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DECISION



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

FILE: B-209234

DATE: March 29, 1983

MATTER OF: Browning-Ferris Industries

DIGEST:

1. Determination that small business bid is reasonable is not legally objectionable when the bid is within 11 percent of the Government estimate, the same as the previous year's contract price, and slightly lower than the bid submitted by another small business the previous year.
2. GAO will not disturb determination of price reasonableness on a small business set-aside absent a showing of bad faith or fraud.
3. GAO will dismiss bid protest as premature when it challenges the possibility of future sole-source awards.
4. GAO will dismiss protest alleging that procurement was improperly set aside for small business when it is filed after bid opening. Post-opening protest that solicitation lacked size standards also is untimely.

Browning-Ferris Industries protests the award of a contract for waste collection services at the Internal Revenue Service's Memphis Service Center to Sunray Sanitation Services, Inc. Solicitation No. IRS-SE-82-10, issued July 22, 1982, was a total small business set-aside. The protester, a large business, contends that Sunray's bid price was excessive. We deny the protest on this basis.

Before bid opening, a representative of Browning-Ferris questioned the contracting officer as to the need for a set-aside, arguing that in the Memphis area there were no small businesses engaged in waste removal. The contracting officer found that two small businesses had competed for the contract the previous year. Since there was no requirement that bidders be from the Memphis area, she determined that the set-aside was proper.

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Bids from Browning-Ferris and Sunray were opened on September 1, 1982; that of Browning-Ferris, at \$14,629, was treated as a courtesy bid. The contracting officer found Sunray's price, \$22,200, to be fair and reasonable, and she awarded a contract to that firm.

Browning-Ferris disputes the determination that Sunray's price was reasonable, pointing out that it was 51 percent higher than its own courtesy bid. The IRS, however, states that the Government estimate was \$20,000, just \$2,200 less than the contested bid, and that Sunray, as the incumbent, had performed the same services in fiscal 1982 for the same price as it bid here. It further states that in the 1982 procurement, another small business, Waste Haulers, Inc., had bid \$24,600. The IRS also asserts that it is not required to compare a small business bid with a courtesy bid in determining reasonableness of price.

We have held that a courtesy bid from a concern ineligible for a small business set-aside may be considered in making a price comparison. Saratoga Industries - Reconsideration, B-202698.2, January 22, 1982, 82-1 CPD 47. In making such a comparison, the fact that a small business bid is higher than a courtesy bid or the Government estimate does not mean that it must be rejected, since there is a range over and above those amounts that may be considered reasonable. In other words, in view of the Congressional policy favoring small businesses, a fair proportion of Government contracts may be awarded to such firms, even at premium (albeit reasonable) prices. Canadian Commercial Corporation, B-196111, May 29, 1980, 80-1 CPD 369.

For example, we have upheld a contracting officer's finding of reasonableness when a small business bid was 31 percent higher than a courtesy bid but slightly more than one half the Government estimate. Id. Similarly, we have held that a small business bid was reasonable even though it was 43 percent higher than a courtesy bid in light of other factors. Id., citing Osmose Wood Preserving Company of America, Inc., B-192191, October 23, 1978, 78-2 CPD 294. Therefore the fact that in this case the courtesy bid was 51 percent lower than the small business bid does not render the latter bid unreasonable per se. Further, the extent to which a courtesy bid indicates a price that actually would be available to the Government is largely a matter for the contracting officer's judgment, since such bids

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in no way bind the large business that has submitted them. Canadian Commercial Corporation, supra.

The determination of whether a small business bid is reasonable also may be based upon past procurement history, current market conditions, or other relevant facts. See Ainslie Corporation, B-203780, September 28, 1981, 81-2 CPD 254. Since the determination ultimately is a matter of administrative discretion, we will not question it unless the determination is clearly unreasonable or there is a showing of bad faith or fraud. Osmose Wood Preserving Company of America, Inc., supra.

Here, there has been no such showing. Rather, the contracting officer found the low responsible bid reasonable because it was within 11 percent of the Government's estimate, the same as the previous year's contract price, and lower than another small business bid submitted that year. Under these circumstances, we find no reason to disturb the contracting officer's findings despite a considerably lower courtesy bid.

Browning-Ferris also expresses concern that IRS will continue to set aside waste collection contracts for small businesses. The firm, which itself held the Memphis contract between 1972 and 1980, argues that since 1981, the year of the first set-aside, contracts have been awarded either to Sunray or to a small business subsequently acquired by Sunray. Browning-Ferris argues that continued set-asides will improperly provide Sunray with sole-source contracts.

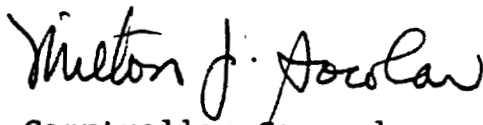
We will not consider this argument. Our Bid Protest Procedures are reserved for determining whether an award or proposed award complies with statutory, regulatory, or other legal requirements, and are not available for challenging future procurements. McDonnell Douglas Corporation, B-202904, August 18, 1981, 81-2 CPD 154. Browning-Ferris' protest on this basis is premature.

Nor will we review Browning-Ferris' other bases of protest, which are untimely. The firm implies that the procurement was improperly set aside for small business, since there was not an expectation of enough competition

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to ensure that award would be made at a reasonable price, and argues explicitly that the solicitation failed to include the applicable small business size standard. Both of these alleged improprieties were apparent on the face of the solicitation and, under our Bid Protest Procedures, should have been protested before opening. See 4 C.F.R. § 21.2 (1982).

The protest is denied in part and dismissed in part.

for 
Comptroller General
of the United States