



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Sylvan Service Corp.

File: B-222482

Date: July 22, 1986

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### DIGEST

1. Agency's cancellation of solicitation on the basis that all otherwise acceptable bids are unreasonable in price is proper where all responsive bids are significantly higher in price than prices recently paid for the same services and a nonresponsive bidder's price, even though the low responsive bid is only 4 percent higher than the government estimate.
2. Where a canceled invitation for bids (IFB) has been converted to a request for proposals (RFP), protest that bidders whose bids were nonresponsive to the IFB or were withdrawn based on mistake should not be permitted to compete under the RFP is denied where the applicable regulation only precludes the participation of nonresponsible bidders, and the bidders in question were considered responsible.

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### DECISION

Sylvan Service Corporation (Sylvan) protests the General Services Administration's (GSA) cancellation of invitation for bids (IFB) No. GS-05-P-86-GA-C-0019, a total small business set-aside, on the basis that all otherwise acceptable bids were unreasonably priced. Sylvan also alleges that after the agency converted the IFB to a request for proposals (RFP), the agency improperly accepted offers from firms whose bids under the canceled IFB had been withdrawn or found unacceptable.

We deny the protest in part and dismiss it in part.

GSA issued the solicitation for janitorial and related services at the United States Post Office and Courthouse in Cincinnati, Ohio. Four bids were received and evaluated. The low bidder, B&W Service Industries, Inc., claimed and proved a mistake in the calculation of its bid and was permitted to withdraw the bid from the competition. The next low bidder, Associated Cleaning, Inc., failed to include an acceptable bid guarantee with its bid as required by the IFB and, therefore, was found nonresponsive. The contracting officer determined that the remaining two bids, submitted by the protester and Midwest Janitorial Services, were unreasonably priced and canceled the IFB on that basis.

In order to prevent a lapse in necessary services, the head of the contracting activity authorized conversion of the IFB to an RFP. An

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amendment to the solicitation was issued to effect the conversion, allowing completion of the acquisition through negotiation without the issuance of a new solicitation. See Federal Acquisition Regulation (FAR), § 15.103 (1984). The amendment also deleted the bid guarantee requirement.

#### CANCELLATION OF THE IFB

Sylvan does not dispute that a solicitation may be canceled after bid opening if the prices of all otherwise acceptable bids are unreasonable. See FAR, 48 C.F.R. § 14.404-1(c)(6) (1984). However, the protester disputes the agency's finding that its bid price was unreasonable. Sylvan contends that its total bid price of \$1,166,400 (covering the base year and two additional option years) was only slightly higher than the government estimate of \$1,129,406, and that cancellation of the IFB therefore could not be justified on the basis of unreasonable prices.

The agency, while affirming the validity of the government estimate, argues that the protester's bid was nonetheless unreasonable in comparison with previous prices recently paid for the same services. Comparing unit (monthly) prices, the agency acknowledges that Sylvan's bid price of \$31,000 is less than 4 percent higher than the government estimate. However, the authorization for canceling the IFB states that prices paid for an adequate performance of these services during the past 3 years range from \$18,939.41 to \$24,900 per month. The highest amount paid was therefore less than \$25,000, a figure that Sylvan's bid exceeds by 24 percent.

Additionally, we note that Sylvan's bid under the canceled IFB was approximately 34 percent higher than Associated Cleaning's nonresponsive bid.

We have found that a determination of price unreasonableness involves broad discretion on the part of the contracting officer. Mid South Industries, Inc., B-216281, Feb. 11, 1985, 85-1 CPD ¶ 175. Our Office will not question such a determination unless it is clearly unreasonable or there is a showing of fraud or bad faith on the part of the contracting official. Security Fence Co., B-218587, July 22, 1985, 85-2 CPD ¶ 67. We have found it entirely proper for an agency to base its determination on a comparison with previous prices paid for the same item, current market conditions, or any other relevant factors, including any which have been revealed by the bidding. See e.g., Omega Container, Inc., B-200808.2, Nov. 26, 1982, 82-2 CPD ¶ 475.

In our view, it was reasonable for the contracting officer to reject Sylvan's bid as unreasonably priced given the discrepancy between Sylvan's price and both the previous cost of these services and the price

bid by Associated Cleaning.<sup>1/</sup> Under these circumstances, the agency did not need to consider whether the 4 percent difference between Sylvan's bid and the government estimate, by itself, would have been sufficient to support the rejection of Sylvan's bid. In this connection, we note that estimates of price are by nature inexact, and that other factors such as prior pricing patterns and currently offered prices from other bidders may more accurately reflect current market conditions. See Adam Electric Co., B-207782, Dec. 27, 1982, 82-2 CPD ¶ 576. We therefore find the protester's argument to be without merit.

Sylvan also argues that the cancellation unfairly permits the disqualified bidders a second opportunity to compete, and that bidders who submitted proper bids are now "forced to bid against themselves in an auction atmosphere." It is precisely because of considerations such as these that an IFB may not be canceled after bids have been opened, and prices exposed, unless there is a compelling reason to do so. See FAR, 48 C.F.R. § 14.404-1(a). The determination that all otherwise acceptable bids are unreasonably priced meets this standard. 48 C.F.R. § 14.404-1(c)(6). Moreover, we do not find that Sylvan has been prejudiced by the disclosure of its bid price since that price was unreasonable. Although any cancellation for unreasonable price may result in nonresponsive bidders having another chance to bid with the knowledge of the prior bid prices, the competition the second time also provides the bidder who bid an unreasonable price another opportunity to bid as well, and this time at a reasonable price. See Stewart-Thomas Industries, Inc., B-196295, Mar. 5, 1980, 80-1 CPD ¶ 175.

#### CONVERSION TO AN RFP

Sylvan argues that B&W Service Industries and Associated Cleaning should not be permitted to submit proposals for this solicitation because their original bids were unacceptable and they should not be given the opportunity to get a "second bite at the apple." In support of this argument, the protester notes that conversion of the IFB to an RFP is authorized by FAR, 48 C.F.R. § 15.103, which provides as follows:

When the agency head has determined . . . that an invitation for bids is to be cancelled and that use of negotiation is appropriate to complete the acquisition, the contracting officer may negotiate

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<sup>1/</sup>While we have stated that it is not good practice to base a determination of price unreasonableness only on a comparison with a non-responsive bid, particularly where the nonresponsiveness may have affected the bid price, reliance on such a comparison in conjunction with other relevant factors may provide a sufficient basis for a determination of price unreasonableness. MIL-STD Corp., B-212038 et al., Jan. 24, 1984, 84-1 CPD ¶ 112.

without issuing a new solicitation subject to the following conditions--

- (a) Prior notice of intention to negotiate and a reasonable opportunity to negotiate have been given by the contracting officer to each responsible bidder that submitted a bid in response to the invitation for bids;
- (b) The negotiated price is the lowest negotiated price offered by any responsible bidder; and
- (c) The negotiated price is lower than the lowest rejected bid price of a responsible bidder that submitted a bid in response to the invitation for bids. (Emphasis added.)

Sylvan maintains that this provision allows negotiation only with "responsible bidders that submitted a bid under the IFB," and "does not permit companies whose bids were previously evaluated and deemed unacceptable and therefore ineligible for award to get a second bite at the apple on the same solicitation."

The agency argues that the protester's construction of the regulation confuses the concepts of responsibility and responsiveness. The two low bidders were not found nonresponsive and, thus, the regulation does not preclude their participation under the RFP.

Responsiveness involves whether a bid as submitted represents an unequivocal offer to provide the exact product or service as specified in the solicitation, so that acceptance of the bid would bind the contractor to meet the government's needs in all significant respects. Johnson Moving & Storage Co., B-221826, Mar. 19, 1986, 86-1 CPD ¶ 273. Responsibility refers to the bidder's apparent ability and capacity to perform all of the contract requirements. DAVSAM International, Inc., B-218201.3, Apr. 22, 1985, 85-1 CPD ¶ 462. We agree with GSA's position that under the clear terms of FAR § 15.103, it is responsibility that is at issue here.

B&W neither was found nonresponsive nor was its bid found nonresponsive; it simply was permitted to withdraw its bid on the basis of mistake. Associated Cleaning's failure to supply the required bid guarantee prior to bid opening did render its bid nonresponsive to the terms of the IFB. However, the agency states that both of these firms were considered to be responsible bidders. Therefore, there is simply no support for Sylvan's allegation that FAR § 15.103 requires exclusion of these firms from competition under the RFP.

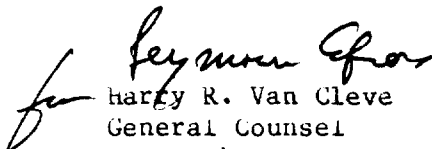
Sylvan also states that Associated Cleaning was awarded an interim contract at a price that was higher than its bid price under the IFB, and

alleges that this was improper under FAR § 15.103(c), supra. We disagree. The cited regulation relates to the price negotiated under the RFP resulting from the conversion, and not a separate, interim contract.<sup>2/</sup> The agency report states that the contracting officer is now in the process of conducting discussions with those offerors who responded to the amended solicitation. It is therefore apparent that the protester's allegations refer only to an interim contract, and do not apply to any award under the RFP. Therefore, we find them without merit.

In its comments responding to the agency report, Sylvan protested for the first time that it was improper for GSA to delete the bid guarantee requirement from the solicitation when it was converted from an IFB to an RFP. We will not consider the merits of this issue.

We consider this issue to be untimely filed since the basis for protest clearly was apparent on the face of the amendment converting the solicitation to an RFP. Our Bid Protest Regulations provide that protests based on a solicitation impropriety which is incorporated into the solicitation by an amendment must be protested not later than the next closing date for receipt of proposals. 4 C.F.R. § 21.2(a) (1986). The proposal closing date in this case was April 15, and Sylvan's report comments raising this issue were not filed with our office until June 2. Accordingly, this basis of protest is untimely and will not be considered.

The protest is denied in part and dismissed in part.

  
Harry R. Van Cleve  
General Counsel

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<sup>2/</sup> Although the protester has not directly challenged the award of the interim contract, we have been advised by the agency that the purpose of the interim, 4-month contract was to ensure continuity of these essential services during the pendency of this protest. The agency also has informed us that the interim contract was awarded noncompetitively on the basis of urgent and compelling need, and was justified under the sole source exception in the Competition in Contracting Act of 1984, 10 U.S.C. § 2304(c)(1) (Supp. II 1984). In the absence of a more specific challenge, we have no basis to question this award.