DECISION

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

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FILE: B-216281

DATE: February 11, 1985

MATTER OF: Mid South Industries, Inc.

DIGEST:

1. Agency's rejection of sole responsive bid on the basis of unreasonable price, resulting in cancellation of the solicitation, is proper when the bid price is significantly higher than either previous price for the same item or the government's estimate.

2. Negotiation with sole bidder for reasonable prices after small business restricted advertisement resulted in unreasonable bid is not authorized by law.

3. Bidders rely on oral advice at their own risk where such oral advise conflicts with the clear language of the solicitation.

4. A protest based upon alleged improprieties in invitations for bids filed after bid opening is untimely.

Mid South Industries, Inc. (Mid South), protests the cancellation of invitation for bids (IFB) No. M00027-84-B-0047, a small business set-aside issued by the Marine Corps (Corps) for refrigerator containers, and the resolicitation of the requirement on an unrestricted basis.

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

At the July 30, 1984, bid opening, Mid South submitted the only bid in the amount of $14,939 per container, although a late bid was received from Heller Truck Body Corporation, a large business concern. The contracting officer determined that Mid South's bid was unreasonable as to price. Therefore, he rejected it and canceled the invitation. The determination concerning price reasonableness was based on the following factors: past procurement history

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which indicated that in 1980 the containers had been purchased for $6,387 per unit; a comparison of Mid South's price of $14,939 and Heller's late bid price of $7,300; and a comparison of Mid South's price with the government estimate for the requirement which was about 20 percent lower than Mid South's price.

Mid South alleges that its price was fair and reasonable considering current market conditions. Mid South also contends that the Corps improperly considered Heller's late bid in determining to cancel the invitation. Specifically, Mid South alleges that Heller's bid should never have been opened since it was late and that, if it had not been opened, the price difference between Mid South's and Heller's bid would not have been known and presumably award would have been made to Mid South. In this regard, Mid South also alleges that it was at an unfair disadvantage in regard to the unrestricted (second) invitation because it did not know the amount Heller bid under the initial invitation while its bid under that invitation had been made public.

The Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.404-1(a)(1) (1984), provides that, after bids have been opened, award must be made to the lowest responsible bidder unless there is a compelling reason to reject all bids and resolicit. The regulation also provides that a solicitation may be canceled after bid opening if the prices of all otherwise acceptable bids are unreasonable. 48 C.F.R. § 14.404-1(c)(6). Such a determination of unreasonableness involves broad discretion on the part of the contracting officer and will not be disturbed absent a showing of fraud or bad faith. Omega Container, Inc., B-206858.2, Nov. 26, 1982, 82-2 C.P.D. ¶ 475; Penn Landscape & Cement Work, B-196352, Feb. 12, 1980, 80-1 C.P.D. ¶ 126. In this regard, we have recognized that a determination of price reasonableness properly may be based upon comparisons with such things as a government estimate, past procurement history, current market conditions, or any other relevant factors. Omega Container, Inc., B-206858.2, supra. Further, we have explained that courtesy bids from large business concerns ineligible for small business set-asides may be considered in making a price comparison. Browning Ferris Industries, B-209234, Mar. 29, 1983, 83-1 C.P.D. ¶ 323.

Here, the record shows that Mid South's bid was rejected after being compared with the past procurement history, a late large business bid, and the government estimate for the item. In all comparisons, Mid South's bid price was significantly higher.

We believe it is clear from the record that the contracting officer was justified in determining that Mid South's bid price of $14,939 per refrigerator container was unreasonably high. Omega Container, Inc., B-206858.2, supra. Even if we assume that the Corps improperly considered Heller's late bid price and disregard that factor, comparison of Mid South's bid price with the procurement history of and government estimate for the item supports the reasonableness of the contracting officer's determination, and neither fraud nor bad faith has been shown here. See Omega Container, Inc., B-206858.2, supra; 37 Comp. Gen. 147 (1957).

Concerning Mid South's contention that the firm was prejudiced because the Corps failed to make public Heller's late bid price, Mid South explains that, had it been aware of Heller's price of $7,300 per container under the initial invitation, the firm possibly could have underbid Heller on the resolicitation by cutting its profit margin. Award under the resolicitation was made to Heller at a price of $7,100 per container and Mid South's bid price under that invitation was $8,455 per container.

Mid South's determination to submit a bid price which included a certain profit margin (and thus was not low) involves a matter of business judgment which is solely within the firm's discretion. See Cannon USA, Inc.--Reconsideration, B-212395.6, June 4, 1984, 84-1 C.P.D. ¶ 591. In any event, we cannot conclude that the fact that Heller's late courtesy bid price was not made public prejudiced Mid South, since Mid South's position under the resolicitation with respect to the Heller bid was no different from other bidders under that solicitation, and there has been no showing that the exposure of Mid South's price of $14,939 under the initial invitation adversely affected the firms's competitive standing under the resolicitation. 37 Comp. Gen. 147, supra.

In any case, Mid South contends that, if the firm's price appeared unreasonable, the Corps, instead of rejecting the bid, should have awarded the contract to Mid South at a price negotiated on a sole-source basis pursuant to the FAR

provisions at 48 C.F.R. § 15.214 since this would establish Mid South as an alternate (small business) source to Heller of the containers.

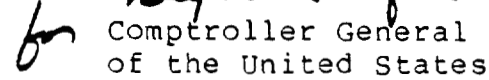
This FAR provision implements 10 U.S.C. § 2304(a)(15) (1982), which authorizes negotiation after formal advertising. However, all small business set-aside contracts, whether entered into by conventional negotiation or by small business restricted advertising, are negotiated procurements. 48 C.F.R. § 19.502-4(a); Chameleon Company, Incorporated, B-197244, July 22, 1980, 80-2 C.P.D. ¶ 59; Crown Laundry and Cleaners, 58 Comp. Gen. 103 (1978), 78-2 C.P.D. ¶ 370. Thus, we have held that negotiation with a sole bidder for reasonable prices after a small business restricted advertisement resulted in an unreasonable price, as here, is not authorized under the provisions for negotiation after formal advertising. Crown Laundry and Cleaners, supra.

Next, Mid South states the Marine Corps contracting officials orally advised that if, as here, two small business bids were received under the new invitation, award would be made to a small business. The invitation was issued on an unrestricted basis and, by amendment, merely reserved the government's right to set aside the procurement for small business participation. Where, as here, the clear language of the invitation provides that the invitation is not restricted to small business participation, that is, award is to be made to the low bidder regardless of its size status, we believe that it was unreasonable for Mid South to have relied on oral advice that award could be made to other than the low bidder. In fact, award to other than the low responsive bidder would have been contrary to the invitation terms. In this regard, we have frequently explained that bidders rely on oral advice at their own risk if the oral advice conflicts with the written terms of the invitation. See Trident Motors, Inc., B-213458, Feb. 2, 1984, 84-1 C.P.D. ¶ 142; Inventive Packaging Corporation, B-213439, Nov. 8, 1983, 83-1 C.P.D. ¶ 544.

Finally, Mid South alleges that the Corps failed to allow adequate bid preparation time under the initial and second invitations. The bid opening dates in the invitations clearly notified bidders of the dates on which their bids were due. Accordingly, under section 21.2(b)(1) of our

Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1984), which provides that protests based upon alleged improprieties apparent on the face of the invitation must be filed prior to bid opening, Mid South's allegations concerning this matter, first raised after both bid openings, are untimely and not for consideration on the merits. Comsec Systems Corporation, B-216596.2, Nov. 5, 1984, 84-2 C.P.D. ¶ 499.

The protest is dismissed in part and denied in part.



for Comptroller General
of the United States