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DECISION



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

FILE: B-192154

DATE: February 28, 1979

MATTER OF: Propserv Incorporated *DLG00977*

[Protest of Contract Award by Air Force]

DIGEST:

Reason

1. Although protest to agency may be oral, telephone conversation cannot be viewed as timely protest where protester's subsequent written comments to GAO show absence of intent to protest at time of telephone conversation. ①
2. Protester will not be charged with knowledge of basis for protest to GAO until date when notice is received of agency's intent on position adverse to protester.
3. Bid, which priced basic contract term and three option years at \$18,000, \$14,000, \$13,000 and \$12,000, respectively, is not found to be mathematically unbalanced under standard enunciated in 54 Comp. Gen. 242 (1974).
4. Responsibility criteria in IFB are not definitive responsibility criteria requiring application by agency.
5. Criteria in IFB merely requests bidder to provide information as to qualifications and experience for use by contracting officer in evaluating bidder responsibility.

Propserv Incorporated (Propserv) protests award of a contract to any other bidder under small business set-aside solicitation IFB No. F27604-78-B0014, which was issued by Pease Air Force Base, New Hampshire, on April 18, 1978, for nonpersonal services to provide maintenance and minor repairs of military family housing units at Westover Air Force Base, Massachusetts (Westover), and for similar services at the commander's office at Westover and a transmitter site at Granby, Massachusetts, covering a basic period of three months and three one-year option periods. *AGC OK 2*

CNC-D1994

At bid opening on May 18, 1978, bids were received from Propserv, Alliance Properties, Inc. (Alliance) and Emerald Maintenance (Emerald). *DLG 00 978*
The aggregate amount of each bid and the breakdown of monthly unit prices for the housing units and for the other facilities follow:

<u>ALLIANCE</u>	<u>Aggregate</u>	<u>Base Term</u>
		<u>July 1 - Sep. 30, 1978</u>
Housing Units	\$ 541,500	\$18,000
Other		500

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<u>EMERALD</u>	<u>Aggregate</u>	<u>Base Term</u> <u>July 1 - Sep. 30, 1978</u>	
Housing Units	\$ 723,060	\$15,540	
Other		3,000	
 <u>PROPSERV</u>			
Housing Units	\$ 744,105.87	\$18,257.71	
Other		129.62	
	1979	1980	1981
<u>ALLIANCE</u>	<u>Option 1</u>	<u>Option 2</u>	<u>Option 3</u>
Housing Units	\$ 14,000	\$ 13,000	\$ 12,000
Other	500	500	500
 <u>EMERALD</u>			
Housing Units	\$ 15,540	\$ 15,540	\$ 15,540
Other	3,000	3,000	3,000
 <u>PROPSERV</u>			
Housing Units	\$18,957.71	\$ 18,957.71	\$ 18,957.71
Other	179.62	179.62	179.62

Propserv's telegraphic protest received in GAO on June 12, 1978, was followed on June 14, 1978, by a detailed letter presenting three grounds for review: (1) that Alliance's bid is below the cost of performance for the aggregate 3-1/4 year period of the contract, and the regressiveness of the prices from the basic term to the third option year are inconsistent with long-term efficiencies. The protester further alleges that Alliance manipulated its bid to secure award, while planning to request price changes or to allege hardship; (2) that Alliance speculated that active housing units would be disposed of during the duration of the contract, and to make such a forecast in its bid preparation is nonresponsive to the IFB; and (3) that the bid is mathematically unbalanced on its face, and that since Propserv's bid price for the basic term (\$55,161.99) is the lowest responsive bid (Alliance bid for basic term - \$55,500), the Alliance bid is materially unbalanced and nonresponsive.

The protester also alleges that Emerald's bid is nonresponsive. That allegation will not be considered because the Air Force (AF) reports that Emerald's bid has been determined to be nonresponsive.

The AF questions the timeliness of Propserv's protest and contends that there are no significant issues that merit review under section 20.2

of our Bid Protest Procedures. 4 C.F.R. 20.2 (1978). The untimeliness theory is grounded on the elapsed time period of 25 days between the date of bid opening, May 18, 1978, the date on which Propserv allegedly had notice of the basis for its protest, and the date of receipt of Propserv's telegram in this Office, June 12, 1978.

Propserv asserts that the protest is timely, contending that a telephone conversation on May 22, 1978, between Robert M. Mielich, president of Propserv, and the AF constituted a protest to the agency under section 20.2 of our procedures, and that advice received from the AF on June 8, 1978, indicating that Alliance would receive award, marks the date of adverse agency action. Under Propserv's theory its protest was filed within four days of the initial adverse agency action. Propserv further asserts that if its protest is untimely, it raises significant procurement issues.

Defense Acquisition Regulation/Armed Service Procurement Regulation (DAR/ASPR) § 2-407.8 (1976) permits the filing of an oral protest with an agency. The absence of a request for specific action does not preclude a finding that a protest was made. See Cessna Aircraft Co.; Beechcraft Aircraft Corp., B-180913, August 12, 1974, 74-2 CPD 91. The test is whether the oral communication was intended as a protest. See Johnson Controls, Inc., B-184416, January 2, 1976, 76-1 CPD 4, and Hydro Conduit Corp., B-188999, October 11, 1977, 77-2 CPD 282.

There is a substantial conflict of facts between Propserv's account and the agency's description of the telephone discussion that occurred on May 22, 1978; however, we believe that Propserv's written account of the conversation fails to show that the necessary intent to protest was present at the time of the conversation. Nevertheless, for reasons discussed below, it is not necessary to decide whether the May 22 telephone conversation amounted to an oral protest.

Although it could be argued, on the basis of Propserv's written description of the telephone conversation, that the basis for protest was known on May 22, 1978, we believe it would be unreasonable to charge Propserv with notice of a basis for protest under section 20.2 of GAO's Bid Protest Procedures on any date earlier than June 8, 1978, the date on which Propserv received notice that Alliance would receive award. Unless an agency conveys to the protester its intent on a position adverse to the protester's interest the protester cannot be charged with knowledge of a basis for protest. See Brandon Applied Systems, Inc., B-188738, December 21, 1977, 77-2 CPD 486. The undisputed portion of the record makes it clear that from the date of the telephone conversation of May 22, 1978, until June 8, 1978, Propserv received no communication from the AF as to the status of the procurement. Consistent with 4 C.F.R. § 20.2 Propserv was

entitled to believe during this period that the AF was in the process of resolving the features of the bidding that it had questioned. Not until receipt of the notice of June 8, 1978, did Propserv have reason to believe that the agency was taking action adverse to its interest. As a result, we conclude that the protest was timely filed in GAO.

In its comments on the agency report, Propserv adds four grounds to its protest, which we consider as timely filed. They cannot be regarded as entirely separate grounds of protest. See Kappa Systems, Inc., B-187395, June 8, 1977, 77-1 CPD 412. See also American Electric Construction Co., Inc., B-189532, November 8, 1977, 77-2 CPD 350. The four grounds, numbered 4 through 7, are: (4) that the agency report of July 21, 1978, is incomplete and contains data that was fraudulently prepared; (5) that award pending protest was based on fraudulent findings; (6) that the AF failed to apply definitive responsibility criteria to the alleged prima facie buy-in; and (7) that there was inadequate competition.

(1) Buy-In

Propserv presents cost data purporting to support its contention that performance at Alliance's bid price would be below cost. It alleges that to avoid losing money Alliance will request price changes for the option periods, and will assert hardship urging resolicitation as an insider. The AF responds by saying that Alliance would be obligated to perform according to the IFB requirements; that the Government will control the exercise of the options and determine its needs and that Alliance would have no right to change the terms of the contract.

Consolidated Elevator Company, B-190929, March 3, 1978, 78-1 CPD 166, the case appropriately cited by the AF, is responsive to Propserv's allegations. A bid price which is extremely low in relation to other bids and below the bidder's cost of performance is a matter of responsibility which, with exceptions not present here, is not reviewed by this Office.

(2) Alliance bid nonresponsive to IFB

This ground for protest is two-pronged. In Propserv's initial protest the allegation was made that bidding was not on an equal basis. This was on the assumption that Alliance anticipated the disposal of deactivated housing units. In its later comments, Propserv notes that

in the IFB bidders were urged to examine records of the current contract (then being performed by Propserv), and that a determination is contained in a contract administrator's report suggesting that Propserv responded to "nuisance calls," thereby inflating the workload. The contention now, that bidding was not on an equal footing, is based on the assumption that Alliance, but no other bidders, knew of a lower workload.

We find no merit to the argument because Propserv has presented no probative evidence of the validity of the underlying assumption, namely, that the agency discriminately gave Alliance pre bid-opening information of a reduced workload. Even if Alliance anticipated a reduced workload, the information from which the speculation was derived was equally accessible to each bidder, with any variation in significance the result of business judgment. The argument is spurious and is rejected.

(3) Unbalanced Bid

Propserv contends that Alliance's bid is unbalanced under section D, paragraph 3b of the IFB and should be rejected on the basis of DAR/ASPR, § 1-1504, arguing that the protester is the low bidder for the basic term and that doubt exists whether Alliance's bid would result in the lowest cost for the full term.

The AF argues, citing Oswald Brothers Enterprises, Inc., B-180676, May 9, 1974, 74-1 CPD 238, that DAR/ASPR § 1-1504 does not require rejection of the bid. The AF points to section D paragraph 1 of the IFB, advising that bids would be evaluated in relation to the aggregate bid, and concludes that Alliance's aggregate bid clearly results in the lowest cost to the Government.

Section D, paragraph 3b requires rejection where the bid is materially unbalanced. Our Office has recognized the two-fold aspects of unbalanced bidding. The first is a mathematical evaluation of the bid to determine whether each bid item carries its share of the cost of the work plus profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. The second aspect--material unbalancing--involves an assessment of the cost impact of a mathematically unbalanced bid. A bid is not materially unbalanced unless there is a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will not result in the lowest ultimate cost to the Government. Mobilease Corporation, 54 Comp. Gen. 242 (1974), 74-2 CPD 185.

Upon review of the bids, we do not find the difference in the prices contained in Alliance's bid to be so great as to render the bid mathematically unbalanced. While Propserv argues that there is no

reason for the pricing pattern employed by Alliance because the work required is repetitive in nature, we do not believe it is the function of our Office to look behind a bid to attempt to ascertain the business judgment that went into a bid which we do not find mathematically unbalanced. S.F.&G., Inc., dba Mercury, B-192903, November 24, 1978, 78-2 CPD 361.

(4) Incomplete Agency Report

We agree with the AF's denial that its report was formally incomplete and we decline to consider Propserv's bare allegations that the report contains fraudulent information. Review of such allegations requires a prima facie showing which is absent here. Compare Zac Smith & Company, Inc., B-183843, November 4, 1975, 75-2 CPD 276.

(5) Award Pending Protest

While Propserv contends that there is no factual basis to support award pending protest, the AF satisfactorily explained its compliance with established procedures. Propserv has failed to show that award was not advantageous to the Government. What-Mac Contractors, Inc.; Chemical Technology, Inc., B-187053 (1), November 19, 1976, 76-2 CPD 438.

(6) Failure to Apply Definitive Responsibility Criteria to Prima Facie Buy-In

Propserv contends that the AF failed to properly apply the responsibility criteria of the IFB to the Alliance bid.

The criteria in section C, paragraph 42 of the IFB, are as follows:

- "1. Startup and phase-in schedule.
2. Key personnel letters of intent and resumes.
3. Availability of labor force, plan for recruiting, type and extent of training.
4. The role of the project manager and the extent of his authority.
5. Organizational and functional charts reflecting lines of management responsibility.
6. Manning charts in a format requested by the Contracting Officer.
7. Plans and management procedures for logistical administrative support of all functions; that is, contractor furnished supplies and equipment and procedures for timely payment of personnel.

8. Procedures to be used to ensure contract requirements are met (quality control program).
9. Corporate experience as evidenced by past and present contracts.
10. Other procurements for which you have bid and for which you are apparent low bidder."

The AF argues that the responsibility criteria are not definitive. We agree; the provision merely requests each bidder to provide all pertinent information as to its qualifications and prior experience so that the contracting officer can use this information in evaluating bidder responsibility. See Dubie-Clark Company, Patterson Pump Division--Request for Reconsideration, B-189642, April 6, 1978, 78-1 CPD 274. Further, we believe that the record shows that the AF satisfactorily considered and applied the criteria to the Alliance bid.

(7) Inadequate Competition

Propserv contends that as a result of the AF's handling of the procurement, only one responsive bid was received. However, award may be made to the only bidder if a significant effort was made to obtain competition, a reasonably priced bid was received and no deliberate attempt is made to exclude a particular firm. Culligan Incorporated, Cincinnati, Ohio, B-189307, September 29, 1977, 77-2 CPD 242. The AF invited bids from 24 firms and the bid of Alliance, on Propserv's sole-bid theory, was \$541,500, or over \$200,000 less than Propserv's bid, and \$114,000 less than the AF's estimate of \$655,800. There is no evidence of an attempt to exclude any firm from bidding.

Protest denied.


Deputy Comptroller General
of the United States