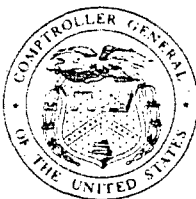


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DECISION



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

FILE: B-198833

DATE: August 14, 1980

MATTER OF: The Ellis Company

DIGEST:

Contracting agency's requirement that bidders offer five-year warranty of materials and workmanship for installation of built-up roofing was not unduly restrictive of competition where warranty obligations were set forth in IFB, estimated cost of compliance therewith could be included in bid prices, use of warranty was consistent with industry practice, and 11 small business bidders other than protester did not object to warranty requirement.

The Ellis Company (Ellis) has ~~protested~~ *Against the* the inclusion of a requirement that the contractor provide a five-year warranty for work done under invitation for bids (IFB) N62474-79-B-5440, which was for the replacement of roofing on warehouses at the Marine Corps Logistic Base, Barstow, California. The procurement was totally set aside for small business concerns.

Before bid opening, Ellis protested to the contracting officer the issuance of an amendment to the IFB which provided that the contractor shall warrant for five years that the built-up roofing is free from defective materials and workmanship. (Failure to make repairs would constitute grounds for having the repairs performed by others and the cost billed to the contractor.)

Ellis contended that the warranty requirement was a burdensome one to small business roofing contractors and "discriminated" against this segment of the construction industry because other trades were generally only required to warrant their work for one year. In addition, Ellis

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argued that the small business roofing contractor should not be exposed to the potential liability of a five-year warranty because of its limited control of the quality of the installation: according to Ellis, the materials used are manufactured to complex specifications by large businesses and are installed by the contractor under close Government supervision. Ellis suggested that it was inequitable to hold it responsible for the installation over a five-year period when it was merely installing products made by others and the installation was being done to Government specifications and inspected by Government employees.

The contracting officer denied Ellis' protest and proceeded with the bid opening as scheduled. Thirteen bids were received: Ellis' was tenth low and was qualified by a cover letter which stated "Bid based upon one (1) year guarantee as stated in original bid documents." Ellis then protested to our Office. After finding that a prompt award would be advantageous to the Government, as required by Defense Acquisition Regulation § 2-407.8(b), the Navy awarded a contract to the second low bidder despite the pendency of the protest. (The low bidder was not a small business concern and was ineligible for award.)


We note that in denying Ellis' protest prior to bid opening, the contracting officer stated that the Navy's current experience with built-up roofing had shown that a five-year warranty was necessary. In this case, therefore, a conflict is created by the Navy's insistence upon a warranty which it believes is necessary for the Government's protection and Ellis' reluctance to expose itself to the liability which such a warranty might entail.

We have considered this issue before in deciding an earlier protest by the same firm in which it objected to the use of five-year warranty provisions by several military departments. The Ellis Company, B-189390, B-189937, January 27, 1978, 78-1 CPD 70. In our 1978 decision, we pointed out that contracting agencies have wide discretion in formulating specifications to fulfill their legitimate needs and that we would not substitute our judgment for that of the contracting agency unless the protester showed by clear and convincing evidence that a contract awarded on the basis of such specifications would have resulted from an undue restriction

on competition and be in violation of law. We concluded that an undue restriction of competition was not present where the solicitation clearly apprised bidders of their warranty obligations, bidders could include the estimated cost of complying with the warranty in their bid prices, five-year warranties were increasingly required by Government agencies and private corporations and an average of over four bids were received in response to each of several solicitations requiring a five-year warranty.

The same conclusion is appropriate in this case, especially in view of the number of other small business concerns who bid on the basis of a five-year warranty without objection. Excluding the low bidder, who eventually was found not to be a small business concern, there remained 11 bidders, other than Ellis, who offered a five-year warranty.

The protest is denied.


For the Comptroller General
of the United States