Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Crawford Laboratories

File: B-277069

Date: August 29, 1997

David Schmetterer for the protester.
Marie Adamson Collins, Esq., General Services Administration, for the agency.
Wm. David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where agency provides no rational basis for its determination of price reasonableness of contract awards for primer coatings at prices more than double the award prices under the prior procurement for the same items.

DECISION

Crawford Laboratories protests the award of contracts under invitation for bids (IFB) No. TFTP-96-DJ-8009, issued by the General Services Administration (GSA) for primer coatings. Crawford contends that it was improperly not given the opportunity to compete for these items, that the award prices were unreasonable, and that the procurement should be recompeted.

We sustain the protest because the agency has provided no rational basis for its price reasonableness determination.

An October 23, 1996, Commerce Business Daily (CBD) synopsis of the procurement advised that the IFB would be issued on or about November 1, 1996, and that the contract performance period was January 1, 1997, through December 31, 1998. The IFB was issued on November 8, soliciting prices on four items covering GSA's estimated requirements for the period of January 1, 1997 (or the date of award if later) through July 31, 1998. By facsimile of October 30, Crawford requested a copy of the IFB. While GSA states that a copy of the IFB was "most likely" sent to Crawford, it has no proof that it was sent. Crawford was not on the bidder's list for the IFB--even though it was the incumbent contractor on three of the four items. On December 11, four bids were submitted on items 2 through 4, the only items relevant to this protest. Line items 2 and 3 each included two subline items: subline item (a) for five gallon cans and subline item (b) for one gallon cans; line item 4 covered only one gallon cans. One of the offerors requested withdrawal of its bid, which subsequently expired and was not further considered. The remaining three bids were as follows:

	Item 2	Item 3	Item 4
Griggs Paint	a. $244.70 b. 49.60	a. $241.80 b. 48.75	$49.60
Hanley Paint	a. 185.00 b. 39.00	a. 185.00 b. 39.00	39.00
Durant Paints	a. 185.75 b. 37.55	a. 190.75 b. 38.55	38.05

On March 18, Crawford telephoned GSA to inquire as to the status of the procurement and upon learning the status to ask why it had not been provided with a copy of the IFB. By letter of that date, Crawford also reminded the agency that it had been the awardee on items 2 through 4 under the prior IFB (issued in late 1994) for these requirements and alleged that the prices bid on the current IFB were more than double the prior award prices. Specifically, Crawford's prices under its 1994 contract were $86.20 for item 2(a), $17.57 for item 2(b), $86.89 for item 3(a), $17.38 for item 3(b), and $17.74 for item 4. GSA advised Crawford that no award decisions had been made.

Prior to the awards, the contracting officer determined that Hanley's and Durant's prices were reasonable. The contracting officer's price analysis recognized that the prices bid on the two subitems of item 3 were "substantially higher" than the prices that the agency had paid for those items on the prior contract. In fact, the bids were more than double the prices that the agency had paid previously. The record shows that the award prices for item 2 and item 4 also were more than double the prices for those items on the prior contract. To support the determination of price reasonableness, the contracting officer noted that there had been competition, with three bids "within a competitive range of each other" and that the Price Producers Index (PPI) for 1994-1997 showed the cost of the ingredients used to manufacture the primers had increased by 13.5 percent during that period.

On May 8, awards were made to Hanley on item 3 and Durant on items 2 and 4. Crawford learned of the awards on May 20 and protested on May 21.

Crawford's protest that the agency failed to solicit Crawford is untimely. Under our Bid Protest Regulations, this allegation was required to be filed not later than 10 days after the basis for protest was known, or should have been known. 4 C.F.R. § 21.2(a)(2) (1997). It is the duty of a protester to diligently pursue the information necessary to determine its basis of protest. Douglas Glass Co., B-237752, Feb. 9, 1990, 90-1 CPD ¶ 175 at 2. The record shows that the CBD synopsis which Crawford read advised that the solicitation would be issued on or about November 1. Although Crawford promptly requested a copy of the solicitation, the firm waited until March 18 to inquire further about the

procurement. We note that as the incumbent, Crawford knew that its contract expired at the end of 1996. In our view, it was not reasonable for the protester to wait 4-1/2 months before inquiring about the procurement. We have held in similar circumstances that delays of 3 and 4 months do not satisfy the requirement of diligent pursuit. Id.

Crawford also argues that the award prices were unreasonable. Although Crawford is untimely in protesting the failure to provide it with a copy of the IFB, its challenge to the reasonableness of the award prices is timely and we conclude that it is an interested party to raise that issue. An interested party is defined as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract." 31 U.S.C. § 3551(2) (1994); 4 C.F.R. § 21.0(a). Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. Black Hills Refuse Serv., 67 Comp. Gen. 261, 262 (1988), 88-1 CPD ¶ 151 at 2-3. Although Crawford did not submit a bid since it was not provided a copy of the IFB, despite its request and its status as the incumbent, based on the circumstances of this case, we conclude that Crawford has asserted sufficient interest in competing for a contract to warrant consideration of its challenge to the reasonableness of the award prices. See Singleton Contracting Corp., B-211259, Aug. 29, 1983, 83-2 CPD ¶ 270 at 2 (firm is interested party to protest award, because firm demonstrated its interest in competing by submitting a bid, albeit late, and would be a prospective bidder if protest is sustained and agency resolicits); cf. Loral Fairchild Corp., B-242957.2, Aug. 29, 1991, 91-2 CPD ¶ 218 at 5 (protester is not interested party where it chose not to submit a proposal); Roy's Rabbitry, B-196452.2, May 9, 1980, 80-1 CPD ¶ 334 at 2-3 (protester is not interested party to challenge the reasonableness of the award price where protester received a copy of the solicitation but voluntarily chose not to submit a bid).

The Federal Acquisition Regulation (FAR) provides that the contracting officer is responsible for selecting and using the price analysis techniques that will ensure a fair and reasonable price. FAR §§ 14.408-2, 15.805-2. The determination of price reasonableness involves the exercise of discretion on the part of the contracting officer, which our Office will not question unless it is clearly unreasonable or there is a showing of fraud or bad faith on the part of contracting officials. California Shorthand Reporting, B-250302.2, Mar. 4, 1993, 93-1 CPD ¶ 202 at 2. Notwithstanding our reluctance to reverse such determinations, we conclude here that the determination of reasonableness of the award prices for items 2 through 4 is not supported by the record.

The contracting officer compared Hanley's and Durant's bids to the prices previously paid (including those from Crawford's prior contract) for these items and concluded that the difference between the bids received here and the prices on the prior contract is explained by the 13.5-percent increase in cost of the ingredients

used to manufacture the primers--as set forth in the 1994-97 PPI. Crawford argues, and we agree, that the PPI for 1994-1997 does not support the price reasonableness determination. Even assuming the 13.5-percent increase used by the contracting officer is correct,[1] that increase in material costs does not explain the dramatic increase in prices. Absent any explanation from the contracting officer, we cannot see how the PPI increase shows the award prices here are reasonable. Further, the fact that these prices were the result of competition does not alter our conclusion that the price reasonableness determination is defective. While comparison of prices obtained competitively ordinarily may provide a basis for determining the reasonableness of prices, here, where all prices are significantly higher (at least double) than the prior contract prices, we think without some analysis or explanation for the higher current prices, the comparison of the bids alone is insufficient to support the determination. For example, FAR § 15.805-2 identifies a number of price analysis techniques--such as comparison of the prices received with the published price lists or market prices, an independent government estimate, or prices obtained through market research--which a contracting officer may use to ensure a fair and reasonable price.

In a supplemental explanation filed after submission of the agency report on the protest, the agency argues for the first time that the current solicitation represents reductions--in some cases of as much as 50 percent--in the estimated quantities compared with those under the prior contract, and that these reductions explain the higher prices bid under the current solicitation. The record includes no indication that this was a factor in the contracting officer's price reasonableness determination. Further, while the contracting officer now asserts "that the method of production for small quantities is often different and more expensive than the method of production [of] large quantities," there is no evidence in the record that the reduced estimated quantities were the reason for the increased prices.[2] The contracting officer made no attempt to verify that this was the case at the time of her price reasonableness determination (or afterward). Indeed, the record shows that the single bidder--Griggs--that bid on both this IFB and the previous IFB reduced its prices for all the items at issue here.

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[1]The PPI referenced by the contracting officer covers January 1994 through February 1997. Since the previous IFB was issued in late 1996, the award prices on the previous contract may very well have included that portion of the 13.5-percent price increase which was attributable to increases in ingredient costs which occurred in 1994.

[2]We note that Durant, one of the awardees, in a letter to GSA more than 2 months after the award, does not argue that it bid higher than Crawford's previous prices because it planned to use a different method of production than Crawford had used on the previous contract.

Although, in its supplemental explanation, GSA also suggests that Crawford's prices must be based on a noncompliant product, Crawford's lower prices on the prior contract apparently were based on a less expensive alternative formulation for the product which has been approved by the agency with authority to approve the product. In spite of the agency's after-the-fact explanation, other than the comparison of prices received under the current solicitation, the contracting officer apparently did not use any of the other price analysis techniques identified under FAR § 15.805-2. In short, the record lacks any meaningful support for the price reasonableness decision, and we conclude that the contracting officer failed to satisfy her obligation under FAR § 14.408-2 to determine that the award prices were reasonable.

Accordingly, we sustain the protest and recommend that the contracting officer reexamine the reasonableness of Hanley's and Durant's prices. Unless the contracting officer can adequately justify the reasonableness of those prices in accordance with FAR §§ 14.408-2 and 15.805-2, we recommend that the contracts on items 2 through 4 be terminated for the convenience of the government and be recompeted. Further, we recommend that Crawford be reimbursed its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). Crawford's certified claim for such costs, detailing the time expended and costs incurred, should be submitted directly to the agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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