

DECISION



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

FILE: B-184211

DATE: September 23, 1975

MATTER OF: Harper Enterprises

DIGEST:

1. Allegation that successful bidder is nonresponsible will not be considered, since review of protests against affirmative determinations of responsibility is limited to situations where fraud is alleged on part of procuring officials or solicitation contains definitive responsibility criteria which allegedly have not been applied.
2. Although protester may have received IFB 8 working days prior to bid opening, there is no basis to waive for good cause untimely protest against improprieties in IFB alleged after bid opening, since there is nothing that establishes that there were circumstances beyond protester's control that prevented filing of protest prior to bid opening.
3. Where bidder submitted bid for custodial work on lump-sum basis as solicited in IFB, but failed to provide as solicited separate bid for each building in which custodial services were to be performed, waiver of failure was appropriate, since individual prices were not material to evaluation of bids.
4. Attempted "buy-in" does not afford basis for rejection of bid and award may not be withheld because low bid is below cost.

Harper Enterprises (Harper) protests the award of a contract to any other bidder under invitation for bids (IFB) No. N62474-75-B-2735 issued by the Navy Public Works Center, San Francisco, California, for custodial services.

Twenty-two bids were received for opening on June 13, 1975. After evaluation, the four lowest bids were:

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Golden State Janitorial Service	\$157,499.00
Action Janitorial Service	160,630.40
Super Building Maintenance	171,830.25
Pacific Coast Utilities Service	179,024.71

The first low bidder was allowed to withdraw its bid due to an error. The second and third low bidders were determined to be nonresponsive. The award was made to Pacific Coast Utilities Service as the lowest responsive, responsible bidder. Harper's bid was the 13th lowest bid received.

Harper contends that the low bidders are not financially responsible; that the invitation is restrictive of competition, misleading and confusing; that failure of the low bidders to complete appendix "A" is a major defect and would render the bids nonresponsive; and, finally, that the invitation allows for a "buy-in."

Since the award was made to Pacific Coast Utilities Service (Pacific), only that bidder's responsibility is in issue. However, our Office does not review protests against affirmative determinations of responsibility, unless either fraud is alleged on the part of procuring officials or where the solicitation contains definitive responsibility criteria which allegedly have not been applied. See Central Metal Products, 54 Comp. Gen. 66 (1974), 74-2 CPD 64; Eastern Home Builders and Developers, Inc., B-182218, November 29, 1974, 74-2 CPD 302; and Sanders Associates, Inc., B-183019, January 27, 1975, 75-1 CPD 55. Although we will consider protests against determinations of nonresponsibility to provide assurance against the arbitrary rejection of bids, affirmative determinations are based in large measure on subjective judgments which are largely within the discretion of procuring officials who must suffer any difficulties experienced by reason of a contractor's inability to perform. Accordingly, we will not consider the protest that Pacific is not responsible.

Section 20.2(b)(1) of our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975), provides that protests based upon alleged improprieties in solicitations which are apparent prior to bid opening shall be filed prior to bid opening. Harper's protest alleging that the invitation is restrictive, misleading and confusing was received in our Office on June 17, 1975. Bid opening was on June 13, 1975. Therefore, the contracting agency has stated that the protest is untimely. However, Harper states that it received the IFB 8 working days prior to bid opening and that had it received the IFB

timely it would have made a timely protest. Section 20.2(c) of our Bid Protest Procedures permits the consideration of untimely protests for "good cause." "'Good cause' * * * generally refers to some compelling reason, beyond the protester's control, which has prevented him from filing a timely protest." 52 Comp. Gen. 20, 23 (1972) and 52 id. 821, 823 (1973). The mere fact that the contracting agency may have been slow in furnishing the IFB to Harper does not justify Harper being slow in filing a protest against the IFB. Although Harper may have received the IFB 8 working days prior to bid opening, there is nothing that establishes that there were circumstances beyond its control that prevented it from filing a protest within that time. In that connection, it appears that there was adequate time for Harper to have protested, since it was able to review the IFB and submit a bid before the bid opening. Accordingly, there is no basis to waive the untimely protest for good cause.

The IFB consisted of a single item which solicited a lump-sum "[p]rice for the entire work, based on the quantities indicated in Appendix 'A,' complete in accordance with the plans and specifications." A note on the face of the IFB stated "Bidders will be required to submit a completed Appendix 'A' with the bid." Appendix "A" listed each of the buildings in which the custodial services were to be performed, the square footages and the building plan that applied. An additional column on the sheet provided space for a separate bid for each building. Pacific submitted a lump-sum bid, but did not complete appendix "A." Harper contends that this rendered the bid nonresponsive. The procuring activity stated that the appendix "A" price breakdown is desired for billing tenants of the buildings and, therefore, was an omission that could be waived as a minor informality.

In B-161012, June 13, 1967, it was stated:

"* * * Since the award was to be made in the aggregate and an aggregate total price was invited, individual item prices were not material to the evaluation of bids and the failure to quote individual item prices should have been waived as a minor deviation. * * *"

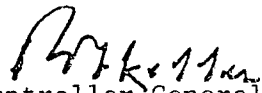
See, also, Nelson Electric, B-180393, April 10, 1974, 74-1 CPD 185. We therefore concur in the waiver of the failure to complete appendix "A." Decisions B-162201, October 4, 1967, and R. C. Hudson & Associates, B-181528, September 16, 1974, 74-2 CPD 171, cited by Harper, are inapplicable to the immediate situation, since they

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involved situations where the bidders furnished something less than a firm fixed price for all the work contemplated by the contract.

Finally, Harper submits that there exists a potential for a "buy-in." However, our Office has held that an attempted "buy-in" does not afford a basis for rejection of a bid and that an award may not be withheld merely because the low bid is below cost. Oneida Chemical Company, Inc., 53 Comp. Gen. 597 (1974), 74-1 CPD 73; 50 id. 788 (1971).

In view of the foregoing, there is no legal basis for our Office to question the award and the protest is denied.


Deputy Comptroller General,
of the United States