

5180

DECISION



H. H. [unclear]
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-189937

DATE: January 26, 1978

MATTER OF: Stacor Corporation; Isles Industries, Inc.

DIGEST:

1. IFB contained brand name or equal clause providing that if bidder proposed furnishing equal product bid must contain sufficient descriptive data to evaluate it. Where bidder furnished no descriptive data, furnishing similar product to agency under previous solicitation is not acceptable substitute for descriptive data requirement, and bid was properly rejected as nonresponsive.
2. Determination to cancel small business set-aside and resolicit with full competition on basis that all responsive bids were unreasonably priced and adequate competition was not achieved is within discretion of contracting officer and will not be disturbed absent showing of abuse of discretion and lack of reasonable basis for decision, which has not been shown here.
3. Withdrawal of small business set-aside does not violate Government policy of setting aside percentage of procurements for small business where as here governing regulations were complied with.
4. Cancellation of solicitation after bid opening and subsequent resolicitation do not create "auction" atmosphere where solicitation was properly canceled due to unreasonable prices and lack of adequate competition.

The Department of Agriculture, Forest Service (Forest Service), issued invitation for bids (IFB) No. R4-77-71 on August 19, 1977, for a quantity of drafting light tables.

R-189987

The IFB was a 100-percent small business set-aside and also required that the product offered should be a "Hamilton Dial-A-Light" or an equal product.

Seven bids were received by the date set for bid opening. The contracting officer determined that six of the bids were nonresponsive. On the basis that the remaining bid, that of the Stacor Corporation (Stacor), was unreasonably high (58 percent above the low bid), the contracting officer canceled the solicitation pursuant to Federal Procurement Regulations (FPR) §§ 1-2.404-1(a) and 1-2.404-1(b)(7) (1964 ed.). The contracting officer determined that there was not adequate small business competition and stated his intent to resolicit with full competition.

Isles Industries, Inc. (Isles), the apparent low bidder, protests the rejection of its bid as nonresponsive for failure to include descriptive literature and also protests the contracting officer's decision to cancel the solicitation and resolicit with full competition. Isles argues that the specifications listed in the IFB were sufficient to describe the product the Government wanted, and that since Isles stated no exception to the IFB, it was clearly offering what the Government required. Isles' main contention is that the policy underlying the descriptive literature clause--to enable the Government to evaluate bids to determine compliance with specifications--was fulfilled in this case because Isles had provided the Government with a similar product on the last Forest Service solicitation for light drafting tables. Isles argues that the product provided under the previous solicitation would meet all but two of the salient features listed in this IFB, and since it stated no exception in its bid, it clearly intended to provide those features as well.

Stacor protests the rejection of its bid as unreasonably high and the subsequent cancellation of the small business set-aside. Stacor argues that since all prices have been revealed, the cancellation will create an auction atmosphere. Additionally, this protester contends that since it is Government policy that a certain percentage of solicitations be set aside for small business, the cancellation and resolicitation with full competition violate that policy. Stacor also asserts that under these circumstances FPR § 1-2.404-1(b)(5) allows for negotiation under FPR § 1-3.214, and that it has offered to negotiate.

D-189987

Stacor supports the contention that its price was reasonable with a number of arguments. It argues that it is improper to use Isles' low bid as a comparison since it was found to be nonresponsive. Also, Stacor alleges that most of the other bidders were large businesses and were bidding unrealistically low in an attempt to cause cancellation of the small business set-aside. Additionally, Stacor argues that the range of prices received in response to a Forest Service solicitation for a very similar item last year (IFB R4-76-30) was comparable to its price here. Stacor contends that the low item price on R4-76-30, \$789.50, should be disregarded because the product delivered under the resultant contract was found to be unsatisfactory. The other prices, ranging from \$905.79 to \$1,169, Stacor contends are comparable to its unit price of \$1,197. This is especially true, Stacor states, because the specifications in the present IFB were upgraded.

Finally, Stacor argues that, if there was inadequate small business competition, the Forest Service contributed to it by mailing IFB's to only 5 firms, as opposed to the 21 small businesses that were invited to bid on R4-76-30.

Responsiveness of Isles' Bid

Isles has stated that it was furnishing its own product as an equal to the brand name specified. The IFB contained the standard brand name or equal clause as specified in FPR § 1-1.307-6 (1964 ed. amend. 15), which provides, in pertinent part, that:

"(c)(1) If the bidder proposes to furnish an 'equal' product, the brand name, if any, of the product to be furnished shall be inserted in the space provided in the invitation for bids, or such product shall be otherwise clearly identified in the bid. The evaluation of bids and the determination as to equality of the product offered shall be the responsibility of the Government and will be based on information furnished by the bidder or identified in his bid as well as other information reasonably available to the purchasing activity. CAUTION TO BIDDERS. The purchasing activity is not responsible for locating or securing any information which is not identified in the bid and reasonably available to the purchasing activity.

Accordingly, to insure that sufficient information is available, the bidder must furnish as a part of his bid all descriptive material (such as cuts, illustrations, drawings, or other information) necessary for the purchasing activity to (i) determine whether the product offered meets the salient characteristics requirement of the invitation for bids, and (ii) establish exactly what the bidder proposes to furnish and what the Government would be binding itself to purchase by making an award. The information furnished may include specific references to information previously furnished or to information otherwise available to the purchasing activity."

The IFB also contained, in Clause 2(1) of the Supplemental Instructions and Conditions to SF-33A, the following requirement for descriptive literature:

"(1) Requirement for Descriptive Literature

(1) Descriptive literature as specified in this Invitation for Bids must be furnished as a part of the bid and must be received before the time set for opening bids. The literature furnished must be identified to show the item in the bid to which it pertains. The descriptive literature is required to establish for the purposes of bid evaluation and award, details of the products the bidder proposes to furnish as to compatibility with existing Government-owned equipment as provided in the attached specifications.

(2) Failure of descriptive literature to show that the product offered conforms to the specifications and other requirements of this Invitation for Bids will require rejection of the bid. Failure to furnish the descriptive literature by the time specified in the Invitation for Bids will require rejection of the bid except that if the material is transmitted by mail and is received late, it may be considered under the provisions for considering late bids, as set forth elsewhere in this Invitation for Bids."

The responsiveness of an "equal" bid submitted in response to a brand name or equal procurement is dependent on the completeness and sufficiency of the descriptive information submitted with the bid, previously submitted information, or information otherwise reasonably available to

B-189987

the purchasing activity. Environmental Conditions, Inc., B-188633, August 31, 1977, 77-2 CPD 166; Ocean Applied Research Corporation, B-186476, November 9, 1976, 76-2 CPD 393.

Isles submitted no descriptive literature with its "equal" bid. Also, Isles admits that this IFB contained two salient features that the product it previously provided did not have. The Forest Service has stated that the product previously provided by Isles was unsatisfactory, and that was why the specifications were changed. Consequently, the information available to the Forest Service from its previous contract with Isles was not sufficient to permit the Forest Service to determine whether Isles was now offering a product that met the current requirements. Additionally, we have held that a statement by a bidder offering to meet all specifications does not substitute or compensate for inadequate descriptive data. 45 Comp. Gen. 317, 318 (1965). Stating no exception to the requirements of the IFB also comes within that rule.

Accordingly, Isles' bid was properly rejected as nonresponsive, and its protest is denied.

Propriety of Cancellation of the Solicitation

FPR § 1-2.404-1(a) (1964 ed. circ.1) provides, in substance, that after bids have been opened award must be made to the lowest responsive, responsible bidder unless there is a compelling reason to reject all bids and re-advertise. However, under FPR § 1-2.404-1(b) (1964 ed. circ. 1), the invitation may be canceled after opening if prices on all otherwise acceptable bids are unreasonable, or if the bids received did not provide competition adequate to insure reasonable prices. That section, in pertinent part, states:

"(b) Invitation for bids may be cancelled after opening but prior to award, and all bids rejected, where such action is consistent with § 1-2.404-1(a) and the contracting officer determines in writing that cancellation is in the best interest of the Government for reasons such as the following:

* * * * *

B-189987

"(5) All otherwise acceptable bids received are at unreasonable prices. (See § 1-3.214 concerning authority to negotiate in such situations.)

* * * * *

"(7) The bids received did not provide competition which was adequate to insure reasonable prices."

Also with regard to small business set-asides, FPR § 1-1.706-3(b) (1964 ed. amend. 101) provides, in pertinent part, that:

"(b) 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 either a joint or a unilateral set-aside determination."

Contracting officers are clothed with broad discretion in deciding whether an invitation should be canceled, and our Office will not interfere with such a decision unless it is unreasonable. Hercules Demolition Corporation, B-186411, August 18, 1976, 76-2 CPD 173. Also, the determination of price reasonableness is basically a business judgment, with which we will not interfere absent a showing of abuse of discretion. Falcon Rule Company, Akron Rule Corporation, B-187024, November 16, 1976, 76-2 CPD 418.

Stacor argues that nonresponsive bids cannot be used to determine that a responsive bid is unreasonably priced. However, we have held that nonresponsive bids may be used to determine price reasonableness unless there is evidence showing that to do so would be unreasonable. McCarthy Manufacturing Company, B-186550, February 17, 1977, 77-1 CPD 116; Support Contractors, Inc., B-181607, March 18, 1975, 75-1 CPD 160. In this case, Isles' bid was found to be nonresponsive for failure to provide descriptive literature, a factor that would be unlikely to greatly affect its price. Therefore, the use of this price to determine the reasonableness of Stacor's price was proper.

B-189987

Stacor also contends that many of the bids were submitted by large businesses and were purposely unreasonably low in an attempt to cause the withdrawal of the set-aside and, therefore, should not be used to determine price reasonableness. Large business bids on small business set-asides, while nonresponsive, are regarded as "courtesy" offers and may be considered in determining whether small business bids submitted are reasonable. 49 Comp. Gen. 740 (1970); Tufco Industries, Inc., B-189323, July 13, 1977, 77-2 CPD 21.

Also, while Stacor's prices may be close to the range of prices received on the previous solicitation, it was higher than the previous high bid and was much higher than the previous low bid.

Regarding Stacor's contention that FPR § 1-2.404-1 (b)(5) permits negotiation under FPR § 1-3.214 when prices received under formal advertising are unreasonable and the Forest Service has not responded to Stacor's offer to negotiate, we note that the decision of whether to negotiate is within the agency's discretion--there is no requirement to negotiate.

It is our opinion, from the above, that Stacor has not shown that the Forest Service determination was without a reasonable basis, or that it constituted an abuse of discretion.

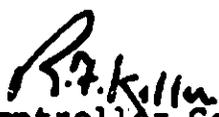
We cannot agree with Stacor's contention that the withdrawal of the small business set-aside violates the Government's small business policy, since FPR § 1-1.706-3(b) specifically permits such withdrawals in these circumstances. Also, while there is a policy to set aside a certain percentage of solicitations for small business, nothing in the Small Business Act or the FPR requires that a specific solicitation be set aside. See W.O.H. Enterprises, B-190272, November 23, 1977, 77-2 CPD 408.

Regarding Stacor's contention that cancellation and resolicitation after bid opening are improper because an "auction" atmosphere is created, where the cancellation is in accordance with the governing regulations, as in this case, an auction is not created. See Silent Hoist & Crane Co., Inc., B-186006, June 17, 1976, 76-1 CPD 392; Alco Metal Stamping Corp., B-181071, September 4, 1974, 74-2 CPD 141.

B-189987

Finally, Stacor contends that if there was inadequate competition, the Forest Service contributed to it by not sending IFB's to all of the small businesses that it sent them to under the previous solicitation. According to the Forest Service, however, 10 bidders responded to the previous IFB; of those only 5 were small business, and 4 of those were offering the same product. Under these conditions, it seems reasonable for the Forest Service to have dropped the nonresponding and large firms from its mailing list and to have attempted to achieve adequate competition by soliciting a number of different firms.

Accordingly, Stacor's protest is also denied.


Deputy Comptroller General
of the United States



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

H. Rothman
P-1

BY REPLY
REFER TO: B-189987

January 26, 1978

The Honorable Peter W. Rodino, Jr.
House of Representatives

Dear Mr. Rodino:

We refer to your letter to our Office dated August 30, 1977, in regard to the protest of the Stacor Corporation concerning the cancellation of solicitation No. K4-77-71, issued by the Department of Agriculture, Forest Service.

By decision of today, copy enclosed, we have denied the protest.

Sincerely yours,

Deputy

A. K. Kappan
Comptroller General
of the United States

Enclosure