

DECISION



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

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FILE: B-215214

DATE: December 3, 1984

MATTER OF: Survivair, division of U.S.D. Corp.

DIGEST:

1. Where speculative statements of protester are the only evidence submitted to rebut agency's version of its oral explanation given to protester of manner of bidding, protester has not met burden of proving agency advised it to bid as it did.
2. Although the rejection of protester's bid results in additional cost to the government, maintenance of the integrity of the competitive system is more in the government's interest than the pecuniary advantage to be gained by acceptance of the protester's lower nonresponsive bid.
3. Adequate competition was achieved, even though only one responsive bid was received, where it has not been shown that the bid price was unreasonable.

Survivair, a division of U.S.D. Corp., protests the award of a contract to Globe Safety Equipment, Inc., under solicitation No. GS-08-1524 issued by the General Services Administration (GSA). The contract covers the Federal Supply Schedule requirements for self contained breathing apparatus. The basis for Survivair's protest is that the procurement agent gave it erroneous oral instructions as to the preparation of its bid and this resulted in its bid being rejected as nonresponsive.

We deny the protest.

The solicitation covered a variety of safety and rescue equipment, but Survivair was interested in obtaining

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a contract to provide only the requirements for items one and two--self contained breathing apparatus. As to these items, the bidding schedule provided in part:

ITEM NUMBER	SUPPLIES OR SERVICES	UNIT	PRICE ZONE 1
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NOTE: Items 3, 6 through 9, 12 through 16, and 19 through 23 will be awarded on an item by item basis. All other items awarded in the aggregate as no

BREATHING APPARATUS (ITEMS 1 thru 2)

BREATHING APPARATUS, SELF CONTAINED: In accordance with Commercial item description A-A-1112, dated August 27, 1980.

Compressed Air:

1			
4240-00-880-1728	Style A, Demand type with audible warning device - NIOSH Approval No.	each	_____

(Bidder to state)

2			
4240-00-919-2864	Style B, pressure demand type with audible warning device - NIOSH Approval No.	each	_____

(Bidder to state)

Group 1: Items 1 & 2, to be awarded in the aggregate (See clause 301F page 8)."

Clause 301F referred to in the schedule provided that the method of award for groups one through seven would be "[i]n the aggregate by group. . . . In order to qualify

for an award on a group, prices must be submitted on each item and submitted within the group."

Survivair contends that, before submitting its bid on items one and two, its employee responsible for submitting the bid discussed the manner of preparing its bid with the procurement agent handling this contract and was advised that its bid would be rejected as nonresponsive if its bid for these items included a multiple number of products, any model numbers, or more than one NIOSH approval number. Survivair states that this was contrary to how it prepared its successful bid for this contract the previous year and in fact was told that, if it bid in the same manner as in the previous year, its bid would be rejected as nonresponsive.

Survivair therefore entered on its bid "No Bid" for item one and entered a price of \$559 per unit for item two and listed a NIOSH approval number for that item. GSA rejected the bid as nonresponsive for failure to include a price on all of the items within group one as required by the solicitation. Three other bids were received on these items, two of which were also rejected as nonresponsive. Globe, which bid a price of \$582.50 for each of the items, was the only responsive bidder and it was awarded the contract.

Survivair states that it realized that the instructions allegedly given to it were contrary to those in the solicitation, but it decided to follow them because it believed that the procurement agent had the authority to vary the instructions. It held this belief because the previous solicitation for this requirement, solicitation No. GS-08-1505, provided that "references in the bid to brand name, models, or part numbers may cause rejection of the bid," yet, in accordance with the contracting officer's oral instructions, Survivair listed specific model numbers and brand names in its bid and it received award of the contract. It further states that it thought these instructions were reasonable because the Occupational Safety and Health Administration no longer approves the demand type apparatus called for in item one for fire brigade uses, 29 C.F.R. § 1910.156(f)(2) (1983), and GSA has historically shown little demand for that type of apparatus--three

ordered in 1982, 10 in 1983, and only three anticipated under this contract. It concludes that, under these circumstances and the monetary savings available under its bid, GSA should have accepted its bid.

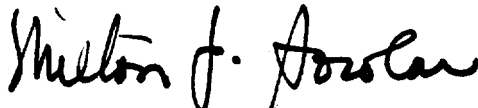
GSA denies that it ever told Survivair that bidding a multiple number of products for both items would make its bid nonresponsive. It states that what it told Survivair was that bidding a multiple number of products for each item would render its bid nonresponsive. In fact, in its bid the previous year Survivair bid more than one product for each item. Under such circumstances, the protester has failed to carry the burden of affirmatively proving that it was advised by GSA to bid as it did. See Holley Electric Construction Co., Inc., B-209384, Jan. 31, 1983, 83-1 C.P.D. ¶ 103; Worldwide Direct Marketing, B-200371, Apr. 2, 1981, 81-1 C.P.D. ¶ 253.

Survivair, in fact, concedes that it is impossible to prove that it was given erroneous instructions, but it tries to support its allegation on two bases other than evidence as to what was actually said. First, it asserts that since its employee involved here had successfully bid on this contract for the previous 5 years, while the procurement agent was handling this contract for the first time and was inexperienced in these matters, its employee is more credible. This claim, however, is purely speculative and does not meet the protester's burden of affirmatively proving its case. Moreover, to the extent that the protester's suggestion of lack of credibility on the part of the procurement agent implies that the agent acted in less than good faith, on the basis of the written record, this must also be regarded as speculative. See Sperry Rand Corporation, B-187116, Jan. 31, 1977, 77-1 C.P.D. ¶ 77.

Second, Survivair believes the pursuit of the government's procurement policies should resolve the factual dispute in its favor. It contends that award to it would result in the agency getting the best product at the best price and would preserve the integrity of the competitive system which was offended here since the contract was awarded notwithstanding the protest by the person whose actions are being questioned in the protest.

These claims also fail to provide any basis for resolving the protest in favor of the protester. Although rejection of Survivair's bid may result in additional cost to the government on this procurement, we have held that the maintenance of the integrity of the competitive system is more in the government's interest than the pecuniary advantage to be gained in a particular case. Emerald Electric, B-212460, Oct. 26, 1983, 83-2 C.P.D. ¶ 505. A nonresponsive bid therefore cannot be accepted even if it offers a product at a lower price. Furthermore, an agency is authorized to make an award of a contract notwithstanding the pendency of a protest. Federal Acquisition Regulation, § 14.407-8(b), 48 Fed. Reg. 42,102, 42,184 (1983) (to be codified at 48 C.F.R. § 14.407-8(b)).

Survivair contends that there was inadequate competition in that only one bidder was responsive and three others including itself were rejected as nonresponsive. However, we have held that there can be adequate competition even where only one bid is received. Blast Defectors, Inc., B-212610, Jan. 9, 1984, 84-1 C.P.D. ¶ 56. The fact that Survivair's price was lower than Globe's does not mean that the price received by the government is unreasonable, Schultes Level, Inc., B-213014, Jan. 10, 1984, 84-1 C.P.D. ¶ 64, and Survivair has not shown that the price bid by Globe was unreasonable. In fact, the price bid by Globe is less than five percent higher than the contract price obtained under the previous procurement for this requirement, thus suggesting the reasonableness of its price. Thus, adequate competition was achieved and the protest therefore is denied.


for Comptroller General
of the United States