



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Superior Engineering and Electronics Company, Inc.

File: B-231772

Date: August 31, 1988

DIGEST

When, in response to a solicitation conducted under a small disadvantaged business (SDB) set-aside, offerors all proposed prices that exceeded the fair market price for the item in question by more than 10 percent, the agency did not act improperly in withdrawing the SDB set-aside and deciding to resolicit the procurement under a small business set-aside.

DECISION

Superior Engineering and Electronics Company, Inc. protests the cancellation of request for proposals (RFP) No. F04606-87-R-1202, issued by the Department of the Air Force for secondary distribution centers for 150 KVA generators (portable electrical power stations). Superior protests that unduly restrictive specifications in the RFP, issued as a total small disadvantaged business (SDB) set-aside, prevented SDBs such as itself from making competitive offers, and that the agency's subsequent determination that the offers it received were unreasonably priced (and did not, therefore, justify the set-aside) was incorrect. Consequently, according to Superior, the Air Force lacked a proper basis for its decision to withdraw the SDB set-aside and resolicit the requirement under a small business set-aside.

We deny the protest.

The decision to conduct a procurement as an SDB or small business set-aside is a business judgment generally within the ambit of the contracting agency; we will not question agency determinations in this regard absent a clear showing of an abuse of that discretion. Alamo Acoustical Restoration Co., B-228429.2, Feb. 16, 1988, 88-1 CPD ¶ 150.

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With respect to Department of Defense (DOD) procurements, such as the one here, the DOD Federal Acquisition Regulation Supplement (DFARS) provides that an SDB set-aside may be utilized where the contracting officer determines that there is a reasonable expectation that (1) offers will be obtained from at least two responsible SDB concerns, and (2) award will be made at a price not exceeding the fair market price by more than 10 percent. DFARS § 19.502.72 (DAC 86-15). Once having determined to utilize an SDB set-aside, the contracting officer is specifically directed to withdraw an SDB set-aside where the expectations required to establish it have not been satisfied, that is, where a determination is made that offers have not been received from at least two responsible sources, and where the offered prices exceed by more than 10 percent the fair market price of the item. DFARS § 19.506.

The agency calculated the fair market price here (\$18,298) by using the unit price that it paid from March 1983 through September 1984 (a contract awarded as a small business set-aside), and by applying a learning curve and published escalation rates for electrical equipment to this unit price to bring it up to date. After excluding the low offeror as nonresponsible (its price was more than 10 percent above the fair market price in any case), the agency determined that the price of the next low offeror, Superior (\$27,123), exceeded the fair market price by 48.2 percent.^{1/} Since the other four offerors' prices were even higher, the agency concluded that there was no reasonable expectation that the SDB set-aside would satisfy the fair market price requirement. We find no basis for questioning the agency's determination.

Superior asserts that the method used to calculate the fair market price was improper, since it did not include the current proposed prices for components that were only available from source-controlled vendors. While this does appear to be the case, the Air Force states it has reviewed the prices General Electric (GE) quoted to vendors for this procurement, and found that these 1988 prices are only 6.5 percent higher than the 1984 prices used in the fair market

^{1/} Superior submitted an alternate proposal based on the substitution of alternate parts for those identified as source-controlled in the RFP's data package, but the price for this alternate (\$26,115) still exceeded the fair market price by 43 percent.

analysis. It thus appears that the prices quoted by GE were not the cause of the highly inflated bid prices.^{2/}

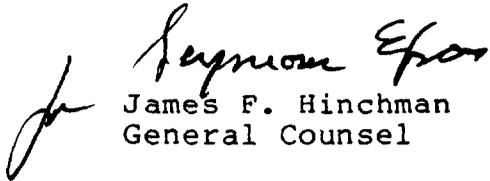
Superior protests that the RFP was unduly restrictive in requiring offerors to utilize source-controlled components manufactured by GE and available only from that firm and from J.R. Hollingsworth Corp. According to Superior, requiring the use of components available from only two firms, neither of them an SDB, was bound to result in higher-priced offers than would have been the case if the Air Force had made the solicitation less restrictive. Superior concludes that the Air Force's findings of price unreasonableness reflect bad faith: the Air Force knew or should have known that requiring offerors to use source-controlled components would result in needlessly inflated prices, undermining the set-aside. Further, although the RFP provided for the substitution of technically equivalent parts, Superior asserts that, in practice, the RFP contained insufficient technical data on which to base a proposal for a substitute.

These allegations are untimely. Under our Bid Protest Regulations, 4 C.F.R. § 21.2 (a)(1) (1988), a protest of alleged solicitation improprieties that were apparent prior to the closing date for the receipt of proposals must be filed prior to that date. Both the source limitations and the adequacy of the technical data for alternate parts were clear from the face of the RFP here, and thus had to be protested prior to the March 25 initial closing date. As Superior did not file its protest until June 21, these allegations are untimely. In any case, we find nothing improper or indicative of bad faith in the source restriction. The Air Force explains that the restriction was necessary because all components of the item must be interchangeable to ensure that repairs can be made in the field, and that source-controlled components were specified only where the agency lacked a complete and accurate data package for the components. The Air Force states that,

^{2/} In any case, even if offers did reflect high price quotes to SDB bidders by GE, this would not necessarily warrant increasing the fair market price accordingly; since the purpose of the fair market price analysis is to determine the cost premium resulting from the set-aside, the determination still properly would be based on a comparison of the SDB set-aside prices with the price that would be available without the set-aside, precisely what the Air Force did here.

although Superior may have considered the data provided inadequate for development of an alternate, this was the only data available.

The protest is denied in part and dismissed in part.

James F. Hinchman
General Counsel