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Michael Boyle
Proc. I

DECISION



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

FILE: B-188194

DATE: April 7, 1977

MATTER OF: Sis-Q Flying Service, Inc.

DIGEST:

1. After bid opening, Forest Service waived IFB requirement that bids state number of bases for which award would be accepted. Protester's contention that all bids not containing that information are nonresponsive is without merit because waiver of that requirement would not materially alter legal obligations of parties.
2. Contention that firm whose equipment was being modified to meet IFB requirements at time of preaward survey did not have capability to perform under contract will not be considered, since procuring activity determinations of affirmative responsibility are no longer reviewed by our Office, except in limited circumstances not present here.
3. Protester contends that separate bids, prepared and signed by one person, and submitted by affiliated firms violated certification of independent pricing provisions of IFB and must be rejected as nonresponsive since dissimilar item prices could have prejudiced Government and other bidders in circumstances of this procurement. Here neither Government nor other bidders were actually prejudiced; therefore, it cannot be concluded that bids violated independent pricing provisions.

Sis-Q Flying Service, Inc. (Sis-Q) protests any award under Department of Agriculture, Forest Service, invitation for bids (IFB) No. 49-77-01 for air tanker services to: (1) any contractor who failed to state in its bid the number of bases for which award would be accepted; (2) any contractor who does not own or have a firm commitment for appropriate air tankers at the time of bid opening; and (3) T.B.M. Inc. and Butler Aircraft, Inc. (Butler) because their bids were prepared by the same person allegedly in violation of the "Certification of Independent Price Determination."

ALLEGED NONRESPONSIVE BIDS

The IFB contained 32 line items listing designated bases and provided that award would be made by item based on the lowest daily availability rate bid for the guaranteed period. The IFB also included the following statement:

"Qualification of Bid

"The same aircraft and crew may be offered on more than one base. Bidders must specifically indicate the number of bases for which award may be accepted.

"Total number of bases for which award will be accepted _____" (Emphases supplied.)

The request for information concerning bases was a departure from prior Forest Service procurement practice requesting information on the number and type of air tankers for which award would be accepted. Since a base could have from 1 to 3 air tankers of different types, the information requested did not seem to be relevant. Of the 21 bidders, several provided information on the number of bases, others left the information blank, and the remainder lined out "bases," wrote in "air tankers" and provided a number. After bid opening, the Forest Service decided to waive the Qualification of Bid requirement for all bidders.

Sis-Q contends that the information requested was mandatory and may not be waived. Sis-Q concludes, therefore, that any bid not providing the number of bases for which award would be accepted is non-responsive.

In response, the Forest Service contends that the information requested does not go to the essence of the contract because evaluation of the number of bases and air tankers to be awarded is not made until after bid opening and the preaward survey. The Forest Service notes that bidders were permitted to offer the same air tanker and crew on more than one base so that award was possible on a base other than a bidder's first preference. The Forest Service also notes that Sis-Q, with nine qualified air tankers, bid on nine bases (4 bases requiring 3 air tankers each, 1 base requiring 2 air tankers, and 4 bases requiring 1 air tanker) for a total of 18 air tankers and thus was not prejudiced by either the original inclusion of the Qualification of Bid clause or its subsequent deletion. Finally, the Forest Service contends that our recent decision, City Ambulance of Alabama, Inc.,

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B-187964, January 13, 1977, 77-1 CPD 29, supports the view that the number of bases or air tankers for which award would be accepted is information concerning responsibility which can be provided after bid opening.

Sis-Q contends that City Ambulance of Alabama, Inc., is distinguishable because it involved minor informalities on the part of an otherwise responsive offeror. Instead, Sis-Q refers to Ballard E. Spencer Trust, Inc. v. Morton, 544 F.2d 1067 (10th Cir. 1976), as an applicable case for our consideration.

In Ballard E. Spencer Trust, Inc., the Bureau of Land Management (BLM) published notice of oil and gas lands available for leasing. Leases were to be issued by random drawing to the first drawee qualified to receive a lease. In order to be qualified, each interested party was required to state on or with its entry card certain corporate information or the serial number of the BLM file in which the information was held. The appellant's card was drawn first for a particular parcel but rejected for failure to provide the required information. Administrative appeals upheld the rejection of the appellant's offer, holding that compliance with the corporate qualification requirement was reasonable. The district court upheld the agency's determination and on appeal the circuit court affirmed, finding that the information was clearly required and that the agency's actions were not arbitrary, capricious or an abuse of discretion.

We believe that the Ballard E. Spencer Trust, Inc., decision is not applicable here because presumably the court found that the information required by the terms of the application card and the implementing regulations served a useful purpose. In this case, the Forest Service indicates that the requirement to state the number of bases for which award would be accepted was inadvertent and that the number of aircraft was intended instead. While the inadvertence has been disputed, no useful purpose for the information on bases has been disclosed; nor is any apparent to us. We do not believe that the competitive system is served by literal enforcement of requirements which serve no useful purpose where the result is to disqualify an otherwise low acceptable bid.

As stated in City Ambulance of Alabama, Inc., whether the failure to supply required information is a matter of responsiveness depends upon the impact of the information. To affect responsiveness, it must be of such consequence that failure to submit the information with the bid would materially alter the legal obligations that flow from any resultant contract. Control Power Systems, Incorporated, B-183603, September 16, 1975, 75-2 CPD 149.

We note that in past procurements for air tanker services, as in this procurement, the number of bases for which award would be made is determined after bid opening and after the preaward survey. In this

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case, the requested information was not required before bid opening because it added nothing. In that connection, we note that under the terms of the "Offer" section on the face sheet of the IFB the bidders had agreed "to furnish any or all items upon which prices are offered." Since the legal obligations of the parties would not be materially altered by the Forest Service's waiver of the Qualification of Bid provision, the failure to state the number of bases for which award would be accepted was a minor deviation that did not affect the responsiveness of the bids.

ALLEGED NONRESPONSIBLE BIDDERS

Sis-Q contends that only those bidders who, at the time of bid opening, possess a modified aircraft approved by the National Air Tanker Screening and Evaluation Board would be able to meet the IFB's requirement that air tanker services be ready 30 days prior to the beginning of the contract guarantee period. Specifically, Sis-Q argues that a bidder who has an aircraft that is being modified after bid opening to comply with IFB's requirements does not have a qualified air tanker and, therefore, is not responsible. Sis-Q further argues that the Forest Service should not accept a "flow chart" as evidence that necessary aircraft modification can be accomplished prior to the time required by the IFB.

The Forest Service indicated that this year, as in past years, the preaward survey team would visit each apparent low bidder and make a responsibility determination. If the air tanker was not ready but a satisfactory "Flow Chart and Progress Schedule" was produced, award would be made. The Forest Service noted that the contractor would then be subject to termination for default if it cannot be "on line" as required by the contract.

We note that Sis-Q has not presented a specific case where it objects to an affirmative determination of responsibility by the Forest Service. While we presume that Sis-Q's reservations were considered by the Forest Service in making such determinations, our Office has discontinued the practice of reviewing protests against affirmative determinations of responsibility, except in limited situations not applicable here. See T & G Aviation, B-186096, June 21, 1976, 76-1 CPD 397. Accordingly, Sis-Q's contention will not be considered.

**ALLEGED VIOLATION OF THE "CERTIFICATION
OF INDEPENDENT PRICE DETERMINATION"**

Sis-Q contends that since the bids of T.B.M. and Butler were prepared by the same person and since each "Certification of Independent Price Determination" was signed by that person, both bids must be rejected as nonresponsive and violative of section 8 of the IFB, which stated:

**"8. CERTIFICATION OF INDEPENDENT PRICE
DETERMINATION (See par. 18 on SF 33-A.)**

"(a) By submission of this offer, the offeror certifies * * * that in connection with this procurement:

"(1) The prices in this offer have been arrived at independently, without consultation, communication, or agreement, for the purpose of restricting competition, as to any matter relating to such prices with any other offeror or with any competitor; [and]

"(2) Unless otherwise required by law, the prices which have been quoted in this offer have not been knowingly disclosed by the offeror and will not knowingly be disclosed by the offeror prior to opening in the case of an advertised procurement or prior to award in the case of a negotiated procurement, directly or indirectly to any other offeror or to any competitor * * *.

* * * * *

"(b) Each person signing this offer certifies that:

"(1) He is the person in the offeror's organization responsible within that organization for the decision as to the prices being offered herein and that he has not participated, and will not participate, in any action contrary to (a)(1) through (a)(3) above * * *."

Sis-Q argues that the dissimilar prices offered by T.B.M. and Butler on the same items prejudiced other bidders and the Government by using the following bidding pattern:

"One of the companies would bid a high price, the other a lower one. If an independent bidder submits a bid which falls between the two prices, the lower priced of the T.B.M.-Butler entities would get the contract. However, if no company submits a bid lower than the higher of the two bids submitted by the T.B.M.-Butler entities, the T.B.M.-Butler entity submitting the lower bid could simply inform the Forest Service that it has no air tankers available. The award then would go to the next lowest bidder, which is the other member of the T.B.M.-Butler corporate enterprise. The bill for the higher prices is paid for by the United States Government, with a corresponding reduction in the amount available for air tanker services.
* * *

The Forest Service has determined that the T.B.M. and Butler bids are responsive. T.B.M. and Butler concur with the Forest Service because: (1) no showing has been made that the bids resulted from any consultation, communication or agreement between competitors; (2) the bids were not submitted for the purpose of restricting competition; and no prejudice to the other competitors or the Government resulted; and (3) even if the bids were determined to be collusive, any award under the IFB without either a new IFB or negotiation would be improper.

T.B.M. and Butler's first argument is premised upon their view that an exchange of ideas between two parties is required to show a violation and here only one person is involved. In support, T.B.M. and Butler rely primarily on our decision at 51 Comp. Gen. 403 (1972). There we held that separate bids in different amounts, computed and signed by one person, and submitted by affiliated firms did not prejudice the Government and did not constitute a reasonable basis for concluding that the elimination of competition was attempted. We find no support in 51 Comp. Gen. 403 for T.B.M. and Butler's first argument that an exchange between two parties is required. Instead, that decision and the other decisions cited by T.B.M. and Butler hold that one person submitting multiple bids for affiliated firms may violate the independent pricing clause if actual prejudice to the Government or other bidders can be shown. See Dynamic International, Inc.--Request for Reconsideration, B-183957, December 29, 1975, 75-2 CPD 412; Informatics, Inc., B-181642, February 28, 1975, 75-1 CPD 121; B-166291, April 16, 1969; 39 Comp. Gen. 892 (1960).

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T.B.M. and Butler's second argument is that no prejudice to other bidders or the Government resulted from their bidding pattern where their bids were not identical, as evidenced from the following information:

<u>Item No.</u>	<u>Base</u>	<u>T.B.M.</u>	<u>Butler</u>	<u>Sis-Q</u>	<u>Low Bid</u>
2	Tri-Cities	\$ 558	\$ 496	None	\$442.98
9	Cedar City/ McCall	558	519	None	500.00
10	Reno	1,199	1,099	None	570.00
11	Boise	884	746	None	574.00
18	Paso Robles	557	550	None	342.94
23(b)	Knoxville	924	954	\$1,087	759.60
25(a)(b)	Redmond	893	892	1,114	Butler
(c)	Troutdale	893	892	1,130	Butler
28	Porterville	555	560	None	385.00

While Sis-Q has shown how affiliated bidders submitting dissimilar bids on the same items could theoretically prejudice the Government or other bidders, a review of T.B.M. and Butler's bidding pattern has shown that neither the Government nor any other bidder was actually prejudiced. Absent a finding of such prejudice, we cannot conclude that T.B.M. and Butler's bids were in violation of the independent pricing clause. 51 Comp. Gen. 403; 52 Comp. Gen. 886, 899-900 (1973), and decisions cited therein. Consequently, we have no need to consider T.B.M. and Butler's third argument.

Accordingly, Sis-Q's protest is denied.

Acting


Comptroller General
of the United States