



Comptroller General
of the United States

514222

Washington, D.C. 20548

Decision

Matter of: Godot Enterprises, Inc.

File: B-255200

Date: February 16, 1994

William L. Bruckner, Esq., Corona & Balistreri, for the protester.

Mark Kelland for Don Kelland Materials, Inc., an interested party.

Maj. William R. Medsger and Maj. Shaw T. Gallagher, Department of the Army, for the agency.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly withdrew small disadvantaged business (SDB) set-aside after opening bids and made award to low non-SDB bidder where the low SDB bidder's bid exceeded the low non-SDB bidder's bid by 29 percent and, while the low SDB bidder's bid was within 10 percent of the original government estimate, the agency reasonably concluded that the estimate was flawed, such that the SDB bidder's bid exceeded the properly calculated estimate by more than 24 percent.

DECISION

Godot Enterprises, Inc., a small disadvantaged business (SDB) concern, protests the award of a contract to Don Kelland Materials, Inc. (DKM), a non-SDB business concern, under invitation for bids (IFB) No. DAADO1-93-B-0239, issued as a total SDB set-aside by the Department of the Army for surface road construction and maintenance services at the Army's Yuma Proving Grounds, Arizona.

We deny the protest.

The IFB contemplated award of a fixed-price requirements contract for a 1-year base period with 2 option years. The IFB was issued as a SDB set-aside, but provided that other than SDB concerns could bid with the understanding that the IFB would be converted to an unrestricted procurement if the low SDB bid was determined to be 10 percent above the fair market price (FMP). See Defense Federal Acquisition Regulation Supplement (DFARS) § 219.502-2-70(a)(2). To

measure the FMP, the Army developed an independent government estimate (IGE) that was calculated at \$6,054,272.

By the bid opening on September 17, 1993, the Army received two bids. The low bid of \$4,842,300 was submitted by DKM, the incumbent contractor and a small business concern. The other bid of \$6,240,460 was submitted by Godot, an SDB concern. Godot's bid thus was 29 percent higher than DKM's bid. The Army reports that it "was struck by the disparity in bid prices and decided to review" the IGE. The unit prices used in determining the IGE were calculated as the numerical average of the relevant prices from the current DKM contract; the 1993 Means Construction Data Guide; and the high unsuccessful bid on the prior procurement.¹ The Army found that the IGE improperly factored in unit prices from the unsuccessful bid under the prior procurement, which resulted in an improperly inflated IGE. After excluding this factor, the Army recalculated the IGE, considering only the current contract unit prices and the Means Guide, as \$5,001,096--which is consistent with DKM's low bid and which the Army determined represented the FMP. Godot's bid exceeds the revised IGE by more than 24 percent. Thus, the Army withdrew the SDB set-aside because Godot's bid exceeded the FMP by more than 10 percent, and made award to DKM. This protest followed.

The crux of Godot's protest is that the Army determination that there was a flaw in the original IGE was erroneous. Godot argues that the fact that the IGE included an unsuccessful competitor's pricing from the prior procurement was not an error in the estimate because Federal Acquisition Regulation (FAR) § 15.805-2(b) instructs the government to consider prior proposed prices in determining the fair market price in SDB set-asides. See FAR §§ 15.805-2(b); 19.202-6.

Even where a solicitation is issued as a total SDB set-aside, a contracting officer is required to withdraw the set-aside if award to the low responsive SDB bidder exceeds the FMP by more than 10 percent. See DFARS §§ 219.502-2-70(a)(2); 219.506(a); Superior Eng'g and Elecs. Co., Inc., B-231772, Aug. 31, 1988, 88-2 CPD ¶ 197, aff'd, B-231772.2, Oct. 3, 1988, 88-2 CPD ¶ 307. The purpose of conducting an FMP analysis is to compare the SDB set-aside prices against the price that would be available to the government under an unrestricted competition. See Government Contract Resources, B-243915, Aug. 15, 1991, 91-2 CPD ¶ 153.

¹The high bid price totalled \$13,207,030 as compared to DKM's price of \$4,953,900.

FAR § 19.001 defines FMP as a price based on reasonable costs under normal competitive conditions and not on lowest possible cost. The contracting officer has the discretion to choose from a variety of price analysis techniques identified in FAR § 15.805-2 to determine the FMP. Among the listed price analysis techniques are "[c]omparison of proposed prices received in response to the solicitation," FAR § 15.805-2(a); "[c]omparison of prior proposed prices and contract prices with current proposed prices for the same or similar [work . . . so long as] the reasonableness of the prior price was established," FAR § 15.805-2(b); and "[c]omparison of proposed prices with independent [g]overnment cost estimates," FAR § 15.805(2)(e). In determining the FMP, the contracting officer is expected to use reliable, accurate, and current information to ensure that the FMP represents a fair and reasonable price. See FAR § 15.805-2; Blue Dot Energy Co., B-253390, Sept. 7, 1993, 93-2 CPD 145; Government Contract Resources, supra.

Based upon the results of the competition under the IFB, Godot's price was more than 10 percent higher than the low price that was available to the Army if the SDB restriction did not apply, that is, DKM's bid. Given the difference in the bids, it was reasonable for the agency to reexamine the IGE. See Blue Dot Energy Co., supra.

Upon reviewing the IGE, the agency reasonably concluded that including the unit prices from the high bid submitted under the prior procurement was improper since the reasonableness of this prior price had not been established. See FAR § 15.805-2(b). While Godot asserts that certain of the individual unit prices taken from this unsuccessful bid were not that far out of line with the other unit prices used in calculating the initial IGE, the fact remains that deleting the very high bid's unit prices from the calculation caused the IGE to drop by more than \$1 million. This suggests that notwithstanding that particular unit prices may not be disproportionate as compared to other indicators of the FMP, i.e., the incumbent contract prices and the Means Guide data, the unit price differences when considered in the aggregate may not be reasonable indicators of the FMP. Given DKM's low price we cannot say that the agency's recalculation was unreasonable, and there is no evidence that the recalculation was done in bad faith.

Government Contract Resources, supra. Therefore, we see no basis to object to the Army's withdrawal of the set-aside and award to DKM.

The protest is denied.

Christine S. Melody
Robert P. Murphy
for Acting General Counsel