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DECISION



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

21154

FILE: B-204821

DATE: March 16, 1982

MATTER OF: Protimex Corporation

DIGEST:

1. A bidder's failure to acknowledge an amendment formally may be waived as a minor informality where the bid clearly indicates that the bidder received the amendment. Where the amendment, among other things, changes the date of bid opening, and the bid bond submitted with the bid contains the new date, the bid may be accepted.
2. In a competitive, advertised sale of crude oil different corporate entities with common ownership may submit separate bids where such bidding is not shown to be prejudicial to the Government's interest and the protester had a fair opportunity to submit a higher bid.
3. The fact that two bidders have common officers or ownership does not violate the certification of independent pricing since there is no evidence that the bidders colluded among themselves to set prices or to restrict competition by inducing others not to bid.
4. A bidder's failure to submit affiliation data is no basis to object to award since such failure may be waived as a minor irregularity.

Protimex Corporation protests the Department of Energy's (DOE) acceptance of three bids under invitation for bids (IFB) No. DE-FB01-81RA32158, to purchase certain daily amounts of crude oil produced from the Naval Petroleum Reserve Number 1. Protimex contends that a bid submitted by Pacific Refining Company (Pacific) should be rejected because it allegedly did

not acknowledge an amendment, and that two bids--from Coastal Petroleum Refiners, Inc. (Coastal) and Century Resources Development, Inc. (Century)--should be rejected because one person allegedly owns a controlling interest in both firms. We deny the protest.

Pacific, Coastal and Century all received awards for quantities of oil under line item 004 (line item 004 is for 65,029 barrels per day (b/d)). Pacific received an award for 10,000 b/d, Coastal was awarded 3,000 b/d and Pacific 4,000 b/d. Concerning the oil in question, the IFB offered a total daily estimated quantity of 88,093 b/d subject to minimum awards of 500 barrels to any bidder and a statutory prohibition against any person controlling, directly or indirectly, more than 20 percent of the Government's share of the estimated annual share of petroleum produced by Reserve No. 1, 10 U.S.C. § 7430(c)(1976), as amended by Public Law No. 96-513, § 513(34), 94 Stat. 2934. In accordance with the IFB's award criteria, DOE made awards to bidders offering the highest bonuses or discounts from a base price stated in the IFB until the entire quantity available was awarded. Protimex did not receive an award, but its offered bonus would have placed it next in line for an award.

I. Pacific's Alleged Failure to Acknowledge an Amendment

Pacific's bid did not expressly acknowledge Pacific's receipt of Amendment No. 1, which, among other things, changed the originally scheduled bid opening date of September 3, 1981, to September 10. The amendment also changed the location where bids must be submitted, and added a number of contract clauses to the general provisions. Pacific submitted its bid at the new location on the bid opening date established by the amendment, and its bid bond stated the bid date as "9-10-81." DOE decided that these facts sufficiently evidenced Pacific's receipt of the amendment so as to bind it to any material terms the amendment might contain. We agree.

The general rule is that a bidder's failure to acknowledge the receipt of a material amendment to an IFB renders its bid nonresponsive and ineligible for award. Nuclear Research Corporation; Ridgeway Electronics, Incorporated, B-200793, B-200793.2, June 2, 1981, 81-1 CPD 437. The failure to formally acknowledge receipt of an amendment, however, should be waived as a minor irregularity if the bid received clearly indicates that the

bidder received the amendment, Federal Procurement Regulations § 2-405(d) (1964 ed.). In such circumstances, the bidder is bound to the terms set forth in the amendment at the price stated in the bid. Nuclear Research Corporation; Ridgeway Electronics, Incorporated, supra; Che Il Commercial Company, B-195017, October 15, 1979, 79-2 CPD 254. In our opinion, the inclusion of the amended bid opening date in the bid bond clearly establishes within the bid itself that Pacific had received the amendment and constitutes an implied acknowledgment of the receipt of the amendment. See Inscom Electronics Corporation, 53 Comp. Gen. 569 (1974), 74-1 CPD 56; Che Il Commercial Company, supra. Thus, DOE properly accepted Pacific's bid.

II. Alleged Common Control of Coastal and Century

The protester alleges that Coastal and Century are owned by the same person, and contends that this relationship runs afoul of several of the IFB's provisions. We disagree.

According to the protester, one individual is shown by the records of the State of California to be the sole shareholder of both firms. In fact, the same individual signed the bids of both firms in this case. Protimex argues that the award thus is contrary to an IFB clause which states:

"Bidders may submit only one bid on each line item * * * subject to the statutory restrictions in Title 10 U.S.C. 7430(c)."

Protimex also observes that if two or more companies with identical ownership may submit bids, then the owner may easily control the bidding for an item by making multiple bids under numerous corporate names. Such a result, argues Protimex, would violate the statutory requirement that Naval Petroleum Reserves sales promote full and free competition. 10 U.S.C. § 7430(d) (1976). The statute provides:

"Each proposal for sale * * * shall provide that the terms of every sale of the United States share of petroleum from the naval petroleum reserves shall be so structured as to give full and equal opportunity for the acquisition of petroleum by all interested persons, including major and independent oil producers and refiners alike * * *."

Coastal and Century each submitted only one bid for the line item in question. Protimex, however, contends that the two corporations must be treated as one bidder due to their common ownership.

The general rule regarding competitive sales is that bids from different corporate entities with common ownership may be accepted unless such multiple bidding is prejudicial to the Government or other bidders. See Atlantic Richfield Company, B-203607, December 9, 1981, 61 Comp. Gen. _____, 81-2 CPD 453. In that case, involving the sale of natural gas, award was to be made to the highest bidders, with a maximum of seven awards under item 1 and two awards under item 2. In the event of tie-bids, award was to be made by lottery, and because there was a tie among all bidders, a lottery was held. The protest was directed against the award of contracts to two affiliated firms as a result of the lottery. We sustained the protest because we found the other bidders were prejudiced, and distinguished the facts presented from those where award would be made to two affiliated firms as a result of a truly competitive sale, that is, a sale in which award was made on the basis of the highest prices bid, and not on the basis of chance, as is the case in a lottery where all bidders bid the same amount.

Thus, while we agreed that bids submitted by commonly owned companies should not be rejected because of the common ownership alone, we concluded that such bids should be rejected when bidders could obtain an unfair advantage by permitting such bids. The unfair advantage in Atlantic Richfield was simply the lack of true price competition and the increased mathematical probability of affiliated bidders receiving an award by lottery when affiliated bidders participate in the drawing.

This is not the case here. There was no maximum price established in the IFB, as there was in the prior case, and bidders could bid above or below the base price established for bidding purposes. There was no lottery, and award was based on price, not chance. In short, the award was based on competition and the objections we found to the award of two contracts to affiliated firms in Atlantic Richfield simply do not pertain here. Thus, the acceptance of Coastal's and Century's bid is clearly in the Government's interest because they each offered a higher price than did the Protimex bid. Since Protimex had a fair opportunity to submit a higher bid, it was not

prejudiced by separate bids from the two corporate entities unless their bids were computed collusively to gain an advantage over Protimex or other bidders, as opposed to further the individual entities' legitimate business interests.

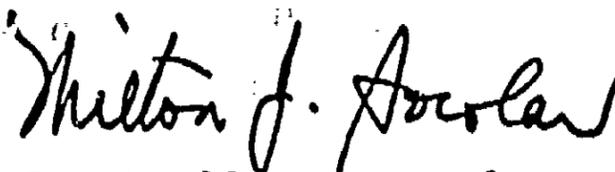
Of course, any awards would be subject to the statutory prohibition against any person either directly or indirectly controlling more than 20 percent of the Government's share of the estimated annual share of petroleum produced by Reserve No. 1, 10 U.S.C. § 7430(c), supra. The records show that even if Coastal and Century are considered to be one person, the award of contracts to them would not violate this prohibition.

Protimex also argues that the two corporations each made improper certifications of independent price determination and failed to disclose their relationship in the "AFFILIATION AND IDENTIFYING DATA" clause. Although separately stated, the crux of these allegations is that there was collusive bidding involved because of the relationship of the two firms.

The purpose of the certification of independent price determination is to assure that the bidders did not collude among themselves to set prices or to restrict competition by inducing others not to bid. Kenner Plastics Fabricators, Inc., et al., B-184451, B-184394, June 1, 1976, 76-1 CPD 351. Thus, even the fact that two bidders may have jointly prepared and submitted two bids does not constitute collusive bidding where there is no evidence of an attempt by these bidders to eliminate competition from other bidders. Informatics, Incorporated, B-181642, February 28, 1975, 75-1 CPD 121. There is no evidence on the record which even remotely suggests that there was an attempt to eliminate competition from other bidders. There is nothing, then, that indicates that the awards to Coastal and Century were improper.

In any event the failure to submit the affiliation data does not form a basis for objecting to an award since such failure may be waived as a minor irregularity. See Professional Security Officers Co., 57 Comp. Gen. 480 (1978), 78-1 CPD 396. Therefore, we will not consider these arguments further.

The protest is denied.

for 
Comptroller General
of the United States