

Proc. II

DECISION



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

9815

FILE: B-192908

DLG00042

DATE: April 12, 1979

MATTER OF: Fiber Materials, Inc.

[Protest Alleging That Low Bidder Is Nonresponsible]

DIGEST:

1. Allegation that low bidder is nonresponsible is not considered since GAO does not review affirmative determinations of responsibility except where fraud is shown or failure to meet definitive responsibility criteria is alleged, neither of which is present here.
2. Contention that low bid is nonresponsive since work called for by solicitation cannot be performed at level of effort reflected by bid price is meritless since test of whether bid is responsive is whether bid constitutes an offer to perform, without exception, the exact thing called for in solicitation and low bid does not take exception to solicitation.
3. Small business concern's unwillingness to accept set-aside quantity at substantially lower, allegedly below cost, bid of large business upon which non-set-aside quantity was awarded properly resulted in dissolution of set-aside. Even if it were proven that large business bid below cost, that in itself would not bar award to that firm, and under partial set-aside procedure Government's obligation is simply to reserve a portion of its needs for award to small business firms at the same price obtained for the unrestricted portion.

This protest concerns an Air Force two-step procurement of missile nosetips half of which were set aside for small business concerns. Two firms competed for this award: Fiber Materials, Inc. (FMI), a small business, and AVCO Corporation, Systems Division (AVCO), a large business. AVCO's step two bid was less than

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half of FMI's. FMI has protested the award of the non-set-aside portion to AVCO, as well as the dissolution of the partial set-aside and award of that quantity to AVCO, after FMI refused to take the set-aside quantity at AVCO's bid price. FMI contends that AVCO's bid was below cost, and that the firm was therefore not responsible, its bid was nonresponsive, and that the set-aside program was circumvented. Other issues raised by FMI but abandoned after a bid protest conference at our Office, will not be considered.

The first step request for technical proposals (RFTP) was for the purchase of an initial quantity of 60 nosetips and option year quantities totaling 476 nosetips over fiscal years 1979, 1980, and 1981. AVCO and FMI were the only firms who responded to the RFTP and both were found by the Air Force to have submitted acceptable technical proposals. The Air Force then issued an invitation for bids to AVCO and FMI for the nosetips as the second step of the procurement. The bids were as follows:

AVCO

<u>ITEM NO.</u>	<u>ITEM</u>	<u>UNIT PRICE</u>	<u>ITEM PRICE</u>
0001	60 EA CCNTs*	\$15,000	\$ 900,000
0002	1 LOT DATA	N/A	20,000
0003	105 EA CCNTs (FY'79)	11,142.90	1,170,000
0004	1 LOT DATA (FY'79)	N/A	10,000
0005	180 EA CCNTs (FY'80)	9,900	1,782,000
0006	1 LOT DATA (FY'80)	N/A	17,000
0007	191 EA CCNTs (FY'81)	10,890	2,080,000

<u>ITEM NO.</u>	<u>ITEM</u>	<u>UNIT PRICE</u>	<u>ITEM PRICE</u>
0008	1 LOT DATA (FY'81)	N/A	20,000
TOTAL PRICE			<u>\$5,998,995</u>

FMI

<u>ITEM NO.</u>	<u>ITEM</u>	<u>UNIT PRICE</u>	<u>ITEM PRICE</u>
0001	60 EA CCNTs*	\$36,256	\$2,175,360
0002	1 LOT DATA	N/A	280,560
0003	105 EA CCNTs (FY'79)	22,898	2,404,290
0004	1 LOT DATA (FY'79)	N/A	224,070
0005	180 EA CCNTs (FY'80)	23,121	4,161,780
0006	1 LOT DATA (FY'80)	N/A	325,440
0007	191 EA CCNTs (FY'81)	26,664	4,710,824
0008	1 LOT DATA (FY'81)	N/A	391,743
TOTAL PRICE			<u>\$14,674,067</u>

*carbon-carbon nosetips

The Air Force compared AVCO's bid to the Government's estimate and found that while AVCO's bid was lower than the Government estimate, it was reasonable. The Air Force then awarded the non-set-aside portion to AVCO. In accordance with the solicitation provisions

prescribed by Defense Acquisition Regulation (DAR) § 1-706.6(d) (1976 ed.), FMI was offered the remaining set-aside portion at the prices bid by AVCO, which as we have noted were less than half of FMI's.

FMI protested, contending that AVCO's bid on the non-set-aside portion was substantially below cost and that a small business such as FMI could not afford to produce the nosetips at AVCO's bid price. Therefore, FMI argued, acceptance of AVCO's bid would circumvent the Air Force's decision to set-aside half of the procurement for small businesses. FMI further alleged that the contracting officer was required to reject AVCO's bid as a "buy-in"; that AVCO's bid was non-responsive since AVCO could not comply with the specifications at the level of effort reflected by AVCO's bid; and that AVCO was nonresponsible since the work could not be performed at AVCO's bid price. FMI refused to accept the set-aside quantity at the prices bid by AVCO. Since no firms, other than AVCO, then responded to a request for technical proposals for the remaining quantity, the Air Force awarded the remaining quantity to AVCO.

The three issues before us -- that the small business set-aside procedure has been circumvented, AVCO is not responsible and its bid is nonresponsive -- flow from the premise that AVCO submitted a below cost bid. In support of its position that AVCO's bid was below cost, FMI has submitted evidence of how FMI arrived at its bid price. FMI has also submitted evidence of the preproduction costs of AVCO and FMI under an experimental program. FMI maintains that most of the material costs are fixed because of the small number of suppliers capable of supplying the qualified material specified by the solicitation: therefore, FMI's material costs should approximate AVCO's. FMI also maintains that the nosetip specifications are such that they inhibit, if not preclude, the introduction of newer cost savings techniques.

In its initial report to our Office, the Air Force stated:

"* * * Under competitive bid conditions the Government is not privy to the bidder's cost data; accordingly, the relationship of AVCO's price to its expected cost cannot be determined. However, AVCO's bid price is in line with the Government estimate and there is no evidence that the Government estimate is inaccurate. * * *"

The Air Force submitted a second report after the conference was held in this protest, in which it advises:

"* * * we have again reviewed the procedures employed to develop the [Air Force] estimate and the resultant estimate itself, and we can find no fault with either. As noted in the contracting officer's statement, the Government estimate was based on actual experience on the pilot production program and an industry survey by the AFML [Air Force Materials Laboratory] to assess efficiencies and savings which could be anticipated in a large scale production program. We believe this approach to be valid and the estimate as derived provides a reasonable basis for assessment of the bids submitted in response to the invitation. Further, our review showed that the estimate considered the total nosetip and its fabrication and was based on the best available information. FMI has submitted no evidence to support its conclusion that the Government's estimate is unreasonable. Instead, its contention is based solely on the fact that the estimate is below the amount FMI considers to be realistic and which it bid in response to the solicitation. * * *"

AVCO, which participated in the protest as an interested party, asserts that it bid "according to its continuing bidding policies, that is; a reasonable expectation to accomplish the effort with a resulting reasonable profit."

We have reviewed FMI's presentation together with the Government estimate and are unable to conclude with certainty that the Government estimate is incorrect or that AVCO's bid was below cost. However, for the reasons given below we do not believe that the Air Force's acceptance of AVCO's bid, even if it was below cost, violated applicable procurement law or regulations.

Our Office has often stated that acceptance of a below cost bid is not legally objectionable. Homexx International Corporation, B-192034, September 22, 1978, 78-2 CPD 219; Allied Technology, Inc., B-185866, July 12, 1976, 76-2 CPD 34. In fact, rejection of a below cost bid requires finding that the bidder is nonresponsive. Consolidated Elevator Company, B-190929, March 3, 1978, 78-1 CPD 166. The Air Force determined that AVCO was responsible, and this Office does not review affirmative determinations of responsibility unless fraud on the part of procuring officials is shown or it is alleged that definitive responsibility criteria have not been met, neither of which is present in this case.

With regard to FMI's contention that the Air Force was required to reject AVCO's bid as nonresponsive since AVCO allegedly could not comply with the specifications at the level of effort reflected by AVCO's bid, we note that a bid is responsive if it constitutes an offer to perform, without exception, the exact thing called for in the solicitation. Vintage Services, Inc., B-190445, January 11, 1978, 78-1 CPD 25. Since AVCO has not taken exception to the terms of the solicitation its bid is clearly responsive.

Finally, FMI argues that acceptance of AVCO's bid effectively circumvented a partial small business set-aside, because FMI cannot afford to produce these items at AVCO's price and therefore FMI was compelled to refuse the set-aside.

Nothing in the Small Business Act, 15 U.S.C. § 631 et seq. (1976), requires that a particular procurement be set aside for small business and such a decision rests with the procuring agency. Tidewater Protective Services, Inc., and Others, 56 Comp. Gen. 115, 123 (1976), 76-2 CPD 462. The partial small business set-aside provisions which are part of this IFB simply contemplate that a portion of the procurement will be reserved for small business firms who will be given the opportunity of contracting with the Government "at the highest unit price for each item awarded on the non-set-aside." If acceptance of AVCO's bid on the non-set-aside portion is not legally objectionable, then all the Air Force is obligated to do is offer FMI the set-aside quantity at AVCO's bid price.

The protest is denied.


Deputy Comptroller General
of the United States