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DECISION



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

[Protest Against IFB Cancellation]

FILE: B-198259

DATE: August 11, 1980

MATTER OF: McNamara-Lunz Vans & Warehouses, Inc.

DIGEST:

1. Low small business bid under small business set-aside was 100 percent higher than bid price submitted by firm determined not to be a small business and 100 percent higher than small business' price for similar service in prior year. Contracting officer, notwithstanding allegation that large business' bid was "low-ball," believed price could be matched on open market; therefore, agency acted reasonably in canceling and withdrawing total small business set-aside procurement to resolicit requirement involved on unrestricted basis.
2. Contracting officer can properly compare small business bid under set-aside with price submitted by large business to determine reasonableness of small business bid.
3. Allegation of predatory pricing is for review by appropriate antitrust agencies, not GAO.
4. To extent questions about timely processing of procurement are meant to be ground of protest, protest is untimely filed under GAO's Bid Protest Procedures (4 C.F.R. Part 20 (1980)), since questions should have been made subject of protest considerably before receipt of protest by GAO in March 1980.

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McNamara-Lunz Vans & Warehouses, Inc. (McNamara), protests the cancellation of Schedule II of invitation for bids (IFB) No. F41800-80-B-0024 issued on November 12, 1979, by the Department of the Air Force for the packing, crating and drayage of consolidated household goods for Bexar and 22 contiguous counties.

The subject solicitation was a 100 percent small business set-aside for bids on three schedules; Schedule I was for outbound services, Schedule II was for inbound services, Schedule III was for interarea moves. These requirements are purchased on an annual basis. This year, a number of changes were required after solicitation issuance and three amendments were issued. As a result, bid opening was delayed until January 18, 1980.

When bids were opened, it was determined that Central Forwarding, Inc. (Central), was the low bidder on all three schedules. McNamara, the incumbent contractor for Schedules I and II, was the only other bidder on those schedules, but did not bid on Schedule III. A preaward survey of Central cast doubt on its self-certification as a small business, and the contracting officer requested a small business size determination from the Small Business Administration (SBA). On February 26, 1980, the SBA determined that Central was a large business and not eligible to participate in the bidding under the small business set-aside. Consequently, the contracting officer turned to the next lowest bidder, McNamara, for Schedules I and II.

After comparing the bid prices on Schedule I with previous prices paid to McNamara, Central's prices, and prices paid at other Air Training Command bases, the contracting officer determined McNamara's bid on Schedule I (which was only about 17 percent higher than Central's comparable prices) was reasonable and awarded McNamara the Schedule I contract. As for the other two schedules, the contracting officer determined that McNamara's prices for Schedule II and the only other small business bidder's prices for Schedule III were unreasonable. In McNamara's case, the determination was based on the fact that McNamara's prices

were approximately 100 percent higher than Central's, and approximately 100 percent higher than the prices paid McNamara in 1979. As a result, the small business set-aside was withdrawn and bids for Schedules II and III were resolicited from both large and small business firms. Central bid the same on the resolicitation and was awarded a contract for the requirement.

Since McNamara has been awarded the contract for Schedule I and did not bid on Schedule III, this protest concerns Schedule II. McNamara questions whether the contracting officer acted properly in rejecting its bid as unreasonable, canceling the solicitation and reopening the competition to large business. McNamara contends that its bid was justified and legitimate and that its reasonableness should not be judged in comparison with Central's bid which McNamara characterizes as a "low-ball" designed to break the small business set-aside and operate the contract at a loss for this year in order to eliminate set-asides in future years; moreover, McNamara questions why only two bidders were held to be a sufficient number of bidders to determine a fair and reasonable price under Schedule I but not under Schedule II. Finally, McNamara has raised a number of questions about the processing of the procurement.

Cancellation of an IFB after bid opening is authorized when all the acceptable bids received are at unreasonable prices. Defense Acquisition Regulation (DAR) § 2-404.1(b)(vi) (1976 ed.). Schottel of America, Inc., B-190546, March 21, 1978, 78-1 CPD 220. Similarly, DAR § 1-706.3(a) authorizes the withdrawal of a small business set-aside based upon a proper determination that the bids received from small business concerns are unreasonable. It is for the contracting officer to determine the reasonableness of price (DAR § 1-706.3(a)), and we will not second-guess a contracting officer's determination absent a showing of unreasonableness. North American Signal Company--Reconsideration, B-190972, August 4, 1978, 78-2 CPD 87, and decisions cited therein. Therefore, the issue in this case becomes the reasonableness of the determination that McNamara's price was unreasonable.

In the present case, McNamara's bid on Schedule II was 100 percent higher than the prices paid McNamara for the prior year and almost 100 percent higher than the low ineligible bid by Central. Concerning these pricing facts, we have held that large business bids on small business set-aside procurements may be considered in determining whether small business bids submitted in the procurement are reasonable. Tufco Industries Incorporated, B-189323, July 13, 1977, 77-2 CPD 21. Moreover, the contracting officer has the discretion to conclude that even an unusually low bid by a large business represents a price which reasonably could be expected, as here, to be obtained on the open market. Jig Boring Specialties, Inc., B-192878, February 15, 1979, 79-1 CPD 189. Moreover, as noted above, the cancellation of Schedule II was also based on a comparison with McNamara's 1979 prices for this same work. Therefore, we cannot question the contracting officer's finding concerning McNamara's bid on Schedule II even though there were two bids received on this schedule.

We note, moreover, that had bids been opened and awards made prior to December 31, 1979, as originally planned, the Air Force states Central would have qualified as a small business since its receipts for fiscal year 1978 were less than \$7 million, the small business size standard. When bid opening was extended into January 1980, Central's most recent fiscal year for small business purposes became 1979, in which its receipts exceeded \$7 million, thereby making Central a large business for purposes of this procurement. Central's bid on the readvertised open competition was the same as its bid on the small business set-aside. Thus, McNamara's accusation of "low-balling" is not supported to the extent the accusation relates to a bid which is not seriously intended. In any case, contentions regarding alleged predatory pricing by a large business are for consideration by the appropriate antitrust enforcement agencies, not our Office. See 15 U.S.C. § 13(a), 21(a) (1976). North American Signal Company--Reconsideration, supra.

As part of its general protest, McNamara also insists that it should have been awarded a Schedule II contract with a clause permitting audit and recapture of any excess profits. The Air Force has replied to this argument, as follows:

"In this regard, McNamara references a clause in the contract permitting recovery of excess profits. We are not aware of any such clause except for one which was rescinded when the Renegotiation Act expired. However, even if the clause was still in effect, it was never intended as a substitute for adequate cost or price analysis. In any event price, not cost, is the governing factor in formally advertised solicitations and McNamara's price for Schedule II was clearly excessive."

We cannot question the Air Force's position on this part of the protest.

As to McNamara's concerns about the processing of the procurement, the contracting officer has replied, as follows:

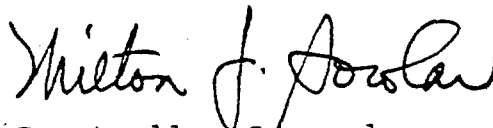
"This office does not make an award of a contract unless and until a determination is made that the price is fair and reasonable. This contract was not awarded prior to 31 December 1979 due to the end of the fiscal year crunch. Preparation of the solicitation had to be delayed. All requirements beginning 1 Oct 1979 had to be funded and signed and there was an unusually heavy workload and shortage of personnel at that particular time.

"The solicitation was issued 12 Nov 79. On 29 Nov 79 bid opening was extended indefinitely by F41800-80-B0024-0001 due to a review by ATC/LGCC. On 14 Dec 79 Amendment Number F41800-80-B0024-0002

was issued and bid opening date set for 11 Jan 80. Due to administrative review of amendment F41800-80-B0024-0002 by higher Headquarters, Amendment F41800-80-B0024-0003 was issued 8 Jan 80 extending the bid opening date to 18 Jan 80. The old contract had to be bi-laterally extended for ninety (90) days to allow time for a pre-award survey and to gather information incident to justifying prices for an award or to reject if appropriate. * * * Another thirty (30) days were necessary to allow time to readvertise Bid Schedule II and III."

To the extent McNamara's concerns about timely processing are meant to be a ground of protest against the continuation of the procurement past December 31, 1979, these concerns should have been made the subject of a protest under our Bid Protest Procedures (4 C.F.R. Part 20 (1980)) long before March 1980, when the protest was received by our Office. See 4 C.F.R. § 20.2. Since this ground of protest is untimely filed with our Office, it will not be considered.

[Protest denied in part and dismissed in part.]



For the Comptroller General
of the United States