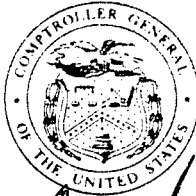


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DECISION



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

[Protest Alleging Awardee Exceeded Statutory Cost Limitation]

FILE: B-200612

DATE: December 4, 1980

MATTER OF: Wickham Contracting Co., Inc.

DIGEST:

Award to low bidder in excess of statutory cost limitation was proper where agency obtained authorized waiver of limitation.

Wickham Contracting Co., Inc. (Wickham), protests the award of a contract to J.S. Nasin Co. (Nasin) under invitation for bids (IFB) N62472-80-B-0358, issued by the Naval Facilities Engineering Command (NAVFAC) for the construction of unaccompanied enlisted quarters.

The project was first advertised in April 1980, but all bids exceeded the funds available and no award was made. The project was redesigned and readvertised. Bidders were required to price four items. (NAVFAC awarded item 1 only, the principal construction work.) Each item price was to be broken down to indicate the amount bid for construction out to the 5-foot line and beyond that line. Bidders were advised that the statutory cost limitation for all work out to the 5-foot line was \$6,364,000. All bidders, with the exception of the protester, exceeded that limit for item 1. The low bid of Nasin and the second low bid of Wickham for item 1 were:

	<u>Out to the 5-foot line</u>	<u>All other work</u>	<u>Total</u>
Nasin	\$7,200,000	\$ 400,000	\$7,600,000
Wickham	5,200,000	2,500,000	7,700,000

Wickham maintains that it was entitled to the award since the contracting officer illegally disregarded the statutory cost limitation by awarding to Nasin. However,

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NAVFAC justifies the award based on a waiver of the limitation by the Deputy Assistant Secretary of Defense (Installations and Housing). This possibility was set forth in the instructions to bidders, as follows:

"Bids may be rejected which * * *
(ii) exceed the cost limitations
unless such limitations have been
waived by the Assistant Secretary
of Defense (Installations and
Logistics) prior to award."

NAVFAC has informed us that the Deputy Assistant Secretary has been delegated the waiver authority.

This provision is authorized by section 606 of Pub. L. 96-125, the Military Construction Authorization Act, 1980, 93 Stat. 928, which specifies the statutory cost limitation and Defense Acquisition Regulation (DAR) §§ 18-110(a) and (c) (1976 ed.) which implement the statutory cost limitation provisions in the annual authorization acts for military construction. Section 606 permits the statutory cost limitation to be waived if:

"* * * the Secretary of Defense, or the Secretary's designee, determines that, because of special circumstances, application to such project of the limitations on unit cost contained in this section is impracticable."

The above DAR sections provide:

"(a) Contracts for construction shall not be awarded at a price in excess of statutory cost limitations unless the limitations for the particular contract can be and have been waived * * *."

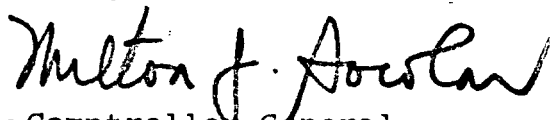
* * * * *

"(c) A bid or proposal containing prices that exceed applicable statutory cost limitations shall be rejected, unless for construction of * * * barracks for

enlisted personnel or bachelor officer's quarters, and the determination of the Assistant Secretary of Defense (Installations and Logistics) has been obtained that the limitation on construction costs in the annual Military Construction Act shall not apply as impracticable."

In view of the above, the Nasin bid did not have to be rejected for exceeding the statutory cost limitation because the record shows that NAVFAC followed the prescribed procedures in obtaining the waiver. The fact that Wickham's bid for the work up to the 5-foot line was lower than Nasin's is of no significance because Nasin submitted the low bid for the awarded work. In a similar case, we held that "the existence of a bid which is within the statutory limit but not low overall does not preclude a discretionary waiver of the statutory limit on the grounds of impracticability. B-162173, September 29, 1967, * * *." 52 Comp. Gen. 969, 973 (1973).

Accordingly, the award to Nasin was proper, and the protest is denied.



For the Comptroller General
of the United States