" but that this requirement may be met by machines having the specified capacity. Although it is unclear what specific properties "commercial" machines possess that are not possessed by "domestic" machines of identical capacity, we believe that the specifications, reasonably read, required installation of machines which met the express criteria of paragraphs 3 and 4. We do not agree with the protester's argument that the term "commercial type" meant that bidders were being asked to furnish equipment exceeding the design characteristics of paragraphs 3 and 4. However, we recommend that in future procurements of this type that the particular characteristics of "commercial" machines which the agency determines are necessary to meet its needs be specifically set forth in the specification.

IMBA further contends that the machines which are being supplied by Alliance and which are being purchased from Sears, Roebuck and Company (Sears), do not meet the capacity requirements because they do not have the minimum 15 and 16 pound capacity for washers and dryers set forth in the specification. In this regard IMBA contends that a Sears official has indicated that the Sears equipment proposed by Alliance will not meet the specification. The Army takes the position that IMBA has not been able to prove that its assertions are correct. Sears as an organization has limited its comments to the observation that it measures the capacity of its equipment in units of volume rather than by weight. Notwithstanding the fact that the capacity of Sears equipment is no longer expressed in terms of weight the Army maintains that its contracting officer acted properly in making the determination that Alliance was a responsible and responsive bidder based on the preaward survey prepared by the San Diego Defense Contract Administrative Services (DCAS) office. The DCAS report dated March 11, 1977 states:

"[t]he offeror [Alliance] is familiar with the majority of washers and dryers being currently manufactured. The models selected for this proposed contract are manufactured by Sears Roebuck Company and they comply with the requirements of the proposed contract specifications."

Based on the above Alliance was determined to be a responsible bidder and awarded the contract on April 1, 1977.

Unless something on the face of the bid limits, reduces or modifies the obligation of the prospective contractor to perform

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in accordance with the terms of the invitation, the bid must be considered responsive. 53 Comp. Gen. 396 (1973). Here, Alliance unqualifiedly offered to meet all the requirements for the washer and dryer service including the capacity requirements for the machines to be used in furnishing the service. Its bid was, therefore, responsive.

The ability of Alliance to supply the appropriate machines with which to supply the service is a matter of responsibility. 53 Comp. Gen. 396, *supra*. IMBA's arguments that the machines which Alliance intends to supply will not meet the specification constitutes a protest against the Army's affirmative determination of Alliance's responsibility.

This Office does not review protests against such affirmative determinations of responsibility unless either fraud is alleged on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Central Metal Products, Incorporated, 54 Comp. Gen. 66 (1974), 74-2 CPD 64; Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376. Since fraud is not alleged and the IRB contains no definitive responsibility criteria this issue is not for our consideration. Moreover, whether or not Alliance is actually furnishing conforming equipment under the contract is a matter of contract administration which will not be reviewed by this Office. Dyneteria, Inc., B-186828, July 22, 1976, 76-2 CPD 72.

Finally, IMBA has asked for reimbursement of its bid preparations costs and of the expenses incurred in pursuing its protest. Since we have not concluded that the Army has acted improperly in conducting this procurement it would logically follow that there was no arbitrary or capricious action toward the protester, and thus that there is no basis to support recovery of its bid preparation costs. Ampex Corporation, RCA Corporation, B-183839, November 14, 1974, 74-2 CPD 304. Regarding IMBA's claim for expenses incurred in pursuing its protest we have held in the past that such expenses are noncompensable. T & H Company, 54 Comp. Gen. 1021, 1027 (1975), 75-1 CPD 345.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States