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DECISION



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

R. M. Martin
D. M. H.

FILE: B-190029

DATE: December 16, 1977

MATTER OF: Dyneteria, Inc. and La-Tex Foods, Inc.

DIGEST:

1. Where IFB set forth minimum manhours as indication of agency's estimate of an acceptable manning level, bid based on manning level less than IFB estimates need not be rejected since IFB did not preclude bidders from using their own estimates of manhours.
2. Protest based on allegation that bidder will suffer loss provides no basis to disturb proposed award since regulations which look with disfavor on "buy-ins" do not justify rejection of otherwise acceptable bid.

Dyneteria, Inc. (Dyneteria) and La-Tex Foods, Inc. (La-Tex) protest the proposed award of a contract under Invitation for Bids (IFB) No. DAHC30-77-B-0052, issued by the Directorate of Procurement, Military District of Washington, U. S. Army (Army). The solicitation called for fixed prices for the operation of the Tri-Service Dining Facility, Fort Myer, Virginia. Bids were opened on August 17, 1977 and the Army proposes to award the contract to ARA Food Services Company (ARA), the low bidder.

Dyneteria protests on grounds that ARA's price cannot possibly support the wages and fringe benefits required to pay for the minimum number of manhours specified in the solicitation. Dyneteria contends an award to ARA would violate the prohibition in the Armed Services Procurement Regulation (ASPR) against knowingly awarding a contract which will produce a loss for the contractor.

La-Tex, the incumbent contractor, contends the "Minimum Manhour Requirements" provision of the IFB sets forth the Government's estimate of an acceptable personnel manning level. It asserts that any bid which deviates substantially from the stated minimum manhour requirements is nonresponsive and probably nonresponsive.

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The IFB required per meal bid prices for an estimated 85,000 meals per month. It stated, however, that monthly payments would be computed solely on the actual number of meals served. The IFB contained, in Section M, a provision entitled "Minimum Manhour Requirements" which states as follows:

"7. MINIMUM MANHOUR REQUIREMENTS

The following manhour requirements are provided as an indication of the Government's estimate of an acceptable manning level of personnel. Regardless of these estimates, the contractor is required to use as many people as are necessary to properly perform all contract services:

"A. 190 manhours (minimum): Monday through Friday - 1100 to 2000 hours.

"B. 110 manhours (minimum): Saturday and Sunday - 1100 to 2000 hours.

"C. 130 manhours (minimum): Monday through Friday - 2000 to 1100 hours.

"D. 90 manhours (minimum): Saturday and Sunday - 2000 to 1100 hours."

Because ARA's bid price was substantially below the Government's estimate, the Army asked ARA to verify its bid. ARA verified its price subject to acceptance of its interpretation that the manning levels set out in the "Minimum Manhour Requirements" provision were estimates of acceptable levels and were not intended to be required minimum levels. The Army accepted this interpretation and proposed to make an award to ARA when these protests were filed. No award has been made.

The Army contends that both protests are untimely under our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) which require that protests based upon alleged improprieties apparent on the face of the IFB be filed prior to bid opening. However, the protesters are not objecting to Provision M-7 and they see no ambiguity in it. They object to the Army's interpretation which they contend was not apparent prior to bid opening. While the Army disagrees with the protester's interpretation of Provision M-7, we believe the protests are timely and should be considered on the merits.

It is a fundamental principle of competitive procurement that all bidders must be treated equally and given a common basis for the submission of their bids. Host International, Inc., B-187529, May 17, 1977, 77-1 CPD 346. The record here indicates that at least some of the bidders based their prices upon an interpretation that the minimum manning levels set forth in Provision M-7 were mandatory minimums. We believe that this interpretation is reasonable under the language of Provision M-7 and we also believe the language is reasonably subject to the interpretation used by ARA and the Army. While use of the words "indication" and "estimates" lend support to ARA's interpretation, the repetitive use of words with mandatory connotations such as "minimum" and "requirements" tend to support the interpretation of the protesters. Provision M-7 clearly states that a contractor will have to use more personnel if needed; it is not equally clear that less personnel may be used so long as all other requirements are met. Thus the IFB was defective and inadequate as a means of providing a common basis for the submission of bids. See Engineering Research, Inc., B-187814, February 14, 1977, 77-1 CPD 106. An award to ARA would not assure the Army that it had obtained the lowest price obtainable through fair competition.

Armed Services Procurement Regulation (ASPR) (1976 ed.) § 2-404.1(b) provides that an IFB may be canceled after opening but prior to award when the specifications are found to be inadequate or ambiguous or when cancellation is clearly in the best interest of the Government. Cancellation can be justified here under each of these conditions. We recognize the prejudice to be suffered by ARA by a cancellation after exposure of its prices but this consideration, in our opinion, is more than offset by the prejudice to the other bidders and the interest of the Government if an award is made under this IFB.

Accordingly, these protests are sustained.

We recommend that the Army resolicit its requirements and make it clear that bidders may deviate below as well as above the estimated manning levels provided they comply with all other requirements. In view of this recommendation we see no point in holding the conference requested by La-Tex.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letter of today to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970),

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which requires the submission of written statements by the agency to the House and Senate Committees on Governmental Affairs concerning the action taken with respect to our recommendation.


Deputy Comptroller General
of the United States