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DECISION



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

FILE: B-216110

DATE: June 3, 1985

MATTER OF: Tayloe Associates

DIGEST:

1. A bidder's failure to submit a required bid guarantee may be waived if the procuring agency receives no other responsive bids eligible for award. Where the record indicates that, contrary to the protester's allegation, one other eligible bid was received, the agency properly refused to waive the bid guarantee requirement.
2. A contracting officer's determination concerning price reasonableness is a matter of administrative discretion involving the exercise of business judgment which GAO will not question unless the determination is unreasonable or there is a showing of bad faith or fraud.
3. To prove bad faith in connection with a price reasonableness determination, a protester must present virtually irrefutable evidence that agency officials acted with a specific and malicious intent to injure the protester. Inference and supposition alone will not support a finding of bad faith.

Tayloe Associates (Tayloe) protests the rejection of its low bid and the award of a contract to Ace-Federal Reporters, Inc. (Ace), under solicitation No. ASB-84-352, issued by the United States Nuclear Regulatory Commission (NRC), for stenographic reporting services.

We deny the protest.

Two bids were received under the solicitation:

Tayloe	\$583,727.20
Ace	\$850,189.75

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Tayloe's bid was rejected as nonresponsive because it did not contain a bid guarantee as required by the solicitation. We note that Tayloe, in a cover letter attached to its bid, stated:

". . . In sum, our performance record has been exemplary. Accordingly, we have not elected to incur the expense of providing a performance bond. It is simply unnecessary in our case.

"Therefore, we request that as Contracting Officer you exercise the discretion specified in paragraph 24 of the subject IFB and not require a performance bond of Tayloe Associates. Of course, if no performance bond is required, the need for a bid guarantee becomes unnecessary."

Amendment No. 2 to the IFB added a requirement for the submission of a bid guarantee in the amount of 20 percent of the bid price and requiring the successful bidder to submit a performance bond in the amount of \$100,000. Ace's responsive bid was determined to be reasonably priced and award was made to Ace.

This Office has consistently held that where a bid guarantee is required as part of a bid, the failure to provide a guarantee renders the bid nonresponsive. Pacific Consolidated Services, Inc., B-204781, Mar. 10, 1982, 82-1 C.P.D. ¶ 223. That failure cannot be waived or excused unless one of the limited exceptions in section 1-10.103-4 of the FPR, 41 C.F.R. § 1-10.103-4, applies. Pacific Consolidated Services, Inc., B-204781, supra.

Tayloe contends that waiver of its bid guarantee deficiency was mandated by FPR, 41 C.F.R. § 1-10.103-4(a), which permits waiver of such deficiency where only a single bid is received. We have held that where more than one bid is submitted, as here, a guarantee may be waived under this exception only if all other bids are nonresponsive or otherwise ineligible for award. Pacific Consolidated Services, Inc., B-204781, supra. In this connection, Tayloe contends that Ace's bid should have been rejected because Ace's price, approximately 40 percent more than Tayloe's, is unreasonable.

We have stated that a determination concerning price reasonableness is a matter of administrative discretion involving the exercise of business judgment, which our Office will not question unless the determination is

unreasonable or there is a showing of bad faith or fraud. Introl Corp.; Forster Enterprises, B-209096, B-209096.2, June 9, 1983, 83-1 C.P.D. ¶ 633. We do not believe that the fact that the awardee's price is approximately 40 percent higher than the protester's necessarily indicates that the awardee's price is unreasonable. See Hybrid Technology Group, Inc., B-215168, Oct. 3, 1984, 84-2 C.P.D. ¶ 385 (where the awardee's price, more than 100 percent greater than the protester's, was not considered unreasonable).

The NRC refused to exercise a 1-year option to extend Tayloe's contract for similar services from March 1984 through March 1985, because Tayloe's prices under the option were considered to be unreasonable. Tayloe argues that since its option prices, which were generally lower than the prices bid by Ace under this solicitation, were regarded as being unreasonable, "a strong presumption of bad faith arises" from the determination at this time that Ace's prices are reasonable. Tayloe additionally contends that since two other recent NRC contracts for stenographic services yielded prices comparable to its bid price (i.e., approximately 40 percent below the awardee's price), acceptance of Ace's bid as reasonable creates the presumption of bad faith.

The agency report indicates that the reasonableness of Ace's price was determined by using as a base the prices bid for NRC work for daily copy in Washington, D.C., without travel (under IFB SECY-84-327), adding travel costs, and then comparing Ace's prices. Travel costs were calculated in two ways: (1) the actual cost incurred by Tayloe under a prior contract (NRC-17-83-399) and (2) estimated travel costs based upon the hearing sites and expected duration, under this solicitation. Using either travel cost calculation, Ace's price was between the average and the highest price bid under IFB 327. Under the first method of comparison, using Tayloe's actual travel costs of \$2.91 per page, Ace's bid of \$8 per page was between the average bid of \$7.54 and the high bid of \$8.91. Using the estimated travel costs of \$2.58 per page resulted in an average bid of \$7.21 and a high bid of \$8.58. NRC states that because Tayloe's bid was nonresponsive, it was not used for price comparison purposes.

Tayloe contends that the travel costs (average of \$2.91 per page, daily rate) incurred by itself on a prior contract with different travel itineraries, modes of travel and hearing durations are not representative of the travel costs that may be experienced under this solicitation and, therefore, should not be used for comparison purposes.

Taylor also argues that the NRC estimated travel cost average of \$2.58 per page, daily rate, is inaccurate and should not be used for comparison purposes because Ace plans to subcontract 75 percent of the work, thereby reducing its travel expense. Although we recognize that travel costs may be different for this contract than on the prior one or that Ace may subcontract a portion of the work which may influence the amount of travel costs incurred (but may not reduce overall costs), we do not believe that Taylor has shown that the two figures used, \$2.91 per page and \$2.58 per page, which are in close agreement, are unreasonable estimates of travel costs.

Taylor also argues that NRC should have disregarded the two highest bidders' (one of which was Taylor) prices as unreasonable, when making a comparison to the prices bid under IFB 327. While NRC characterized these two bids as "not competitive" in comparison with the low bid under IFB 327, NRC states that it was referring to the total bid price, which included copying, floppy disks and tapes, and not to Taylor's per page price of \$5.45, which was used in the comparison. We do not believe that it was improper to use those bid prices in determining whether Ace's price was reasonable. Based on the above analysis, we cannot say that the contracting officer's determination of price reasonableness was an abuse of discretion.

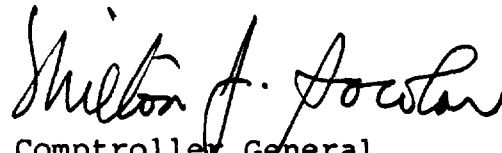
The protester bears a heavy burden of proof when alleging bad faith on the part of government officials; it must show by virtually irrefutable proof that these officials had a specific or malicious intent to injure the protester. Ebonex, Inc., B-213023, May 2, 1984, 84-1 C.P.D. ¶ 495. Taylor has not met this standard.

While Taylor argues that because of prior NRC decisions concerning price reasonableness for stenographic reporting services we should infer bad faith from the price reasonableness determination in this procurement, Taylor has not submitted any direct evidence of bad faith. The relationship between prior determinations and the present determination concerning price reasonableness does not establish any specific intent by the NRC and, thus, by itself does not constitute evidence of bad faith. Ebonex, Inc., B-213023, supra. Inference and supposition will not support a finding of bad faith. Ebonex, Inc., B-213023, supra. Since we find that Taylor's argument is based on its inadequately substantiated suspicions, it has not met its burden of proof.

We find that the single bid exception is not applicable because Ace's bid was responsive and Ace was otherwise eligible for award. Since NRC received a responsive bid

which it could, and did, accept, NRC properly rejected Tayloe's bid as nonresponsive and, therefore, properly excluded it when evaluating Ace's prices. Pacific Consolidated Services, Inc., B-204781, supra. Moreover, we do not believe that the single bid exception should be expanded to include a situation, such as here, where a responsive bid is being evaluated for price reasonableness. In other words, even if Ace's bid prices were evaluated as being unreasonably high, Tayloe would still be ineligible for award under this solicitation, due to its failure to provide a bid guarantee. Thus, in view of the likelihood that Tayloe's failure to provide a bid guarantee may have affected its price, NRC properly decided not to use Tayloe's bid in evaluating the reasonableness of Ace's bid price. See MIL-STD Corp., B-212038; B-212038.2, Jan. 24, 1984, 84-1 C.P.D. ¶ 112 (bid nonresponsive because payment was premised on 20 days rather than 30 days).

The protest is denied.

for 
Comptroller General
of the United States