19091 Cohen

DECISION

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

FILE: B-200753.2 DATE: August 12, 1981

MATTER OF: Honolulu Disposal Service, Inc.--
Reconsideration

DIGEST:

1. Prior decision that refuse collection services invitation improperly was canceled because contracting officer erroneously calculated inflation factor in finding low bid price unreasonable is reversed, since on reconsideration agency has shown that in view of procurement history regarding services low bid was unreasonably high.

2. Contracting officer has discretion to determine whether it is necessary that solicitation require firms to furnish bid bonds with their bids.

3. Defense Acquisition Regulation provides that once service has been successfully acquired through small business set-aside, all future requirements of contracting activity for that service must be set aside unless contracting officer, in exercise of business judgment, determines that there is not reasonable expectation that offers from two responsible small businesses will be received and award will be at reasonable price.

4. Contracting agency is not required to equalize competition on particular procurement by considering competitive advantage accruing to offeror by virtue of its incumbency.

The Department of the Army requests that we reconsider our decision Honolulu Disposal Service, Inc., B-200753, March 13, 1981, 60 Comp. Gen. ___, 81-1 CPD 193, in which we sustained Honolulu Disposal Service, Inc.'s protest against the cancellation of Lot II of invitation for bids (IFB) DAHC77-80-B-0280 for a contract for refuse collection services at Fort Shafter, Hawaii, for fiscal years 1981-1983. The IFB was canceled because the contracting officer found Honolulu's low bid of $206,974.41 for each fiscal year unreasonable. The basis for the contracting officer's finding was that the bid was 25.36 percent higher than the yearly price in the previous two-year (fiscal years 1978 and 1979) contract for the services, whereas the average annual inflation rate was only 9.2 percent. We found that the contracting officer, in working from the previous contract price to calculate what the Army should expect to pay for the three fiscal years involved in the instant IFB, improperly failed to compound that 9.2 percent rate for the second and third years of performance. We held that if the previous contract price was increased by 9.2 percent per year compounded for each of the three years, the $620,923.23 three-year cost to the Government under a contract with Honolulu would have been considered reasonable. We therefore sustained the protest.

The record disclosed that between the cancellation of the solicitation and our decision, the Army resolicited the requirement and awarded a new contract. We recommended that the Army determine whether it was practical and otherwise legally appropriate to terminate that contract. We pointed out that in considering the weight to be attached to termination costs, if any, "the Army should keep in mind the importance of taking corrective action to protect the integrity of the competitive procurement system."

For the reasons set forth below, we reverse the decision.

In the request that we reconsider the decision, the Army admits that the contracting officer failed to compound the annual inflation rate when judging the reasonableness of Honolulu's bid price. However, the Army advances two new factors to show that Honolulu's price nonetheless was unreasonable. See 4 C.F.R. § 20.9 (1980), providing for

our reconsideration of a decision if the requester presents information not previously considered.

First, the Army states that the fiscal year 1977 contract price for the refuse collection service was $147,577.56, the fiscal year 1978 price was $158,302.20, and the yearly price for fiscal years 1979 and 1980 was $165,103.54. The Army points out that the yearly contract prices increased only approximately seven percent ($10,724.64 from 1977 to 1978) and four percent ($6,801.34 from 1978 to 1979) over that four-year period. In view of this procurement history, the Army suggests that the yearly contract price for fiscal years 1981-1983 could reasonably have been expected to increase similarly from the fiscal year 1980 price of $165,103.54; in the Army's view the increase thus should have been to not more than $181,614 per year for three years, or $544,842 total (a ten percent increase). Accordingly, the Army argues that Honolulu's price of $206,974.41 per year for fiscal years 1981-1983, totaling $620,923.23, in fact was unreasonable notwithstanding consideration of the effect of inflation on the cost of the services.

Second, the Army advises that the contract that resulted from the resolicitation, which in our March 13 decision we recommended be terminated if practical and otherwise legally appropriate, was awarded at a bid price of $172,963.20 per year. The Army suggests that this fact confirms that Honolulu's price of $206,974.41 per year under the initial solicitation actually was unreasonable, or at least indicates that termination of the resolicitation contract and reinstatement of and award to Honolulu under the canceled solicitation would not be in the Government's interest.

A determination of price reasonableness properly may be based on a comparison with procurement history, as well as other relevant factors. Coil Company Inc., B-193185, March 16, 1979, 79-1 CPD 185. As we pointed out in our initial decision, because the determination is a matter of administrative discretion often involving the exercise of business judgment by the contracting officer, we will not question it unless it is unreasonable or there is a showing of bad faith or fraud. Espey Manufacturing and Electronics Corporation, B-194435,

July 9, 1979, 79-2 CPD 19. While we believe our original decision was proper, the facts now presented lead us to a different conclusion.

The contracting agency's experience in the procurement of these services in the four fiscal years preceding the procurement in issue is that the Army's cost increased less than 12 percent total from fiscal year 1977 to fiscal year 1980, an average of three percent each year even though substantial inflation was prevalent in the economy. We believe that it was reasonable for the contracting officer to expect a similar increase in the contract price for the fiscal year 1981-1983 period, i.e., to award a contract at a yearly price averaging a three percent increase per year over the three-year period of the contract.

However, Honolulu's bid totaling $620,923.23 for three years ($206,974.41 per year) is $76,081.23 more--or fourteen percent--than what the procurement history indicated to the Army that it should expect to pay over that period. While our initial decision noted that the total cost of accepting Honolulu's bid for fiscal years 1981-1983 appeared reasonable when applying and compounding a 9.2 percent yearly inflation rate to the previous contract price, it nonetheless appears excessive when other factors are considered.

In addition, while the determination to reject a bid and readvertise must be based on the facts available at the time, we have held that it is not improper to consider the results of a resolicitation as evidence in support of that determination. Coil Company Inc., supra. The low bid of $172,963.20 per year through fiscal year 1983 under the Army's resolicitation is not only substantially lower than Honolulu's bid of $206,974.41 under the canceled IFB, but in fact is lower than what the Army expected to pay each year based on its experience in procuring these services.

Under the circumstances, we believe that the contracting officer reasonably could conclude that Honolulu's bid under the initial invitation was too high and thus the solicitation properly was canceled. We

therefore withdraw our March 13 recommendation that the contract awarded under the resolicitation be terminated and the canceled IFB reinstated with award to Honolulu.

In doing so, we are mindful of our recent decision where we held that we would not consider evidence on reconsideration that an agency could have but did not furnish during our initial consideration of a protest. See Interscience Systems, Inc.; Cencom Systems, Inc.--Reconsideration, 59 Comp. Gen. 658 (1980), 80-2 CPD 106. That holding arose out of a situation in which the agency had made a general conclusionary statement concerning the availability of competition but neither it nor the interested party concerned offered any support whatsoever for that position until the agency requested reconsideration of our decision which was adverse to the agency on that point. Our holding was not meant to encompass the very different situation here, where the agency did indeed provide evidence in support of its position and the record contained some indication (from both the agency and the protester) that the resolicitation had produced a substantially lower bid than was obtained initially.

Because we initially sustained Honolulu's protest against the cancellation, it was not necessary in that decision to consider certain issues raised by the firm regarding the resolicitation of the Fort Shafter refuse collection contract. In view of the above, we will now discuss those matters.

Honolulu complained that the Army departed from prior practice by deleting the bid bond requirement from the resolicitation and by refusing to limit participation to small business firms.

In a report on Honolulu's protest against the cancellation of the original invitation, the contracting officer stated:

> "We have 13 companies listed as refuse collection services firms, with one of them determined to be other than small. However, Contracting Division has been

> asking for both a Bid Bond and 100% Performance Bond, which makes it very difficult for small business firms to comply. As a result one big business firm and one small business have been the only firms able to submit bid bond. One other small business was able to post cashier checks in lieu of a bid bond. * * *
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> "The new solicitation therefore, has the bid bond requirement deleted and the performance bond reduced to 50% of the contract price. * * * A solicitation restricted to small business firms with requirement that Bid and Performance Bonds be obtained will mean that only one firm, Honolulu Disposal Service, Inc. will be able to bid. [Honolulu was the only bidder on Lot II under the initial invitation.] To issue the solicitation on a non-restricted basis will mean competitive prices for all lots. Under the circumstances, SBA is in agreement with the Contracting officer in his determination to submit procurement on a non-restricted basis."

There is no legal requirement that bid guarantees be furnished in every case. Rather, the contracting officer has the discretion to decide whether a bid bond is necessary in a particular situation to insure that the successful bidder execute further contractual documents and bonds. See Defense Acquisition Regulation (DAR) § 10-102 (1976 ed.); cf. Willard Company, Inc., B-187628, February 18, 1977, 77-1 CPD 121 (concerning performance bonds). We have no basis to conclude that the discretion was abused in this case.

Regarding the decision not to set the procurement aside for small business, DAR § 1-706.1(f) (DAC No. 76-19, July 27, 1979) provides that once a service has been successfully acquired through a small business set-aside,

all future requirements of the contracting activity for that service must be set aside unless the contracting officer determines that there is not a reasonable expectation that offers from two responsible small businesses will be received and the award will be at a reasonable price. These are the same considerations that enter into a decision whether to set aside a procurement in the first instance under DAR § 1-706.5(a)(1) (1976 ed.), and we therefore have stated that the repetitive set-aside provision appears to be consistent with the general DAR set-aside policy. Fermont Division, Dynamics Corporation of America; Onan Corporation, 59 Comp. Gen. 533, 542-543 (1980), 80-1 CPD 438.

Thus, while it is within a contracting officer's discretion to determine whether to set a procurement aside initially, see Technical Services Corporation; Artech Corporation, and Sachs/Freeman Associates, Inc., B-190970, B-190992, August 25, 1978, 78-2 CPD 145 at page 14, once that discretion has been exercised and the decision to set aside made, the next procurement of the service must be set aside unless there is no reasonable expectation of the receipt of offers from two responsible firms and a reasonable contract price. See Otis Elevator Company, B-195831, November 8, 1979, 79-2 CPD 341.

However, the determination of the extent of the competition expected and whether the price will be reasonable essentially are business judgments for the contracting officer to make, although we note that DAR § 1-706.3(d) (1976 ed.) provides that where a contracting officer decides not to set aside a procurement the matter should be referred to the Small Business Administration (SBA) representative (if one is assigned and available) for review and his concurrence or appeal. In view of the quoted discussion from the Army's report, we have no basis to question the contracting officer's judgment here, with which the SBA concurred, that a set-aside pursuant to DAR § 1-706.1(f) should not be effected on resolicitation.

Honolulu also complains about the Army's award of an interim contract for the period October 1, 1980, when performance under the canceled IFB was to begin, until December 31, 1980, by which date it was anticipated that the full requirement (less the first three months) could be resolicited and a new contract awarded. That contract was awarded to the incumbent (fiscal year 1980) contractor

after the contracting officer solicited oral offers from a number of firms, including Honolulu and the incumbent. Honolulu asserts that the interim procurement was biased in favor of the incumbent because only that firm had no start-up costs to consider in calculating an offer, and had the personnel to begin performance on short notice.

Honolulu's complaint is without merit. The initial solicitation was canceled on September 24, 1980. The oral solicitation was conducted immediately thereafter to avoid the sanitation problems that would result from a lapse in refuse collection services after the fiscal year 1980 contract expired one week later. In this respect, DAR § 3-501(d)(ii) authorizes an oral solicitation where the processing of a written solicitation would, to the Government's detriment, delay the furnishing of supplies or services.

Further, we often have recognized that a firm may enjoy a competitive advantage because of its incumbency See ENSEC Service Corp., 55 Comp. Gen. 656 (1976), 76-1 CPD 34. The Government is not required to equalize the competition unless the competitive advantage enjoyed is the result of preference or of unfair action by the Government. Oshkosh Truck Corporation, B-198521, July 24, 1980, 80-2 CPD 161. In view of the circumstances of the instant interim procurement as described above, the incumbent's competitive advantage here is irrelevant to the legality of the contract award, notwithstanding that it may have caused the firm to be successful in the competition. As we stated in Tenavision, Inc., B-199485, July 28, 1980, 80-2 CPD 76:

> "* * * The purpose of competitive procurement is not to insure that all bidders face the same odds in competing for Government contracts. Rather, the purpose is to insure that the Government obtains its minimum requirements at the most favorable price. * * *"

Since our March 13 decision contained a recommendation for corrective action, we had furnished copies to the House Committee on Government Operations, the Senate Committee on Governmental Affairs, and the House and

Senate Committes on Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the submission of written statements by the agency to the Committees concerning the action taken with respect to our recommendation. We are advising those committees of this action on reconsideration.

Our initial decision is reversed and the protest is denied. Our recommendation for corrective action therefore is withdrawn.

Milton J. Socolar

Acting Comptroller General
of the United States