16045 Weiskopf PL2

DECISION

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

[Request by Navy for Reconsideration]

FILE: B-196659.2 DATE: February 6, 1981

MATTER OF: Garrett Enterprises, Inc. -- Reconsideration

DIGEST:

Decision holding that procedure requiring post-bid opening submission and negotiation of unit prices for indefinite quantity-type contract solicited by formal advertising is improper is affirmed since procedure is not consistent with legal requirements governing formal advertising.

The Navy has requested reconsideration of Garrett Enterprises, Inc., B-196659, September 29, 1980, 59 Comp. Gen. ____, 80-2 CPD 227. That decision held that the Navy's procedure in soliciting bids and letting an indefinite quantity-type contract for sewer maintenance services violated 10 U.S.C. § 2305(c)(1976), the pertinent statute governing contract awards in formally advertised procurements.

As explained in our prior decision, the solicitation included a Schedule of Prices which listed 132 items of work, an estimated quantity for each, and spaces to enter unit prices, extended prices and a total bid. However, firms were to submit only total bid prices before the opening date. The low bidder on that basis then would have 10 days after bid opening, and prior to award, to submit a completed Schedule of Prices; the sum of the extended bid prices for each line item listed therein had to equal the total bid initially submitted. If approved by the Officer in Charge of Construction, the Schedule of Prices would "be part of the contract and provide

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the basis for payments and for any withholding." The invitation further provided that "unbalancing in the Schedule shall be cause for withholding approval and requiring submission of a balanced schedule, and may be cause for rejection of the bid." (Emphasis added.)

The Navy explained that where an IFB contains many items which involve the multiplication of unit prices times an estimated quantity, the probability of arithmetical errors is great, and that this procedure alleviates the risk of such errors. We noted that Defense Acquisition Regulation (DAR) § 2-406 (1976 ed.), which substantially limits the withdrawal or correction of bids due to a mistake, places the primary burden on bidders to properly calculate their bids while also specifying an affirmative duty on the contracting officer to review bids and to request verification where there is a discrepancy noted. Since the DAR contemplates the possibility of mistake and allocates the risks of a mistake, we did not believe the Navy's rationale of removing the risks was compelling.

We held that the Navy should have required the submission of unit prices with the bids for the following reasons:

1 - The contract to be awarded was an indefinite quantity-type with individual requirements to be purchased by the issuance of work orders as needs arose. The individual unit prices for each item, not the total "price," were therefore to be the material terms of the contract which were not established at bid opening contrary to statutory requirements.

2 - The Navy's procedure permitted the low bidder the option to accept or reject an award, after bids were opened and prices exposed, merely by deciding whether or not to submit a completed Schedule or a balanced one.

3 - The Navy's reservation of the right to require a bidder to resubmit a balanced Schedule after bid opening in the event of unbalancing improperly contemplated negotiation in an otherwise formally advertised procurement.

We recommended that the Navy require bidders to submit a Schedule of Prices with their bids in future procurements.

The Navy did not address our third point regarding negotiation in a formally advertised procurement in its request for reconsideration. With respect to our first point the Navy argues:

> "If the critical factors in determining the most advantageous bid are the unit prices of the Schedule of Prices, one would expect that a different bidding result would be obtained by requiring the submission of same at bid opening. You will note that the IFB in question requires the unit prices of the Schedule of Prices to total the amount bid. Therefore, there can be no different bidding result under either method. Thus, it does not follow that the Government has thereby been deprived of the most advantageous bid since the bidding system actually used results in the same bidder being awarded the contract as in the method proposed by your decision. Accordingly, it is submitted that the bidding system used in the IFB has resulted in the most advantageous bid to be obtained."

Apparently relying upon the mandatory language of the invitation that the low bidder must submit a Schedule after bid opening, the Navy responds to our second point by stating that a bidder is not free to refuse to submit a Schedule, rendering itself ineligible for an award and in effect choosing to reject the award. The Navy also proposes that should bidders be required to submit a bid bond (not required in the subject procurement), the bond would enforce the Schedule submission requirement because a bid bond stipulates that the bidder must execute such further contractual documents as required by the terms of the bid.

Finally, the Navy reiterates its argument about mistakes, contending that the multiplicity of bid items (132 items) would ensnare even the most prudent bidder and result in procurement delays, protests to this Office, and the rejection of bids.

An indefinite quantity-type contract does not obligate the Government to purchase more than the minimum quantity specified in the contract while the Government may purchase up to the maximum quantity -- here between $50,000 and $400,000, respectively -- with the total contract "price" established only on the basis of estimated quantities. See DAR § 3-409.3 (1976 ed.). Thus it does not automatically follow that a low total bid will result in the most advantageous prices for the Government's actual needs for the individual items to be purchased under the contract.

We also point out that the relevant statute governing formal advertising requires, among other things, that "bids shall be opened publicly." 10 U.S.C. § 2305(c)(1976). We have consistently interpreted the public opening provision as requiring that the material terms of the contract be established at bid opening to protect the public interest and bidders against any form of fraud, favoritism or complicity and to leave no room for any suspicion of irregularity. Computer Network Corporation, 55 Comp. Gen. 445, 451 (1975), 75-2 CPD 297 at page 8; 48 Comp. Gen. 413, 414 (1968). To protect against even the appearance of these or other improprieties, we have interpreted the statutes governing formal advertising to require that a bid at bid opening must publicly disclose the elements of the bid which relate to price, quantity, quality or delivery terms. See Computer Network Corporation, supra. We are still of the opinion that the unit prices for each of the 132 individual items were material terms of the contract which under formal advertising procedures are required to be disclosed at bid opening. The Navy's present procedures in these procurements simply are not consistent with that legal requirement.

In addition, the fact that the invitation required in mandatory terms that the low bidder submit a Schedule prior to award does not provide the Navy with a legally enforceable right to require the low bidder to either submit the Schedule or to submit an "acceptable" one. While we agree that a bid guarantee or bid bond might have the effect of requiring the low bidder to submit a Schedule or forfeit the bond, we do not believe such a bond could necessarily assure the Government that a Schedule would not be materially unbalanced.

Concerning the Navy's contention that the multiplicity of bid items would ensnare even the most prudent bidders, we note that the Navy's procedure did not prevent one bidder from withdrawing its bid due to a mistake in that bid, and we do not see how it would do so in the future. The burden is on the bidder to carefully prepare its bid and on the agency to carefully review the bid for discrepancies.

Accordingly, we find no errors of fact or law in our prior decision, which is affirmed. See 4 C.F.R. § 20.9(a) (1980); Las Vegas Communications, Inc.--Reconsideration, B-195966.2, October 28, 1980, 80-2 CPD 323.

Milton J. Socolar

For the Comptroller General
of the United States