01539

T. Przybylek
Proc II

DECISION

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

FILE: B-186550 DATE: February 17, 1977

MATTER OF: McCarthy Manufacturing Company

DIGEST:

1. Rejection of bid as unreasonably high, even though bid price is lower than initial Government estimate, is proper exercise of agency discretion where record shows that estimate was outdated and agency could reasonably determine that low bid price submitted by nonresponsive bidder accurately represented current fair market value of system that would satisfy Government's needs.

2. Although in two-step formal advertising divergent technical approaches may be acceptable to agency, costs associated with particular approach may not be acceptable, and Government need not take into account cost of more expensive approach or system in estimating reasonable price of system that would satisfy its needs. Further, where agency reports that higher bid price is due primarily to profit and overhead rather than to differences in technical proposals, Government estimate based on apparent cost of least expensive approach is not unduly prejudicial to bidder offering higher price.

3. Propriety of incorporating by reference in resolicitation various representations and certifications submitted by bidders as part of bids previously rejected is questionable with respect to legal effect and since bidders would be precluded from modifying previous answers. However, resolicitation document is not totally defective since provisions in question basically involve bidder responsibility and thus representations may be furnished after bid opening.

McCarthy Manufacturing Company (McCarthy) protests the award of a contract for a Media Retrieval System to Long Engineering (Long) by the General Services Administration (GSA) under solicitation D-W-01625-Q2. McCarthy alleges that the determination to reject all bids under step two of a two-step formally advertised procurement and to resolicit step two bids was improper; that such action did not enable bidders to compete on an equal basis; and that the resolicitation document was deficient.

FACTUAL BACKGROUND

On November 17, 1975, GSA issued Part 1 of a two-step formally advertised procurement, a request for technical proposals, to 19 prospective suppliers. The request called for an Electronic Instructional Media Retrieval System to be furnished, installed and made completely operational at the Bureau of Indian Affairs, Cherokee High School, Cherokee, North Carolina. Potential suppliers were admonished that the technical proposals were not to include prices or pricing information. Further instructions were provided to the effect that bids would be sought during the second step of the procurement from those firms whose technical proposals were judged acceptable either initially or as a result of discussions. Four technical proposals were received and after evaluation, three were determined to be acceptable.

Step two was initiated on March 19, 1976, by the issuance of an invitation for bids (IFB), No. D-W-01625-Q2, to the three firms with acceptable technical proposals. Bids were opened on April 19, 1976, as follows:

Long Engineering	$114,750.00
McCarthy Manufacturing Co.	$149,175.00
Hartman Systems	$212,954.00

Because of the disparity in bid prices, Long was asked to and did verify its bid.

On May 6, 1976, the contracting officer determined that no acceptable offer had been received. Long's bid was determined to be nonresponsive for failing to include taxes as required by the IFB. It was further determined that the bids of McCarthy and Hartman were not acceptable because they were excessive in price when compared to the Government estimate which was revised in light of Long's bid. The decision to reject all bids and readvertise was communicated to McCarthy on May 7, 1976, and was protested by McCarthy on May 10, 1976. Attempts to resolve the protest were unsuccessful and the resolicitation, seeking bids from the same contractors who had submitted acceptable technical proposals, was issued on May 13, 1976. Bids were received from the three offerors and were opened on June 1, 1976, with Long again submitting the lowest bid. Award was not made immediately due to the pendency of this protest. However, on July 29, 1976, award was made to Long following a determination by GSA that any further delay would result in substantially increased costs to the Government.

1. REJECTION OF ALL BIDS AND RESOLICITATION

McCarthy alleges that the rejection of its bid under the original solicitation, and therefore the resolicitation, were improper. McCarthy asserts that the contracting officer improperly revised the Government estimate after bid opening on the basis of the nonresponsive and very low bid submitted by Long and upon this revision improperly determined McCarthy's bid price to be excessive, even though that bid price was less than the original Government estimate.

Federal Procurement Regulations § 1-2.404-1(b)(5) (1964 ed.) authorizes cancellation of an IFB after bid opening when all the acceptable bids received are at unreasonable prices. We have held that the rejection of bids based on a determination of price unreasonableness is a matter of administrative discretion which will not be questioned barring fraud or bad faith or unless it is otherwise unreasonable. Hercules Demolition Corporation, B-186411, August 18, 1976, 76-2 CPD 173; Ward Leonard Electric Co., Inc., B-186445, July 20, 1976, 76-2 CPD 98.

Here, GSA explains the basis upon which it formulated its revised estimate after bid opening as follows:

> "A Government estimate normally reflects the fair market value of the item being procured and is used as a guideline to assess the reasonability of the offers received. In this instance, the [original] estimate was made four years prior to the procurement and was based on systems available at that time. In the course of the instant procurement, we learned that the cost of such systems has substantially declined and that the Government estimate no longer reflected current market trends. * * * After reviewing the bids received, the contracting officer determined that a media retrieval system sufficient to meet the Government's requirements could be attained at a price substantially below the Government estimate."

We see nothing unreasonable or improper with GSA's actions. It is GSA's view, and McCarthy has submitted no evidence to the contrary, that the original Government estimate was outdated and excessively high and that the Long Engineering bid accurately

reflected the fair market price of a system that would meet the Government's needs. In this regard, we point out that the fact that McCarthy's initial bid was below the original Government estimate has little bearing on the reasonableness of that bid price, B-164931, September 5, 1968, and that nonresponsive bids may be used to determine what is a reasonable price. Support Contractors, Inc., B-181607, March 18, 1975, 75-1 CPD 160; B-164931, supra. McCarthy has not shown that the use of Long's nonresponsive bid either in revising the Government estimate or in gauging the reasonableness of McCarthy's original bid was unwarranted or unreasonable. Although McCarthy alleges that Long cannot perform at its unrealistically low price, it has not shown on this record that GSA abused its discretion in determining that Long's verified bid did represent a fair and reasonable price. Therefore, we find this aspect of the McCarthy complaint to be without merit.

2. EQUAL BASIS FOR COMPETITION

McCarthy's next allegation is that "the Government has not allowed the bidders to be on the same footing." Apparently McCarthy is concerned that since the Government specifications permitted widely divergent technical proposals to be considered acceptable, any estimate of reasonable price which is based on the lowest-priced technical approach will put offerors on an unequal footing.

We find no merit to this contention. Although in two-step formal advertising different technical approaches with correspondingly different prices are to be expected, the Government is not required to pay more than what it should reasonably have to pay to satisfy its needs. The fact that a particular method or approach may be technically acceptable to the Government does not mean that the costs associated with the technically acceptable proposal necessarily will be acceptable also. In any event, GSA reports that:

> "* * * a comparison of McCarthy's bid with the low offer reveals that the difference in price is not due to differences in technical proposals. The equipment offered is largely either equivalent or comparable. This agency has therefore concluded that the price disparity is due not to technical differences, but to factors such as profit, administrative overhead, and the prices at which the bidders are able to obtain equipment from their respective suppliers."

Accordingly, we do not find that GSA acted improperly or that McCarthy was unduly prejudiced with respect to how the revised estimate was formulated.

3. DEFICIENCIES IN RESOLICITATION

McCarthy complains that the resolicitation was deficient because certain pages were missing from the reissued IFB and because the IFB did not properly restrict who could submit a bid and on what basis.

The reissued IFB consisted of three pages. Pages 1 and 2 were the front and reverse sides of Standard Form 33. Page 3 recited that "This is a readvertisement for requirements as detailed in Solicitation D-W-01625-Q2 * * *," and stated:

> "All terms and conditions in this Readvertisement remain the same as those cited in Solicitation D-W-01625-Q2 * * *."

There followed a space for the bidder to insert a price for Item No. 1, identified as an electronic instructional media retrieval system.

McCarthy argues that this abbreviated IFB prejudiced its opportunity to bid properly by precluding it from modifying its position with respect to various provisions and certifications dealing with:

- affirmative action
- clean air and water
- source inspections
- production points
- contract administration
- minority business enterprise
- employment of the handicapped.

GSA states that the quoted statement incorporated by reference the pages and clauses contained in the original IFB and that this permitted "intelligent bidding by all interested parties."

While the incorporation by reference of standard contract and solicitation terms and conditions is a recognized practice, see, e.g., FPR 88 1-16.101(a), 1-16.105, we have some doubt as to the propriety of incorporating by reference bidder certifications and representations which were made in connection with a

bid that was not accepted by the Government. Where a bidder must complete certain representations and certifications by checking boxes reflecting affirmative or negative replies, we think the legal efficacy of incorporating by reference the responses submitted in connection with a prior bid is subject to question. Also, as the protester points out, this type of incorporation by reference deprives the bidder of an opportunity to provide a certification reflecting the bidder's current situation.

Nevertheless, we do not view the resolicitation as fatally defective. It is clear that the provisions in question basically are informational in nature and as such bear on the question of bidder responsibility, with the result that the certifications and representations need not be furnished with the bid, but may be completed after bid opening. See, e.g., Bryan L. and F. B. Standley, B-186573, July 20, 1976, 76-2 CPD 60; Royal Industries, B-185571, March 1, 1976, 76-1 CPD 139; Allis-Chalmers Corporation, 53 Comp. Gen. 487, 489 (1974), 74-1 CPD 19. Accordingly, we do not find that any bidder could reasonably be prejudiced by the absence from the resolicitation of the pages in question.

McCarthy's final complaint is that the language in the resolicitation would allow any "active bidder" to submit a bid and would permit a bidder to bid on any one of the three acceptable technical proposals submitted during step one. We disagree. As indicated above, the reissued IFB incorporated the terms and conditions of the original solicitation. The original IFB specified that it was being issued "pursuant to two-step formal advertising procedures" and that bids would be considered "only from those firms who have submitted acceptable technical proposals * * *." It was further indicated that each bid submitted under step one had to be based on the bidder's own technical proposal as accepted by the Government. Thus, we see no basis for McCarthy's complaint.

The protest is denied.

R. F. Keller

Acting Comptroller General
of the United States