12459 PL-1 Mr. Fitzmaurice

DECISION

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

FILE: B-194514.3 DATE: January 7, 1980

MATTER OF: R.B.S., Inc. DLG 00086

DIGEST:

1. Agency's decision to reevaluate bids in order to add to each bid price increased freight rates which were on file at date of bid opening and scheduled to become effective prior to expected date of initial shipment was in accordance with both IFB and applicable regulation.

2. Where same bidder is determined to be low under both initial bid evaluation and reevaluation, contract awarded should not be disturbed.

3. Mere notification to bidder that it is in line for award does not constitute an award.

R.B.S., Inc. (R.B.S.), protests the award of a contract for line item Nos. 0002 and 0003 under invitation for bids (IFB) DLA600-79-B-0051 issued by the Defense Fuel Supply Center, Defense Logistics Agency (DLA), Alexandria, Virginia. DLG 01788

The IFB solicited bids for estimated amounts of coal to be delivered at various military installations located within the United States. Line item No. 0002 called for the delivery of an estimated 3,000 tons of coal to the United States Army, Michigan Army Missile Plant, in Sterling Heights, Michigan, for the plant's estimated monthly requirement for May 1979. Line item No. 0003 called for an additional 5,000 tons of coal to be delivered to the same location to provide for the plant's estimated monthly requirements for the period of June through September 1979. R.B.S. contends that DLA did not properly evaluate the bids because it did not use

[Protest Against Agency's Decision to REEvaluate Bids] 111223 ~~008225~~

the correct freight rates when determining the low bid. However, for the reasons indicated below, the R.B.S. protest is denied.

The relevant facts of the case are as follows. Seventeen bids were received for the six line items contained in the IFB. The bids were opened on December 28, 1978. In evaluating the bids to determine the low responsive bidder, DLA added to each bid price the transportation rate--an FOB origin price (FOB the coal mine). This action was taken in accordance with paragraph D41 of the IFB entitled "Evaluation of Offers-Transportation Rates and Related Costs" and Defense Acquisition Regulation (DAR) § 19-301.1(a) (1976 ed.). Island Creek Coal Sales Company (Island Creek) was found to be the low bidder on the line item Nos. 0001, 0002, and 0003 and was awarded a contract for these items on February 22, 1979. DLA03568

By letter dated March 23, 1979, R.B.S., which was second low bidder on these three line items, notified DLA of a possible discrepancy in the freight rates used to evaluate both its bid and Island Creek's in regards to line item Nos. 0002 and 0003. According to R.B.S., the information that it obtained from the railroads indicated that the proper freight rate per net ton for Island Creek was not $11.97, as used by DLA, but $12.28. Further, R.B.S. argued that the proper freight rate for the evaluation of its bid was not the $13.03 per net ton used by DLA but rather $12.61. Based on this, R.B.S. requested that DLA reevaluate the two bids.

DLA had obtained the original rates from the Eastern Area, Military Traffic Management Command (EAMTMC), located in Bayonne, New Jersey. In light of the R.B.S. request, DLA took steps to verify the transportation rate which had been used to evaluate the Island Creek bid. It discovered that the initial rates EAMTMC gave for Island Creek had not included a 9-percent rate increase effective December 15, 1978. With this increase, the Island Creek rate now rose to $13.05 per net ton.

DLA then reevaluated the two bids, and on March 30, 1979, informed R.B.S. that it was now the low bidder for line item Nos. 0002 and 0003. On the same day, DLA notified Island Creek of its decision and requested Island Creek to agree to a cancellation of its contract for those two items at no cost to the Government. However, by letter of April 6, 1978, Island Creek protested the proposed cancellation arguing that R.B.S.'s freight rate had also increased. DLA proceeded to verify the R.B.S. rate and discovered that it had in fact increased from $13.03 to $15.89 per net ton. Further, DLA learned that this increase had also been issued on December 15, 1978--prior to bid opening--and was scheduled to become effective on January 18, 1979--prior to the date of initial shipment. Thus, under both paragraph D41 of the IFB and DAR § 19-301.1(a), this higher freight rate was the one that DLA was required to use in the evaluation of the R.B.S. bid. Therefore, after reevaluating the bids a second time, DLA concluded that Island Creek was in fact the low bidder and that its contract should be allowed to stand.

Upon learning of this latest development, R.B.S. filed a protest with our Office arguing that if DLA had evaluated the bids correctly the first time all this confusion would have been avoided and R.B.S. would have received the contract. In support of this argument, R.B.S. maintains the following:

> (1) the record shows that DLA always used freight rates that were advantageous to Island Creek and rates that were prejudicial to R.B.S.;
>
> (2) the freight tariff data supplied in DLA's report to our Office is incomplete since it does not show the actual rate increases;
>
> (3) Supplement 76, which increased the R.B.S. rate to $15.89 per net ton, does not in fact meet the requirements of DAR or paragraph D41 of the IFB since it was not available for reference until after bid opening and because it was later canceled and replaced by Supplement 80--effective May 31, 1979--so that it

did not in fact become effective until after deliveries had begun; and

(4) when R.B.S. was advised on March 30, 1979, that it was now the low bidder, a binding contract came into existence.

In response to R.B.S.'s first contention, we do not believe the record indicates that DLA manipulated the freight rates in order to insure that Island Creek's rates would always be lower than R.B.S.'s. This argument is clearly refuted by the fact that after DLA's first reevaluation of the two bids it concluded that R.B.S. was the low bidder.

With regard to the second point, we have held that a contracting officer, acting in good faith, has a right to rely on a transportation evaluation prepared by transporation experts. Thus, even if the rates used later prove to be erroneous and under the corrected rates the low bidder is displaced, the contract entered into does not have to be canceled, but is voidable at the option of the Government. See 46 Comp. Gen. 123, 132 (1966). Here, R.B.S. has argued that the agency's report to our Office does not include the tariff documents reflecting the rate increases that caused DLA to twice re-evaluate the bids. However, the record indicates that DLA obtained all rate information from the transportation experts at EAMTMC, who presumably based their calculations on the tariff documents. In light of the rule stated above, we believe that DLA was justified in relying on this information for making its evaluation of the bids and do not find it damaging to the agency's position that the tariff documents are not included in its report to our Office.

Third, in order to determine which freight rates DLA should have used to evaluate the bids, we must look to both the IFB and the applicable regulation. IFB paragraph D41 provides in pertinent part:

"(a) Tranportation rates and related costs shall be used in the evaluation

> of F.O.B. origin bids and proposals. The best available transporation rates and related costs in effect or to become effective prior to the expected date of initial shipment and on file or published at the date of the bid opening shall be used in the evaluation." (Emphasis added.)

Similarly, DAR § 19-301.1(a) provides in pertinent part:

> "To afford proper analysis and consideration of transportation factors, the contracting officer shall consider transportation rates and related costs in the evaluation of f.o.b. origin bids and proposals. The best available transportation rates and related costs in effect or to become effective prior to the expected date of initial shipment and on file or published at the date of the bid opening shall be used in the evaluation. * * * (Emphasis added.)

In view of the above, we believe that the freight rates which DLA should have used in its evaluation were the increased rates of $13.05 per net ton for Island Creek and $15.89 per net ton for R.B.S. Section 10762(c)(3) of the Act of October 17, 1978, Pub L. No. 95-473, 92 Stat. 1396 (to be codified in 49 U.S.C. § 10762(c)(3)), provides that changes in rates must be filed with the Interstate Commerce Commission (ICC) at least 30 days before they can become effective. The effective date for the R.B.S. increase was January 18, 1979. Clearly, then, this rate increase was required to be "on file" with the ICC prior to the bid opening date of December 28, 1978. Thus, despite R.B.S.'s argument to the contrary, this rate increase does meet the first test of IFB paragraph D41 and DAR § 19-301.1(a) that it be "on file or published at the date of bid opening." In addition, we do not believe it is relevant that Supplement 76 (which increased the R.B.S. rates) was eventually canceled and replaced by Supplement 80,

since the rate increase it brought about was "effective prior to the expected date of initial shipment" and at the time bids were evaluated Supplement 76, not Supplement 80, was the "best available" transportation rate. Therefore, the second test required by paragraph D41 and DAR § 19-301.1(a) has also been met. Accordingly, we find no basis to object to DLA's use of the $15.89 per net ton freight rate to evaluate the R.B.S. bid.

Finally, R.B.S. also claims that a binding contract came into existence when DLA notified it on March 30, 1979, that it had now been determined to be the low bidder. However, we do not agree. The mere notification that one is in line for a contract award does not constitute award of the contract. See, e.g., A & C Building and Industrial Maintenance Corporation, B-193047, April 13, 1979, 79-1 CPD 265. Therefore, since R.B.S. provides no other evidence that steps were taken to award it a contract, DLA's only contract for line item Nos. 0002 and 0003 is with Island Creek.

In conclusion, we find no legal basis to object to DLA's final evaluation of the bids or to the contract awarded to Island Creek.

Protest denied.

Milton J. Socolar

For The Comptroller General
of the United States