

Cunningham



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Rolette Meats & Distributing, Inc.
File: B-234383
Date: June 5, 1989

DIGEST

1. Agency decision to cancel invitation for bids set aside for Indian/Alaska Native economic enterprises, and to resolicit requirement on an unrestricted basis, because sole Indian-owned bidder's price was considered unreasonably high, is not unreasonable where it is supported by comparison of bidder's price with government estimate and prices paid under prior year's contract.

2. Protester's alleged understanding, obtained through a third party, that it would be permitted an opportunity to submit a second best and final offer provides no basis for disturbing the procurement even though no such second opportunity was given where the alleged advice: (1) is contrary to the usual practice of soliciting only one best and final offer; (2) appears to have resulted from a misunderstanding of a statement made by the contracting officer to the third party; and (3) was not communicated directly to the protester by any contracting official.

3. Where protester was the only one of three bidders who was eligible for award of contract set aside for Indian-owned firms and its price even as negotiated downward was considered by the contracting agency to be unreasonably high, it was improper for the agency to have disclosed the protester's final negotiated price in a notice advising all bidders of the agency's decision to cancel the solicitation and to resolicit on an unrestricted basis. Nevertheless, protester was not prejudiced by this action since record indicates that at no time was its price competitive with those quoted on the open market.

DECISION

Rolette Meats & Distributing, Inc., protests the cancellation of invitation for bids (IFB) No. A00-0668 by the Bureau

045639/138812

of Indian Affairs (BIA), Department of the Interior, and the subsequent award of a contract to another firm for the supply of meat products for the Turtle Mountain Community Indian School system in Belcourt, North Dakota.

Rolette, who was the only offeror eligible for award under this restricted solicitation, principally objects to BIA's determination that its price, even as negotiated downward, was unreasonably high, as a result of which the agency canceled the solicitation and resolicited on an unrestricted basis. In addition, Rolette protests certain aspects of the way the procurement was handled. For the reasons stated below, we deny the protest.

The BIA issued the IFB for competition only among eligible Indian/Alaska Native economic enterprises. Rolette and two other firms (Cloverdale Foods, Inc., and Quality Meats and Seafood Company) submitted bids by the bid opening date of January 10, 1989. The contracting officer states that he opened the bid packages and determined that the bids of Cloverdale, the prior year's contractor, and Quality should be recorded as "nonresponsive" and their prices not entered on the bid abstract, since these bidders did not represent themselves to be Indian firms, unlike Rolette. However, the contracting officer states that he did consider it proper to use Cloverdale's 1988 prices, as well as Cloverdale's 1989 unit prices under IFB No. -0668 as to those items "new to the FY [Fiscal Year] '89 procurement," for the purpose of determining the reasonableness of Rolette's price.

Based on this comparison, the contracting officer determined that the prices bid by Rolette were "substantially above" the prior year's prices, and that Rolette's offer was therefore unreasonably priced. The contracting officer also states that he considered a cost estimate, which was based on "open market" vendors' quotations for the first quarter of FY '89, and compiled by the community school's cook foreman, to assess the reasonableness of Rolette's prices.

The contracting officer then proceeded under provisions D and E of the IFB section entitled "Additional Actions - Buy Indian Contracts" which provide, in effect, that if only one Indian offeror has submitted a bid and if that bid exceeds the government estimate, the contracting officer shall make a good faith effort to negotiate a lower offer with the Indian offeror. Specifically, provision D of the IFB further required the contracting officer to advise the Indian offeror that its offer was too high. Rolette admits, in effect, that BIA did conform to this specific requirement.

The contracting officer states that negotiations were conducted with Rolette on January 19. From the accounts of the parties, it appears that after face-to-face discussions in which Rolette was advised that its price was considered to be unreasonably high and it attempted to justify the prices it bid, it was asked to submit a best and final offer which would be evaluated for reasonableness. "After that was done," Rolette states, "I asked the contracting officer where they thought I should be. They commented that they were not at liberty to tell me that."

Pursuant to these negotiations, Rolette lowered some of its unit prices, but the contracting officer determined that even as reduced Rolette's total price was unreasonably high. Consequently, after consultation with the applicable Indian Tribal Employment Rights Office (TERO) representative, the contracting officer canceled this restricted IFB on January 25. Following the receipt of bids on an unrestricted basis, a contract was subsequently awarded to another firm.

As we indicated above, Rolette's principal contention is that the contracting officer unreasonably determined its price to be unreasonably high. In this regard, Rolette argues that the cost estimate prepared by the cook foreman at the community school contained errors and, therefore, does not support the contracting officer's decision. BIA admits that there are flaws in the cost estimate, ^{1/} but asserts that those errors were recognized and ignored in evaluating Rolette's proposed unit prices. Specifically, Interior states that the "contracting officer compared each unit price of the three quotes [of the cost estimate] to Rolette's unit prices, making the appropriate adjustment where the quotes were based on inconsistent units."

We have consistently held that a determination of price reasonableness is within the discretion of the contracting agency, and that we will not disturb such a determination

^{1/} The cost estimate was a tabulation listing: 27 meat items; the unit of measure for each (pound or case); up to three vendors' quotations for each item; and an "average price" of these quotations, which when multiplied by the estimated quantity needed, resulted in a total price. Rolette points out that with regard to five items on the estimate, four of which were included on the bid Schedule, the "average price" was meaningless since the vendors' quotations from which the "average" was derived were based on different units of measure, i.e., per piece, per pound, and per case.

unless it is unsupported or there is a showing of fraud or bad faith on the part of the contracting officials. See Washington Patrol Service, Inc., B-225610; B-225878; B-226411, Apr. 7, 1987, 87-1 CPD ¶ 587. We have specifically applied this rule to a determination of price reasonableness for Indian/Alaska native set-aside contracts. See Interstate Brands Corp., B-225550, Mar. 3, 1987, 87-1 CPD ¶ 242. For the reasons stated below, we do not find the contracting officer's determination to have been unreasonable.

First, even though the manner in which the government estimate was compiled admittedly was flawed, the estimate does provide some support for the contracting officer's determination that Rolette's price was unreasonably high. Even as to the four IFB Schedule items whose "average price" listed on the government estimate was meaningless because the average was derived from open market quotes based on different units of measure, in three out of four instances the unit prices which did correspond to the way Rolette was required to bid were lower.^{2/}

Furthermore, even if one were to disregard those flawed items in considering those items on the IFB Schedule which also were on the government estimate, as to 16 of the remaining 21 items, or approximately 76 percent, the government estimate contained lower open market prices than Rolette offered even after negotiations with it had been completed.

In addition to the government estimate, the contracting officer also considered the prices paid Cloverdale under the prior year's contract which was awarded pursuant to an unrestricted solicitation. Again, approximately 77 percent of the unit prices were lower than those offered by Rolette under the current year's procurement. Overall, Rolette's bid exceeded the comparison bid (1988-1989) of Cloverdale by nearly 9 percent. Although Rolette argues that its prices merely reflect the "sharp increase in meat prices . . . over the past year," the fact remains that on the recent open market resolicitation of this requirement, the successful bid was still more than 10 percent lower than Rolette's final negotiated price. Consequently, we find support for BIA's decision that Rolette's bid was too high, and we

^{2/} The government estimate (G.E.) prices per pound of ground beef patties were lower than Rolette's price per pound; the G.E. prices per case of chicken patties and burritos were lower than Rolette's; but the G.E. price per case of corn dogs was higher than Rolette's.

therefore deny its protest of the contracting officer's determination in this regard.

Rolette has raised other objections to the manner in which this procurement was conducted. First, it objects to the fact that copies of the IFB were released to, and bids were accepted from, other firms known to it to be non-Indian concerns. In support of this argument, Rolette contends that "[not] much attention [was] given to" certain "Special Contract Requirements" of the IFB which "forbid" the solicitation of offers from non-Indian business enterprises until there has been an unsuccessful attempt to negotiate a fair and reasonable offer from an Indian firm. These contract provisions, however, apply only to the selection of subcontractors and do not bar the BIA from determining the reasonableness of an Indian bid or offer by comparing it with a non-Indian bid or offer. Consequently, BIA cannot be criticized, as urged by Rolette, for releasing copies of the IFB to Cloverdale and Quality who were not definitively known, in any event, to be non-Indian firms until their bids were opened and their status determined from a reading of the "Self Certification Statement" contained in their bids.

Next, with regard to the post-bid opening negotiations which were held with it, Rolette argues that the contracting officer should have done more than request a best and final offer from Rolette, a procedure which the company considers to be "one-sided." Rolette contends that since in negotiations it had explained its "need" to charge what it did based on its costs of production, that BIA should have made a "counteroffer" which Rolette may have been able to meet halfway.

There is no question that Rolette was aware that it had been called in for negotiations because its price was considered unreasonable and that it was being given an opportunity to reexamine its bid and to submit its best price. This is all that was required by the solicitation; there was simply no requirement for the government to make a "counteroffer." This ground of protest is without merit.

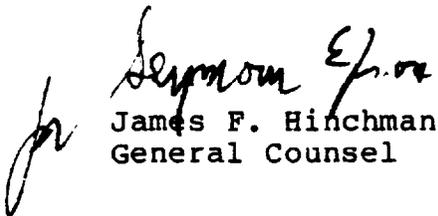
Rolette also argues that it was informed by the TERO representative that "one of [BIA's] contracting officers" had stated that Rolette would be permitted to submit another best and final offer before the BIA would turn the procurement over to the open market. The contracting officer reports that what he told the TERO representative was that in the event Rolette's negotiated best and final prices were determined to be unreasonable, BIA would open the requirement to unrestricted competition and that Rolette would then have another opportunity to compete under an unrestricted

IFB. From this statement of the facts, the contracting officer considers that the TERO representative misunderstood the contracting officer's advice and, in turn, mistakenly informed Rolette that the company would have the opportunity to submit a second best and final offer. The contracting officer's position is consistent with the common understanding that the submission of one best and final offer generally concludes the negotiation process, and there is no suggestion in the record that any contracting officer ever directly advised Rolette that it would have the opportunity to submit a second best and final offer. We therefore find no basis to sustain the protest as to this allegation.

Finally, Rolette argues that its final total negotiated price was improperly released to Cloverdale and Quality, prior to the resolicitation. The record shows that after BIA was unsuccessful in negotiating with Rolette what the agency considered a fair and reasonable price, the agency sent a memorandum to all bidders advising them of the results of the competition as to Rolette (including its total sealed bid and negotiated prices) and advising them that the solicitation was canceled and that "alternative procurement actions will be explored." BIA states that Rolette's negotiated price was inadvertently released.

While the sealed bid prices received under the initial solicitation are a matter of public record and could be known to bidders participating in a resolicitation, BIA should not have disclosed the lower price which it subsequently negotiated with Rolette. Under the circumstances of this case, however, we do not think this action prejudiced Rolette, for it does not appear that at any time was Rolette competitive with the prices obtainable on the open market.

The protest is denied.

 James F. Hinchman
General Counsel