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DECISION



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

FILE: B-204192

DATE: April 20, 1982

MATTER OF: G & B Packing Company, Inc.

DIGEST:

- 21536
1. Contention that contracting agency decision to cancel a solicitation is based on an allegedly erroneous analysis that it would be less costly to continue to perform services in-house is dismissed as untimely. Despite allegations that the solicitation specifications were so deficient as to preclude effective competition with the Government's in-house cost estimate, the protester failed to protest on that basis prior to bid opening or within 10 working days after denial of its appeal of that decision by the agency, thereby electing to treat the matter as a separate issue contrary to its subsequent assertion that propriety of the cost comparison is inextricably intertwined with its timely protest against the specifications.
 2. Protest alleging that specifications for packing and crating services are not based on the best information available to the contracting agency and are stated in such broad ranges as to require inflated bid prices to provide for the largest containers in each range, placing undue risk on bidders, is denied. Requirements may properly be stated as estimates of work anticipated under the contract where the estimate is based on the best available information, the contracting agency based estimates on past in-house work records which were listed in the solicitation, and the protester has not shown that the estimates are inaccurate or that the requirements are not based on the best information available.

G & B Packing Company, Inc. (G & B), protests against the Department of the Army's specifications and in-house cost comparison under invitation for bids (IFB) No. DABT51-81-B-0040 for packing, crating, marking and tie-down services at Fort Bliss, Texas.

G & B, the low bidder, contends that the IFB specifications are not based on the best information available to the Army, that requirements are stated in broad ranges which require inflated bid prices to provide for the largest containers in each range, and that the specifications favor the in-house estimate and result in a biased cost comparison.

G & B's complaint concerning the in-house cost comparison is untimely and its objections to the IFB specifications are without merit.

The work has been performed in-house by Army personnel and the IFB was issued, pursuant to Office of Management and Budget Circular No. A-76, to determine whether the services should be contracted out. The IFB contemplated the award of an annual requirements-type contract with two 1-year option periods. Prospective bidders were advised that the Government's in-house cost estimate would be used to determine whether contracting out would be more economical. See Defense Acquisition Regulation (DAR) § 7-2003.89 (Defense Acquisition Circular No. 76-28, July 15, 1981).

Upon receipt of bids, the Army determined that the work could be done in-house at a lower cost and canceled the IFB. G & B initially protested the specifications to the Army before bid opening and unsuccessfully appealed the Army's decision to continue performing the work in-house on the basis that the cost comparison was erroneous.

The protester asserts that the IFB requires fixed unit prices without regard to the variety of container sizes and weights in each work unit, contrary to the industry practice of pricing by cubic foot or hundredweight within a container size category or range. G & B complains that the IFB does not require separate pricing for preservation treatment. The protester further objects to the fact that the contractor is required to furnish all supplies and equipment notwithstanding that Fort Bliss

has a completely equipped shop in which the work can be performed. G & B suggests that the facility will be dismantled and the equipment disposed of as surplus property if the work is contracted out. The protester insists that the IFB does not adequately describe the Army's requirements, as required by DAR § 2-101(i) (1976 ed.), and that the solicitation of bids and comparative cost evaluation based on these specifications were improper. While contending that its protest concerning the IFB specifications was not originally intended to appeal the Army's A-76 determination, G & B argues that the issues are inextricably intertwined because the deficient specifications precluded true competition against other bidders and the in-house cost estimate. G & B concludes that the IFB specifications also affected the propriety of the A-76 cost comparison, requiring our consideration of the cost comparison on the merits.

The Army states that G & B continuously complained about the IFB specifications from the time the IFB was issued until the bids were opened and that the IFB was amended seven times in response to prospective bidders' questions. The contracting agency views the protest as an attempt to substitute G & B's judgment for that of the agency in determining its actual minimum needs and drafting specifications which reflect those needs. The Army insists that the range of requirements stated in the IFB is based upon the historical data available to the contracting agency and that the specifications were adequately stated to apprise bidders of the work required under the contract. The Army further argues that the mere presence of risk does not make the IFB improper, that bidders should have provided in their bids for any risk inherent in bidding on the range of requirements specified, and that it is not required to state requirements in a manner which provides for the differing levels of risk posed to prospective bidders, citing Applied Devices Corporation, B-199371, February 4, 1981, 81-1 CPD 65, and Consolidated Maintenance Company, B-196184, March 18, 1980, 80-1 CPD 210.

The contracting agency asserts that workload data for fiscal year 1980, included in the IFB by amendment to provide the quantity, length, width, height, cubic footage and unit weight for blocking and tie-down services, provided sufficient information from which bidders could

calculate the cubic footage involved in performing the work. The Army takes the position that, since the work is to be performed on a fixed-price basis pursuant to Technical Manual No. 38-230-2, the cost of preservation is to be included in the bidder's unit price for packing. In accordance with its responsibility to acquire services in the manner most advantageous to the Government, the contracting agency determined that contractor-furnished equipment would be more cost effective for these requirements because the Army's equipment can continue to be used and need not be disposed of and because the Army will not have to oversee the contractor's operations in order to assure the security and maintenance of the equipment.

Finally, the Army contends that G & B's complaint concerning the A-76 cost comparison, first raised in the protester's comments on the Army's report in response to the protest, is untimely because G & B did not appeal the agency's decision to GAO within 10 working days after it received that decision.

We agree with the Army. Generally, we regard a dispute concerning a contracting agency's decision to perform work in-house rather than to contract out as a policy matter to be resolved within the executive branch. However, when the agency uses the procurement system to aid in making its decision, we will consider a protest contending that the contracting agency made an erroneous cost comparison--provided that the protest is timely. World Landscaping, B-200271, February 24, 1981, 81-1 CPD 130; S & G Services, Inc., B-197076, April 17, 1980, 80-1 CPD 271.

If, as the protester suggests, the IFB specifications were so deficient as to preclude competition with the Government by comparative cost evaluation, that alleged solicitation impropriety was also apparent and should have been protested before bid opening. See 4 C.F.R. § 21.2(b)(1) (1981). G & B, however, did not question the cost comparison until after the bid opening when it appealed the Army's determination to continue performing the work in-house at that level. Moreover, G & B did not protest to our Office concerning the cost comparison until almost a month after the Army issued its decision denying G & B's appeal. Therefore, G & B's subsequent protest to

our Office is clearly untimely. 4 C.F.R. § 21.2(a) (1981). Because G & B elected to treat the cost comparison as a separate issue until that time, we find no reason to consider the matter on the merits now on the basis of the protester's belated contention that it is inextricably intertwined with our review of the IFB specifications. G & B's objections to the cost comparison are dismissed.

While a contracting agency is required to state its need in a manner to enable bidders to compete on a common basis and to insure acquisition of services at the lowest ultimate cost to the Government, requirements may be stated in terms of the estimated quantity of work anticipated under the contract. Where, as here, bids are solicited on the basis of estimated quantities, those quantities must be formulated from the best information available to the contracting agency. Union Carbide Corporation, B-188426, September 20, 1977, 77-2 CPD 204. Estimates may be based upon records of previous work requirements, and listing past orders in the solicitation is a reasonable alternative to estimating future requirements. DAR § 3-409.2(a) (1976 ed.); Michael O'Connor, Inc., 56 Comp. Gen. 108 (1976), 76-2 CPD 456.

Contrary to G & B's claim, we do not find the Army's reliance on past in-house work order information or its method of stating the IFB requirements to be unreasonable. Because G & B has presented no evidence to show that the estimates are inaccurate or that the requirements are not based on the best information available to the Army, the protester has not met its burden of affirmatively proving its case. Diversified Computer Services, Inc., B-201681, July 7, 1981, 81-2 CPD 13; ACMAT Corporation, B-197589, March 18, 1981, 81-1 CPD 206.

The fact that bidders might undertake additional risk in bidding on these specifications does not render the IFB improper. We have recognized that some risk, including the risk that the work might vary from the Government estimate, is inherent in most types of contracts; bidders are expected to allow for such risks in computing their bids. Palmetto Enterprises, 57 Comp. Gen. 271, 276 (1978), 78-1 CPE 116.

Regarding G & B's concern that the Army failed to require separate pricing for preservation treatment, paragraph 5.1.1 of the IFB does provide for the price

of preservation to be included in the price bid for packing by expressly defining "packing" to include preservation.

Contrary to G & B's assertion, the Army did plan to continue using the facility's shop and equipment. At any rate, the Government is under no obligation to make Government-owned property available for use by bidders. Even where equipment is made available to bidders, it is Government policy to eliminate the competitive advantage that may accrue to a bidder by charging rent for the equipment or by using a rental equivalent in evaluating bids. Swedlow, Inc., B-189751, December 21, 1977, 77-2 CPD 489; DAR § 13-501 (1976 ed.).

From our review of the record, we find no basis upon which to object to the Army's specifications; G & B's protest on this ground is denied.

We dismiss the protest in part and deny it in part.

for 
Comptroller General
of the United States