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Boyle

DECISION



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

18495

FILE: B-203098

DATE: June 16, 1981

MATTER OF: ABC Demolition Corporation

DIGEST:

1. Contention that grantee's solicitation provisions are improper will not be considered on merits since basis of complaint was not filed within reasonable time. To be considered by GAO, complaint should have been filed prior to bid opening.
2. Solicitation provided that, if any bidder offered reasonable price and met female-owned business utilization goal of one-tenth of 1 percent, grantee would presume conclusively that any bidder requesting waiver of goal would be ineligible for waiver and award. Grantee, with concurrence of grantor, arbitrarily rejected low bid (\$243,000) and accepted second low bid (\$343,875) solely on reasonableness of second low bid without any consideration of reasonableness of low bid and insignificant impact that goal had on overall cost of work.

ABC Demolition Corporation (ABC) complains against the rejection of its low bid in response to invitation for bids (IFB) No. CA-428 issued by the Port Authority of Allegheny County, Pennsylvania (Port Authority), for demolition of a parking garage. The project is 80 percent funded by the Urban Mass Transportation Administration, Department of Transportation (UMTA).

UMTA concurred in the Port Authority's determination to reject ABC's bid on the grounds

[Protest of Low Bid Rejection]

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that ABC failed to exert sufficient reasonable efforts to meet minority business goals. ABC contends that the minority business goals are unconstitutional and unenforceable and that the Port Authority should have permitted ABC to change its bid after bid opening to comply with the goals.

We find that the grantee's rejection of the low bid was arbitrary.

The IFB established a one-tenth of 1 percent goal for female-owned business utilization and provided that, if after diligent and conscientious effort the bidder could not reach the goal, the bidder must submit a request for waiver with its bid. The IFB provided that if any bidder offering a reasonable price met the goals, the Port Authority would presume conclusively that all bidders failing to meet the goals did not exert sufficient reasonable efforts and, consequently, would be ineligible both for a waiver and for award of the contract.

ABC submitted the low bid at \$243,000, but ABC requested a waiver from the female-owned business utilization goal. The second low bid was submitted by Crown Wrecking Company, Inc. (Crown), at \$343,875, and the Port Authority determined that Crown's bid was responsive and that the price was reasonable. UMTA concurred with the Port Authority's determination that Crown's price is reasonable. An estimate for the work in the amount of \$325,000, which is within 6 percent of Crown's bid price was prepared by consulting engineers prior to bid opening. The record also shows that two other bids were received in the amounts of \$385,000 and \$363,700, which are within 13 percent of Crown's bid price and the other two bids. The Port Authority determined that, under the IFB's provisions, ABC's bid was not eligible for consideration. After bid opening, ABC advised the Port Authority that its request for waiver was no longer necessary since ABC was now able to meet the goal. The Port Authority determined that ABC's effort to withdraw its waiver request was too late to be considered. Subsequently, with UMTA's concurrence, award was made to Crown.

ABC initially contends that the IFB's provisions regarding goals, waivers, and conclusive presumptions

are improper for several reasons. However, ABC's complaint concerns alleged improprieties in the grantee's solicitation which was not, but should have been, filed prior to the bid opening. Accordingly, we conclude that this complaint was not filed within a reasonable time and it will not be considered on the merits. Caravelle Industries, Inc., 60 Comp. Gen. ____ (B-202099, April 24, 1981), 81-1 CPD 317.

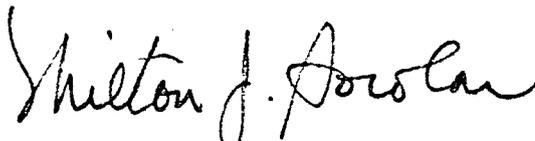
ABC contends that the conclusive presumption provision was arbitrarily and capriciously applied by the Port Authority because Crown's bid was not reasonably priced, since Crown's bid was 41.5 percent higher than ABC. We agree.

Both UMTA and the Port Authority apparently applied the conclusive presumption and rejected ABC's bid solely on the reasonableness of Crown's bid based on the close proximity of the Crown bid with the Government estimate and the other two bids without any consideration to ABC's bid price and the insignificant impact that the goal had on the overall cost of the work. The goal was one-tenth of 1 percent, whereas the difference between ABC's \$243,000 bid and Crown's \$343,875 bid was just over \$100,000. This means that Crown's commitment to a goal of only \$343 in terms of its bid price resulted in an award in excess of \$100,000 over the low bid. We fail to see any rationale for UMTA's and the Port Authority's determination that Crown's bid was reasonable as required by the terms of the IFB. Further, neither UMTA nor the Port Authority present any evidence to show that ABC's bid price was unreasonable. In contrast, ABC states that its price is correct and contains a reasonable profit for performing the work. Therefore, we find that UMTA and the Port Authority arbitrarily rejected ABC's bid under the conclusive presumption provision.

When this complaint was filed with our Office on April 29, 1981, the complaint represented that if a decision were issued by the middle of June any corrective action we found necessary would be possible. Based upon this representation, we required expedited filings of arguments by all parties. The record was

closed after the last filing on May 26, 1981. We have now learned that as of June 12, 1981, approximately 50 percent of the work is completed. Therefore, we are unable to recommend any corrective action since it would not be in the Government's best interest to do so.

However, by letter of today, we are bringing this matter to the attention of the Secretary of Transportation so that appropriate corrective action may be taken to prevent this impropriety in the future.

A handwritten signature in cursive script, reading "Milton J. Rowland".

Acting Comptroller General
of the United States