

DECISION

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

*Murphy
PC-II*

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FILE: B-218075.2

DATE: May 23, 1985

MATTER OF: Oceanside Moving and Storage

DIGEST:

Agency acted unreasonably in failing to refer its rejection of a small business low bidder to the the Small Business Administration when the bid submitted was responsive on its face. Although the contracting officer rejected the bid as nonresponsive because he believed the bidder had violated a Certificate of Independent Price Determination, this basis for rejection actually concerns the bidder's responsibility.

Oceanside Moving and Storage protests the rejection of its bid under invitation for bids (IFB) No. M00681-84-B-0079, issued and set aside for small businesses by the Marine Corps. The contracting officer found Oceanside's bid to be "nonresponsive" because markings and handwriting on it were so similar to those on the bid of another company, Collins Moving and Storage, that he suspected that Oceanside had falsely executed a Certificate of Independent Price Determination. Oceanside argues that there was no collusion between the two companies with regard to the bid prices and that there was insufficient evidence of collusion to justify the contracting officer's action.

Because the rejection actually was based on a finding that Oceanside was nonresponsible, and thus should have been referred to the Small Business Administration (SBA), we sustain the protest.

The IFB sought bids for packing and related services at Camp Pendleton, California, under three schedules. Schedule I was for outbound shipments from Camp Pendleton; Schedule II was for inbound shipments; and Schedule III was for local area shipments. The solicitation contained estimated quantities for various items included within each schedule, and bidders were required to specify unit

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and extended prices for each service. Bids were evaluated on the basis of the total prices for all items within a given schedule.

The Marine Corps received and opened 10 bids on November 26, 1984, including bids by Oceanside and Collins with the following aggregate prices:

	<u>Schedule I</u>	<u>Schedule II</u>	<u>Schedule III</u>
Collins	\$260,606.50	\$47,430	\$408,920
Oceanside	245,890.00	40,130	421,180

Collins' "all or none" bid for the three schedules was not low, and the firm, therefore, was not in line for an award. Oceanside, which had specified that its bid for Schedule II should only be considered if it received an award for Schedule I, was low for both these schedules and second-low for Schedule III.

After the contracting officer had requested a pre-award survey of Oceanside, he became aware that the Collins and Oceanside bids might have been prepared by the same person. The bids list the same street address, post office box and telephone number for the companies. The same type style and composition were used for cover letters to the bids, and markings and handwriting, including the handwritten bid prices, are identical or remarkably similar throughout the bid documents. The bids do appear to have been signed by different persons, Patrick M. Collins as President of Collins and Robert F. Putnam as President of Oceanside. Mr. Collins had been the General Manager of Oceanside during another recent contract with the Marine Corps, and the preaward survey disclosed that he would continue in that role.

The contracting officer concluded that the bids had been prepared by the same person and that both bidders had violated the Certificate of Independent Price Determination in their bids. That certificate, which is also set forth in the Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.203-2 (1984), provides in part as follows:

"(a) The offeror certifies that--

- "(1) The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to (i) those prices, (ii) the intention to submit an offer, or (iii) the methods or factors used to calculate the prices offered;
- "(2) The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a formally advertised solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and
- "(3) No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition."

In connection with its protest, Oceanside has submitted extensive affidavits by Mr. Collins, Mr. Putnam and the office manager of Oceanside. In sum, these individuals state that Mr. Collins is employed by Oceanside as its General Manager, but that he has simultaneously operated his own moving and storage business. The contracting officer is alleged to be aware of this fact. Since Collins Moving and Storage currently does not have substantial assets or a permanent address, Mr. Collins uses the Oceanside address for his business.

According to the affidavits, the office manager was given the job of opening the solicitation documents for both Collins and Oceanside and annotating any changes specified in amendments to the IFB. She states that she did not participate in determining the prices submitted by either company. Mr. Collins and Mr. Putnam state that, while Mr. Collins provided Mr. Putnam with information about Oceanside's labor and material costs for preparing Oceanside's bid, both individuals prepared their respective bid prices completely independently and did not see

or discuss them with each other or anyone else. Each separately delivered the bid which he prepared to the bid opening site.

In addition to its factual presentation, Oceanside generally argues that, based upon prior decisions of our Office, the contracting officer was not justified in rejecting the bids because there was no probative evidence of collusion and no evidence that the two firms sought to restrict competition, gain an unfair competitive advantage, or prejudice the government.

In its report on the protest, the Marine Corps characterizes the contracting officer's determination as one concerning the responsibility of Oceanside and Collins, rather than the responsiveness of their bids. We agree. Since neither bidder took exception to the IFB requirements, the bids were responsive. See 49 Comp. Gen. 553, 556 (1970); International Alliance of Sports Officials, B-211831, Mar. 6, 1984, 84-1 CPD ¶ 271. Based upon his suspicions, the contracting officer effectively made a negative responsibility determination.

The Marine Corps contends that the contracting officer's conclusions that the certifications were possibly untrue and that the antitrust laws had possibly been violated were reasonable and made in good faith. Therefore, the agency argues, the responsibility determination was itself reasonable and it is irrelevant whether or not the bidders actually violated their certifications.

Probative evidence of collusion between bidders to gain a competitive advantage or prejudice the government or other bidders may be considered in a responsibility determination. 52 Comp. Gen. 886, 899-900 (1973); Protimex Corp., B-204821, Mar. 16, 1982, 82-1 CPD ¶ 247. However, because Oceanside is a small business, we do not need to decide whether the contracting officer's determination in this case was reasonable.

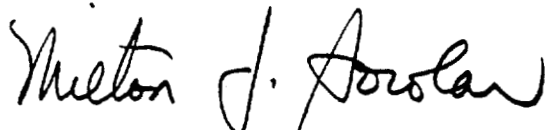
The Small Business Act, 15 U.S.C. § 677(b)(2) (1982), provides that a small business may not be precluded from an award on the basis of a nonresponsibility determination without referral of the matter to the SBA for final disposition under certificate of competency (COC) procedures. See FAR, 48 C.F.R. §§ 9.103(b), 19.602-1. Consequently, the Marine Corps' rejection of Oceanside's bid

B-218075.2

without referral to the SBA was unreasonable and tantamount to arbitrary and capricious action. Environmental Growth Chambers, B-201333, Oct. 8, 1981, 81-2 CPD ¶ 286.

By letter of today to the Commandant of the Marine Corps, we are recommending that the contracting officer refer this matter to the SBA. If the SBA issues a COC, then the current contract for Schedules I and II, awarded to Military Pack and Crate in December 1984, should be terminated for the convenience of the government and award made to Oceanside if it is willing to perform at its originally proposed prices for the remainder of the contract term. See Food and Drug Research Laboratories, Inc., B-208559, Feb. 14, 1983, 83-1 CPD ¶ 152. If a COC is not issued, no further action is required. See Angelo Warehouses Co., B-196780, Mar. 28, 1980, 80-1 CPD ¶ 228.

The protest is sustained.

for 
Comptroller General
of the United States