



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

31038

B-178132

June 12, 1973

Fried, Frank, Harris, Shriver &
Kampelman
Suite 1000, The Watergate 600
500 New Hampshire Avenue, NW.
Washington, D.C. 20037

Attention: Kenneth S. Kramer, Esquire

Gentlemen:

By letter dated May 3, 1973, and prior correspondence, you protested on behalf of Martin Bakery, Incorporated (Martin), the proposed award of a contract under invitation for bids (IFB) F-41615-73-B-0427 to Sterling Bakery, Incorporated (Sterling). The procurement was issued as a total small business set-aside on January 11, 1973, with bid opening date on February 13, 1973.

The solicitation contemplated award of a requirements type contract for 33 pastry items for troop, hospital, and organizational consumption at Lackland Air Force Base, Texas, for a 12-month period ending March 31, 1974. The schedule listed estimated quantities for each of the 33 items and required both unit and total estimated prices for each of the items.

The solicitation cautioned bidders that the "quantities of supplies or services specified herein are estimates only, and are not purchased hereby." Further, the solicitation did not guarantee bidders that any quantities described as estimated would be purchased; but rather, only the Government's actual requirements would be procured.

Sterling and Martin, the only bidders, bid on each of the 33 items set forth in the schedule. Martin submitted low unit prices for items 1, 2, 5, 6, 8, 11, 12, 13, 14, and 15; and also submitted the low aggregate evaluated price for all 33 items in the amount of \$523,740. Sterling was low bidder on items 3, 4, 7, 9, 10, and 16-33. Sterling's aggregated evaluated price for all 33 items was \$530,280, or \$6,540 higher than Martin's. However, the solicitation did not limit award to the low aggregated price on an all or none basis, but provided for multiple awards "for the items and combination of items which result in the lowest aggregate price to the Government. * * * ."

PUBLISHED DECISION
52 Comp. Gen. _____

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Total Small Business...
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Martin bid each item separately while Sterling's bid included the following:

Item Numbers: 1, 2, 5, 6, 11 are bid as a Total All or None Bid

Item Numbers: 3, 4, 7, 8, 9, 10 are bid as a Total All or None Bid

Item Numbers: 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, are bid as a Total All or None Bid

It has been determined that on a multiple award basis the aggregate price to the Government would be \$511,070. On this basis Martin would receive award for items 1, 2, 5, 6 and 11, for a total price of \$56,740; and Sterling would receive award for items 3, 4, 7, 8, 9, 10 and 12-33, for a total price of \$454,330.

You contend that by adding the "all or none" language Sterling qualified its bid in such a way as to render it nonresponsive. In this connection, you cite our decisions B-174038, December 28, 1971 and B-160173, October 20, 1966, for the proposition that our Office "has held numerous times that 'all or none' bids such as Sterling's are nonresponsive."

In B-174038 the solicitation contemplated award of an indefinite quantity contract for a single item, with a guaranteed minimum quantity of 624 units and with the Government reserving the right to order up to a total of 2,000 units. The low bid included the following language at the end of the schedule:

MINIMUM QUANTITY	624	\$6.90
MAXIMUM QUANTITY	2000	\$6.90

ALL OR NONE

Because of the "all or none" language the contracting officer considered the low bid to be conditioned on award of the maximum quantity of 2,000 units; and since only the minimum quantity of 624 was to be awarded initially, he rejected the low bid as nonresponsive. The low bidder asserted that it intended to supply whatever quantity the Government might order; and that the "all or none" language was intended to overcome the eventuality that the contract might be awarded to more than one bidder. Our Office, however, denied the protest stating that the contracting officer's interpretation was not unreasonable.

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In B-160173, supra, we held that an "all or none condition" in a bid precluded award of any quantity other than the quantity set forth in the solicitation. In that case the IFB called for deliveries on an indefinite quantities basis of an aggregate maximum quantity of 2,474,700 tent pole sections to four different destinations. The IFB provided that bidders could bid on "maximum" and "minimum" quantities for each of the four destinations.

The protesting bidder placed the word "all" in both the maximum quantity and minimum quantity columns for each of the four destinations. The bidder maintained that its bid should be interpreted as applying to any quantity that the Government might actually order under the IFB, rather than to the maximum quantity advertised. Our Office, however, agreed with the contracting officer and rejected this position. We stated:

* * * By inserting the word "All" in the maximum quantity column, opposite each of the four destinations shown on Forms 369-1 and 369-2, you stated, in effect, that you were bidding upon that definite number of units specified in the preceding "Quantity (Number of Units)" column for each of the installations
* * *

You contend that the reasoning of the above cited cases applies equally to the instant case. You maintain that Sterling's use of the "all or none" language, particularly the use of the phrase "are bid as a total," indicates that Sterling was bidding on the exact quantity set forth in the "Quantity-Estimated" column for each of the 33 items rather than on a "requirements" basis. Thus, you conclude that Sterling's bid was nonresponsive to the Government's need for a "requirements" contract.

Additionally, you maintain that at the very least the "all or none" language rendered Sterling's bid ambiguous as its intent is not clear from a reading of its bid. You then point out that the ambiguity cannot be explained after bid opening, citing for example 45 Comp. Gen. 800, 804-5 (1966). You therefore request that Sterling's bid be rejected as nonresponsive and that all 33 items under the solicitation be awarded to Martin.

The Comptroller General decisions you cite for the proposition that Sterling's "all or none" language indicates that it was bidding on the exact quantities set forth in the schedule as the estimated quantity for each of the 33 items, rather than on a requirements

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bids, are distinguishable from the present case. In the procurements involved in those decisions only one item was being procured and maximum and minimum quantities were specified in the solicitation. Thus, when the bidders stated "all or none" it was reasonable to conclude that they intended to bid on only the maximum quantity specified.

In the instant solicitation, however, no "maximum" and/or "minimum" limitations are stated. Furthermore, section D of the solicitation reads in relevant part:

* * * bids will be evaluated on the basis of advantages or disadvantages to the Government that might result from making more than one award (multiple awards). * * * individual awards will be for items and combinations of items which result in the lowest aggregate price * * *. (Under-scoring supplied.)

Thus, the solicitation clearly indicated that any of the 33 items in the schedule might be grouped together and awarded to one or more bidders in whichever grouping would be most advantageous to the Government.

It is our opinion that when Sterling's bid is viewed in light of the foregoing section, it must reasonably be interpreted to stipulate that award would be accepted only on items 1, 2, 5, 6, and 11 as a group; on items 3, 4, 7, 8, 9 and 10 as a group; and on items 12 through 31 as a group; and that award of individual items or any other combination of items would not be acceptable. We do not believe that the bid is reasonably susceptible of any other interpretation and to construe the qualifications as relating to item quantities rather than to groups of items is in our view unreasonable. By listing the items in the schedule in groups the bidder's intent is clear.

You also contend that Sterling may not be a responsible bidder within the meaning of Section 1, Part 9, of the Armed Services Procurement Regulation. You maintain it is likely that Sterling will not be able to obtain many of the ingredients necessary for satisfactory performance, and that the Government will be forced to alter its planned menus in order to accommodate Sterling's inability to perform.

In this connection, a preaward survey of Sterling was conducted by the cognizant Defense Contract Administration Service office and

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an affirmative recommendation made in a report dated March 7, 1973. On the basis of that report, which our Office has examined, the contracting officer determined that Sterling was a responsible prospective contractor. Our Office has consistently held that questions concerning the qualifications of a prospective contractor are primarily for resolution by the administrative officers concerned. In the absence of a showing of bad faith or arbitrary or capricious action, or lack of any reasonable basis for the determination, we are not justified in objecting to, or substituting our judgment for a determination made on this question by an administrative agency. See 49 Comp. Gen. 553 (1970); B-175922, October 17, 1972. Since no such showing has been made, we find no legal basis for overturning the agency's determination that Sterling is a responsible prospective contractor.

On the basis of the foregoing, your protest is denied.

Sincerely yours,

PAUL G. DEMBLING

For the Comptroller General
of the United States