



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Nissho Iwai American Corporation; Patterson
Pump Company

File: B-254870; B-254870.2

Date: January 24, 1994

John W. Polk, Esq., and Joseph E. Downey, Esq., Baker & McKenzie, for Nissho Iwai American Corporation, and Bobby R. Rickman for Patterson Pump Company, the protesters.
Paul H. McDowell, Esq., for Sumitomo Corporation of America, an interested party.

James L. Weiner, Esq., Department of the Interior, for the agency.

David Hasfurther, Esq., and Linda C. Glass, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's acceptance of a bid that did not contain all the information required by the place of performance clause in the solicitation was proper since the information, which concerns the question of a bidder's responsibility and not the responsiveness of a bid, may be furnished at any time prior to award.

2. Bid containing a line item price which may be below cost is not unbalanced where the bid does not contain overstated prices for any line item.

DECISION

Nissho Iwai American Corporation and Patterson Pump Company protest the award of a contract to Sumitomo Corporation of America under invitation for bids (IFB) No. 1425-3-SI-40-13860/DS-7890, issued by the Department of the Interior for various pumps and components for a pumping plant.

We deny the protests.

The IFB contained clause K.7, Place of Performance, (Federal Acquisition Regulation (FAR) § 52.214-14), which provided that bidders who intended to perform work under the contract at one or more plants/facilities located at different addresses "shall insert" in the spaces provided the appropriate addresses and the names of their owners if other than the bidder. The IFB also required under clause K.19,

Buy American Certificate, (FAR § 52.225-1), a certification that each end product being furnished under the contract was a domestic product, except for those the bidder listed by product name and country of origin in the spaces provided.

Five bids were received at bid opening on April 22, 1993. Sumitomo submitted the low bid at \$5,855,953; Nissho submitted the second low bid of \$7,644,000. The contracting agency initially determined that Sumitomo's bid was nonresponsive because it did not specify in accordance with clause K.7 the plants/facilities that would be used (other than its own)--it specified only one plant/facility in Japan. Award subsequently was made to Nissho.

Sumitomo protested the agency's rejection of its bid as nonresponsive. Sumitomo stated that the agency orally advised it prior to bid opening that it was not required under clause K.7 to list its American suppliers (it listed in clause K.19 only its pumps and valves as not being domestic end products). The agency subsequently reversed its decision that Sumitomo's bid was nonresponsive. On July 23, a stop-work order was issued to Nissho. After submission of a list of its domestic equipment suppliers, Sumitomo was found responsible. Nissho's contract was then terminated for the convenience of the government on September 2. Award was made to Sumitomo on the same date. On September 10, Nissho protested to our Office.

Nissho and Patterson argue that Sumitomo's bid was nonresponsive because the firm did not identify in its bid the plants/facilities that would manufacture the equipment Sumitomo intended to supply. This contention is without merit. The place of performance requirement (clause K.7) relates to the bidder's responsibility rather than the responsiveness of its bid and can be satisfied at any time prior to award. Kings Point Indus., 66 Comp. Gen. 74 (1986), 86-2 CPD ¶ 488. While we have in rare circumstances considered the place of performance to be a matter of responsiveness where the government has a material need for performance at a certain location, see 53 Comp. Gen. 102 (1973), the IFB here did not require performance at a specific location and failure to identify the manufacturing facility provides no basis to find Sumitomo's bid nonresponsive.

Nissho also argues that Sumitomo's bid must be rejected since its prices are unbalanced. The prices submitted by all bidders--except Sumitomo--for their pumps were approximately equal to the prices submitted for their motors. For instance, Nissho submitted a price of \$3,175,000 for its pumps and a price of \$2,740,000 for its motors. In contrast, Sumitomo submitted a price of only \$742,000 for its pumps and a price of \$3,652,765 for its

motors. Thus, Nissho argues that Sumitomo's bid is mathematically unbalanced because its prices for pumps are "astonishingly" low and its prices for motors are unreasonably high. Nissho also contends that the bid is materially unbalanced because these prices show that there is a reasonable doubt that an award to Sumitomo will result in the lowest cost to the government.

One of the elements required for a bid's prices to be considered unbalanced is that the bid must contain understated prices for some items and overstated prices for other items. Hampton Rds. Leasing, Inc., B-250645.2, Feb. 1, 1993, 93-1 CPD ¶ 486. The submission of a below-cost bid is not illegal, and the mere fact that a bid includes understated prices does not justify rejection of the bid. BFPE Int'l, B-248783, Sept. 25, 1992, 92-2 CPD ¶ 206. Accordingly, even a well-founded allegation of an understated price, without the showing of overstated prices, does not constitute a legally adequate basis for finding the existence of this element of unbalancing. Atlantic Research Corp., B-247650, June 26, 1992, 92-1 CPD ¶ 543.

Here, while Sumitomo's total price for pumps was significantly lower than Nissho's total price,¹ there is nothing in the record which shows that Sumitomo's bid contains overstated prices. Although Sumitomo's total price for the motors was higher than Nissho's, the motors do not appear to be overpriced when compared to the prices submitted by the other bidders or the government estimate for this item. Since we find no enhanced pricing in the awardee's bid, we see no basis to conclude that the prices in Sumitomo's bid were unbalanced.

Patterson also questions the legal status of Sumitomo as a regular dealer or manufacturer within the meaning of the Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1988). Under our Bid Protest Regulations, 4 C.F.R. § 21.3(m)(9) (1993), our Office does not consider the legal status of a firm as a regular dealer or manufacturer under the Walsh-Healey Act. By law this matter is to be decided by the contracting agency, in the first instance, subject to review by the Small Business Administration where a small business is

¹To the extent that Nissho and Patterson suggest that the submission of such a low price for the pumps may be in violation of the antidumping laws, 19 U.S.C. §§ 1673 et seq. (1988), the enforcement of these laws is within the jurisdiction of the Secretary of the Treasury and the International Trade Commission, not our Office. Ling/L.A.B., B-208182, Aug. 25, 1982, 82-2 CPD ¶ 179.

involved, and the Secretary of Labor. The Pratt & Whitney Co., Inc.; Onsrud Machine Corp., B-232190; B-232190.2, Dec. 13, 1988, 88-2 CPD ¶ 588.

The protests are denied.

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for Robert P. Murphy
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