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DECISION



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

9769

FILE: B-192910

DATE: April 11, 1979

MATTER OF: International Trade
Operations, Incorporated

CNG-02084

DIGEST:

[Protest of Contract Award For Supply of Spare Parts By Army Corps of Engineers]

1. Preliminary spare parts list and prices submitted by protester pursuant to contract and subject to review and approval by agency does not obligate agency to purchase spare parts requirements from protester.
2. Requirement that contracting officer solicit reasonable number of quotations from qualified sources under small purchase procedures of DAR does not prohibit contracting officer from comparing prices obtained from earlier contract with new quotation and from awarding contract without soliciting additional quotations if contracting officer believes one of the prices obtained is reasonable and the lowest price available.
3. Under small purchase procedures, fact that large price variance exists between quotations submitted does not require solicitation of additional quotations as long as contracting officer is satisfied that one of the quotations is fair and reasonable.
4. Where no evidence exists that the Government acted arbitrarily or capriciously with respect to a bid or proposal, bid preparation costs are not recoverable. Attorneys' fees in pursuing a bid protest are noncompensable.

International Trade Operations, Incorporated (International) protests the award of a contract by the Huntsville Division, Corps of Engineers, Department of the Army to the Insinger Machine Company (Insinger).

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Decision

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The contract, under the Foreign Military Sales Program, is for a supply of spare parts for dishwashers to be purchased by the Government of Saudi Arabia with the United States in the capacity of purchasing agent. For the reasons stated below, the protest is denied.

The contract being protested was awarded to Insinger at its price of \$5,784.90. The dishwashers for which these parts were necessary were supplied by International in an earlier contract with the agency. This contract contained a provision which required within 20 calendar days after award of the contract that International submit a preliminary spare parts list for the dishwashers which, when approved, was to constitute the final spare parts list. Approval was to be made within 20 calendar days after receipt of the preliminary list. The list was to contain the spare parts International considered necessary "to provide an adequate one year's spare parts stockage * * *" and the proposed net unit price for these parts. Accordingly, International submitted its preliminary spare parts list with its price of \$10,561. A determination was made that this price was too high. Thereafter, the agency orally solicited a quotation from Insinger for the same spare parts. Insinger quoted a price of \$5,784.90 which it confirmed for the agency at a later date. A purchase order was issued to Insinger on September 5, 1978. International's protest followed the award.

International first submits that it had a contractual right to negotiate with the agency for an acceptable price for the spare parts and that its preliminary spare parts list was not a firm non-negotiable offer. It takes the position that the agency was under a contractual obligation to obtain the necessary spare parts from International.

We do not agree that International had a contractual right to supply the spare parts to the agency. A review of the contract indicates that the agency was required to approve the preliminary list within 20 days after its receipt from International in order to transform it into the final spare parts list. Approval of the list never took place because the agency considered

International's prices to be too high. Nothing in the contract even generally provided that the agency was obligating itself to purchase its spare parts requirements from International nor was there a provision which necessitated the agency's negotiation with International in the event of its initial rejection of the list. Implicit in the agency's right to approve the list was its right to disapprove it. When 20 days from the receipt of the spare parts list had expired and International was not notified of its transformation into a final list, it should have had no expectations of supplying the necessary spare parts since it had no contractual rights to do so.

It is clear that it was never the intention of the agency to obligate itself to obtain the spare parts from International. The contract referred to the procurement of the spare parts in tentative terms. In Section J, ¶ 5.4, it stated:

"SPARE PARTS DELIVERY:

The contractor shall provide the firm spare parts requirements, as revised in the final spare parts list, if procured under this contract." (Emphasis added.)

In this case, the agency chose not to procure the spare parts under this contract.

Notwithstanding its first argument, International next contends that it was effectively denied an opportunity to compete for the contract with Insinger. International suggests that its competitive price for the spare parts would have been less than Insinger's.

Statutory requirements for maximum competition are not applicable in the instant case because the procurement did not exceed \$10,000. 10 U.S.C. § 2304(g) (1976). Defense Acquisition Regulation (DAR) Section 3 part 2 provides that:

"Purchases or contracts aggregating not more than \$10,000 shall be made in accordance with Part 6 [small purchase and other simplified purchase procedures] of this Section * * *."

Small purchase procedures are utilized to minimize administrative costs which might otherwise be the equivalent of or exceed the cost of acquiring relatively inexpensive items. In these cases it is sufficient that the contracting officer make a good faith determination that the proposed award is to the best advantage of the Government, considering price and other factors. In order to make such a determination, the contracting officer is required to solicit quotations from a reasonable number of potential sources, usually through oral solicitations. Tagg Associates, B-191677, July 27, 1978, 78-2 CPD 76.

Despite the broad discretion given to a contracting officer with respect to small purchases, we will review whether a reasonable effort was made to solicit quotations from a reasonable number of sources.

In the present case, the contract did not exceed \$10,000 and the small purchase procedures are applicable. Although the contracting officer did not actively solicit two quotations as suggested by DAR §3-604.2, he was able to compare the prices of International and Insinger, the manufacturer of the spare parts. We find that the contracting officer's actions were reasonable in light of the fact that International's spare parts list recited Insinger spare part numbers and it was reasonable for him to believe that Insinger could provide the parts at the lowest price available because other contractors solicited for quotations, like International, would most likely add their own profit to the price of the parts as obtained from Insinger.

There is, however, an additional requirement that the quotations reflect adequate competition. DAR § 3-604.2 (b) states in part:

"Reasonableness of a proposed price should be based on competitive quotations. If only one response is received, or the price variance between multiple responses reflects lack of adequate competition, a statement shall be included in the contract setting forth the basis of the determination of fair and reasonable price." (Emphasis added.)

In this case, International's price was twice that of Insinger's, a disparity which may reflect inadequate competition. No explanation was included in the contract as to the reason for awarding it to Insinger as required by DAR. However, without more, this is not a sufficient reason to sustain this protest. Just as the contracting officer had personal knowledge to determine that International's price was too high, he was also capable of determining the reasonableness of Insinger's price.

The report of the contracting officer discusses the reason for awarding the contract to Insinger and states:

"When it became obvious from price analysis that ITO's [International's] prices were unreasonably high, it was appropriate, even mandatory, to issue the purchase order to Insinger. * * *"

It is further stated that it was impossible to obtain quotations from sources other than International and Insinger because the parts were described only by Insinger part numbers and, therefore, "it was reasonable for HND [the agency] to consider Insinger's prices as fair and reasonable and to issue the purchase order without further ado."

While the explanation should have been included in the contract between the agency and Insinger in compliance with DAR §3-604.2(b), we find that the subsequent explanation was sufficient to justify the award of the contract to Insinger.

International requests that it be reimbursed for its "reasonable costs for preparing and responding" to the agency's request for spare parts documentation and quotations and for attorneys' fees incurred in pursuing this bid protest.

Bid preparation costs can be recovered only where the Government acted arbitrarily or capriciously with respect to the claimant's bid or proposal. Heyer Products Co. v. United States, 135 Ct. Cl. 63 (1956);

Norfolk Conveyor Division of Jervis B. Webb Company, et al., B-190433, July 7, 1978, 78-2 CPD 16. No evidence of this exists. However, even if there was arbitrary and capricious action, bid preparation costs would not be reimbursable because International did not submit a separate bid or proposal; its only submission was a spare parts list which was required by the earlier contract. In addition, attorneys' fees incurred in pursuing a bid protest are noncompensable. Tennessee Valley Service Company, 57 Comp. Gen. 127 (1977), 77-2 CPD 442.

We further note that Section C, paragraph 37 of the contract between International and the agency states that the cost of preparing the spare parts list would be included in the hardware price bid in Section E. Thus, International has been paid for its efforts.

The protest is denied.


Deputy Comptroller General
of the United States