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DECISION

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

FILE: B-191575 DATE: July 6, 1978

MATTER OF:
Colton Construction Co., Inc.

DIGEST:

1. Bid protest alleging improprieties in solicitation (that provisions which are used by civilian agency to give contracting officer unfettered discretion to choose additive and deductive alternate bids conflict with military regulations and deny bidders equal protection of the law) which is not filed until after bid opening is untimely under 4 C.F.R. § 20.2(b)(1) and not for consideration on merits.

2. Protester alleges that additive alternates were not evaluated, proposed awardee was selected because of low bid alone, and low bidder had advance knowledge that selection would be based on price. Protester has not satisfied burden of proof. Record indicates that alternates were included in IFB so agency could choose between alternates, contracting officer's advisers took factors other than price into consideration before recommending award, contracting officer states that he evaluated all bids and alternates, and IFB did not preclude selecting awardee considering additives on basis of price alone.

3. Record fails to substantiate allegation of considerable business dealings between architect-engineer and prospective contractor. Architect-engineer made recommendation to contracting officer to award to prospective contractor based on bids containing additive and deductive items. Neither law nor regulation relating to conflict of interest prohibits architect-engineer from evaluating prospective contractor's bid.

4. Where bidder has verified bid, contracting officer shall consider bid as orginally submitted. Bidder which verifies bid is not required to submit documentation in support of bid verification.

5. Bidder is not precluded from award because bid may have been too low and as result may suffer loss on contract.

The Department of Energy (DOE) issued invitation for bids (IFB) EW-78-B-04-0100 for the construction of a building complex consisting of a research laboratory and a training and conference annex. The IFB requested a base bid and a bid on five alternates. Alternate Nos. 1 and 3 permitted the bidders to add or deduct from the base bid. Alternate Nos. 2 and 4 were additives and alternate No. 5 was a deductive.

The instructions to bidders (Standard Form 22) and the Supplement to Standard Form 22 of the IFB, respectively, set forth the basis of award:

> "10. Award of Contract. (a) Award of contract will be made to that responsible bidder whose bid, conforming to the invitation for bids, is most advantageous to the Government, price and other factors considered.
>
> "(b) The Government may, when in its interest, reject any or all bids or waive any informality in bids received.
>
> "(c) The Government may accept any item or combination of items of a bid, unless precluded by the invitation for bids or the bidder includes in his bid a restrictive limitation."

"19. BASIS OF AWARD

"Award will be made as a whole to one bidder on the work specified as the Base Bid and on the Alternate or Alternates which the Agency elects to accept."

Bids were opened on March 14, 1978. Nine bids were received. A partial abstract of the three low bids is shown below.

Bidder	Base Bid	Alternate No. 1
G. E. Johnson Construction Co., Inc.	$4,037,000	-$57,400
Colton Construction Co., Inc.	3,993,000	+ 17,500
Lembke Construction Co., Inc.	4,037,000	- 1,800
Government Estimate	4,638,415	+ 7,445

BASES OF PROTEST

Colton Construction Co., Inc. (Colton), protests any award to G.E. Johnson Construction Co., Inc. (Johnson) because the procuring activity announced after bid opening that it intended to award the contract on the basis of the base bid minus the highest deductive price for alternate No. 1. With the exception of Johnson's base and alternate No. 1 bid, Colton would be the low bidder on any combination of alternates. Colton's bid, including all additive alternates, was less than the amount appropriated for the project and less than the Government's estimate.

According to Colton, the procuring activity's refusal to consider any of the additive alternates makes clear that, prior to bid opening, it was decided not to award a contract containing additives but award a contract to the bidder which submitted the low price. Colton asserts that the contractor which will utilize the laboratory and training and conference annex has not denied that it made the decision to award the contract to Johnson solely because of Johnson's low price for the base bid and alternate No. 1. Contemporaneous documents from the contracting officer's advisers (the contractor and the architect-engineer) recommending acceptance of Johnson's low bid and the adoption of that advice by the contracting officer indicate that price was the only factor considered in evaluating the bids without evaluating the additive alternates. Since the cost and aesthetic qualities of the additive alternates were known in advance by the contractor and DOE, it was not necessary to include these alternates in the IFB.

The procuring activity violated section 1-2.404-1 (1964 ed. circ. 1) of the Federal Procurement Regulations (FPR) by not advising the bidders of this change in requirements. Any bidder which learned of the change would have had a competitive advantage. Further, the solicitation is defective because the procuring activity did not intend to evaluate the additive alternates. 41 Comp. Gen. 709 (1962).

The fact that Johnson's bid on alternate No. 1 was approximately 10 times lower than the amount for the next high deductive bid for this alternate (- $6,000) clearly shows that Johnson either made a mistake in bid or knew how the procuring activity would evaluate the bids. Even though Johnson verified its bid for alternate No. 1, the bid must be rejected because Johnson has the option to withdraw or to accept the award. 37 Comp. Gen. 579 (1958). Further, Johnson did not provide documentation in support of its position that it did not make a mistake in bid. Its statement that no mistake in bid was made is simply an election to accept award.

Johnson also has had considerable business dealings with the procuring activity's architectural-engineering firm which evaluated Johnson's bid. This constitutes an organizational conflict of interest. Colton calls attention to 41 C.F.R. § 9-1.5407(e) (1977), which provides as follows:

> "A contractor performing evaluation or consulting services for ERDA in connection with a competitive procurement should not be allowed to evaluate or give other consulting services: * * * (2) on the product or services of any company with which the contractor has a consulting relationship * * * Such a contractor should not be allowed to give consulting services to prospective bidders on a procurement item for which it has performed or will perform evaluation services for ERDA."

Colton states further that if paragraphs 10 and 19, quoted above, provide the procuring activity with unlimited discretion in selecting the awardee, they violate the statutory norm for awarding to the low bidder, as that norm is included in sections 2-201(b)(xli) and 7-2003.28 of the Armed Services Procurement Regulation (ASPR) (1976 ed.) (now Defense Acquisition Regulation). More specifically, if the bids had been submitted to a military procuring activity, which uses a specific procedure stating priorities for choosing additives and deductives based on available funding, Colton would be the awardee. If a different result is achieved here, then, a serious constitutional problem arises under the equal protection of the law provision of the Fifth Amendment to the Constitution.

AGENCY RESPONSE

The contracting officer contends that no announcement was made after bid opening that the additive alternates would not be considered. Colton offers no support for its erroneous allegation that DOE decided prior to bid opening not to consider the additive alternates.

According to the contracting officer, he carefully evaluated the various materials and exterior finishes called for by the alternates against the cost of their procurement. Also, he considered the advice of his advisers which evaluated all of the alternate bids and there was never any intention to do otherwise. (In addition to the contractor and the architect-engineer, the contracting officer received a detailed recommendation for award analysis from the Director, Facilities and Construction Management Division, Albuquerque Operations Office (DOE)). There was no change in DOE's requirements as far as the bids on the alternates were concerned. Since there was no change, there was full and free competition for all bid items which were carefully evaluated, and since there were no defects in the solicitation, the contract should be awarded to the lowest responsive, responsible bidder on the combination of base bid and alternate(s) which are determined to be in the Government's best interest.

The contracting officer asserts that Colton has offered no evidence to support its allegation that Johnson's deductive bid on alternate No. 1 was a mistake. FPR § 1-2.406-3 (1964 ed. circ. 1) provides that the procuring activity may permit a bidder to withdraw a bid after it determines by clear and convincing evidence that the bidder has made a mistake. Here, however, Johnson verified its bid for alternate No. 1; consequently, Johnson does not have the option to withdraw the bid or accept an award.

With regard to the alleged conflict of interest, the architectural-engineering firm categorically denied any conflict of interest relationship with Johnson in response to the contracting officer's specific request for information on the matter. Accordingly, the contracting officer determined that there was no conflict of interest or a violation of the letter or spirit of agency regulations. Moreover, the contracting officer points

out that Colton is presently involved in a Government construction project with the architect-engineer, but that Colton does not consider the architect-engineer's evaluation of its bid to be a conflict of interest.

The contracting officer contends that alternate Nos. 1 through 4 were added because DOE did not know the cost of various exterior materials and finishes for the buildings. DOE wanted the option to select the materials and finishes which would be aesthetically pleasing at the lowest cost. Only alternate No. 5, a deductive alternate, was included to cover the possibility that the bids might exceed available funds. Alternate No. 5 required a perimeter warm air heating system in lieu of a much more desirable perimeter convector heating system which was specified by the base bid.

Finally, the contracting officer states that he gave careful consideration to the recommendations of his advisers. He agrees with them that acceptance of Johnson's base bid and bid on alternate No. 1 would ensure that the buildings have an aesthetically pleasing exterior, which will satisfy the legitimate needs of the Government at the least cost. There is no justification for selecting a more costly combination. Selection of alternate No. 5 would not be in the Government's best interest because the heating system called for in the base bid is far superior to that which would be provided under alternate 5. The contracting officer also notes that he revealed for the first time his intention to award the contract to Johnson in his report to our Office.

DECISION

Colton asserts that paragraphs 10 and 19 of the instructions to bidders violate the statutory norm of awarding to the low bidder if those provisions give the contracting officer unfettered discretion in choosing alternate bids. The contracting officer asserts that this portion of Colton's protest alleges improprieties in the IFB,

which were apparent prior to bid opening. Since Colton did not protest prior to the time set for bid opening, the protest concerning the alleged improprieties in the IFB is untimely and not for consideration on the merits, citing 4 C.F.R. § 20.2(b)(1) (1977). For the reasons stated, we agree. For the same reasons, we conclude that Colton's protest concerning the possible violation of the Fifth Amendment is also untimely and not for consideration.

The protester has the burden of affirmatively proving its case. Reliable Maintenance Service, Inc.,--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337. In our opinion, Colton has not sustained this burden.

Contrary to Colton's allegation, the record shows that two out of three of the contracting officer's advisers specifically mentioned factors other than price in recommending award to Johnson. We see no necessity for the contractor which will utilize the facilities to deny that it made the decision to award the contract to Johnson strictly on the basis of price, since it is ultimately the contracting officer's responsibility to evaluate the bids and select the awardee. Of particular significance, the contracting officer has categorically stated that he carefully evaluated all bids including alternates and considered the advice of his advisers. In any event, even if the award to Johnson is based exclusively on low price, we find no impropriety since the evaluation terms of the IFB permitted award on the basis of low price and the contracting officer's consideration of the additive alternates only on the basis of price (which he denies) was not precluded.

Colton contends that it was unnecessary to include the alternates in the IFB because the prices of the alternates could be estimated by the Government and the aesthetic qualities of the various exterior finishes were known prior to bid opening.

According to Colton, this indicates that there was never any intention to evaluate the alternates because the contracting officer found no justification for incurring the additional costs. However, without requesting bids on the alternates (the abstract of bids shows a general disparity between the additive alternate bid prices and the Government's estimate), the contracting officer could not evaluate the alternates and base bids and choose that combination which would satisfy the Government's legitimate needs. Even if the aesthetic qualities and approximate price of the additive alternates were known, this does not indicate that the procuring activity did not intend to evaluate the additive alternates.

Because of the above, Colton has not shown that there was any change of requirements of which bidders were to be advised, or that the IFB was defective in this regard. The record further fails to show that the procuring activity made any prebid and postbid opening decision to ignore the additives which obviates any advance knowledge by Johnson.

Colton contends that it was improper for the procuring activity's architectual-engineering firm to evaluate Johnson's bid because that firm's relationship with Johnson constitutes a conflict of interest. Colton's assertion seems to be based primarily on the erroneous statement made by an employee of the architect-engineer to the effect that the architect-engineer and Johnson had worked on several construction projects together.

The record indicates that Johnson bid on one or, at most, two contracts in which the architect-engineer was involved; however, neither of the contracts was awarded to Johnson. This seems to be the extent of the relationship between Johnson and the procuring activity's architectural-engineering firm which does not even approach Colton's assertion of considerable

business dealings. Colton asserts that the architect-engineer evaluated Johnson's bid immediately after bid opening; however, the architect-engineer denies that such an evaluation took place. This disagreement between the parties seems to be of no particular import since we know of no law or regulation relating to conflict of interest which would be violated by the architect-engineer's evaluation of Johnson's bid. Colton acknowledges that the conflict of interest regulation which it called to our attention is not on point.

The price disparity between Johnson's bid price for alternate No. 1 and the other bid prices for this alternate and the Government estimate indicate that Johnson may have made a mistake in bid. Johnson, however, verified the bid twice after the contracting officer specifically advised Johnson of the disparity. When a bidder verifies a bid, there is no requirement that documentation be submitted in support of verification. In this regard, FPR § 1-2.406-3(d)(2) (1964 ed. circ. 1) provides that the contracting officer shall consider a bid as originally submitted if a bidder verifies a bid. Moreover, the architect-engineer states that, based upon experience with many construction projects, it is not unusual for a contractor to offer a price reduction for applying a cementitious coating, as called for by alternate No. 1 , in lieu of sandblasting, as required by the base bid, while other contractors will offer a higher price for the cementitious coating. We observe that the IFB gave the bidders the option to add or deduct from the base bid for this alternate. Further, the fact that Johnson may have bid too low and as a result suffer a loss on the contract affords no grounds for precluding Johnson from receiving an award. Universal Propulsion Co., B-186845, January 26, 1977, 77-1 CPD 59.

The cases cited by Colton are inapposite since, among other things, there is no clear showing that the contracting officer did not evaluate the alternate bids or that Johnson made a mistake in bid.

Based on the foregoing, the protest is dismissed in part and denied in part.

Deputy Comptroller General
of the United States