



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Free State Reporting, Inc.; Neal R. Gross and Co., Inc.
File: B-225531, 225531.2, B-225532, B-225532.2
Date: January 13, 1987

DIGEST

1. A nonresponsible firm, protesting that award under a negotiated procurement following cancellation of the second step of a sealed bid two-step procurement was made at prices higher than those received under the canceled second step in violation of the Federal Acquisition Regulation, is an interested party who can protest under the Bid Protest Regulations because, if the protest were sustained, the remedy would be a resolicitation under which the protester could compete.

2. The Federal Acquisition Regulation, 48 C.F.R. § 15.103(c), does not preclude award, following negotiation after the cancellation of a sealed bid procurement, at a price higher than the lowest rejected bid price under the canceled procurement except where the cancellation was based on unreasonable prices or collusive bidding.

DECISION

Free State Reporting, Inc. (FSRI), protests the award of contracts to York Stenographic Services and Science and Management Resources following negotiations after the cancellation of invitation for bids (IFB) No. SSA-IFB-86-002. After we requested the agency's report on FSRI's protest, pursuant to the express option provisions of our Bid Protest Regulations (4 C.F.R. § 21.8 (1986)), Neal R. Gross and Co., Inc. (NRG), also filed a protest. The IFB was the second step of a two-step, sealed bid, total small business set-aside acquisition of services to transcribe cassette tapes generated by the Social Security Administration's Office of Hearings and Appeals (SSA). FSRI and NRG protest that SSA awarded contracts under the negotiated procurement at prices higher than the lowest bid price of a responsible bidder under the IFB in violation of the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.103(c) (1985). FSRI also alleges that SSA did not file its administrative report on time and improperly failed to suspend contract performance.

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We deny FSRI's protest and dismiss NRG's protest.

The contracting officer determined FSRI nonresponsive under the IFB as the result of an unacceptable performance history. This determination was referred to the Small Business Administration (SBA) as required by 15 U.S.C. § 637(b)(7) (1982) for consideration under the SBA's certificate of competency program. By letter dated September 19, 1986, the SBA declined to issue a certificate of competency.

After SSA found the four other bids received under the IFB nonresponsive, SSA canceled the IFB in October 1986 and completed the acquisition through negotiation. See FAR, 48 C.F.R. §§ 14.404-1(e)(1) and 15.103. FSRI's offer was rejected, apparently due to the nonresponsibility determination under the canceled IFB.

SSA awarded a contract to York Stenographic Services, Inc., for 25 percent of the estimated maximum annual quantity, and awarded a contract for 75 percent of the estimated maximum annual quantity to Science and Management Resources, Inc.

As a preliminary matter, we must consider SSA's assertion that FSRI is not an interested party under our Bid Protest Regulations. SSA contends that since FSRI was found to be nonresponsive it would be ineligible to receive an award even if its protest were sustained.

The question of whether a party is interested depends on the nature of issues being protested. If FSRI were protesting the award to a particular firm and if other bidders would remain eligible for award under the procurement, then FSRI would not be an interested party. However, FSRI contends that no award can be made under the negotiated portion of this procurement because the lowest price received exceeds the lowest price obtained under the canceled second step, in violation of FAR, 48 C.F.R. § 15.103(c). If we sustain FSRI's protest, the remedy would be termination of the contract and a resolicitation under which FSRI could participate. While SSA, in its report to our Office, relied on our decision in Mar-Mac Precision Corp., B-221561, Jan. 22, 1986, 86-1 C.P.D. ¶ 72 (a nonresponsive bidder is not interested to protest the price reasonableness of the remaining bids) to support its interested party argument, in that case there was no indication the nonresponsive bidder would be able to compete upon a resolicitation. Here, however, we consider Mar-Mac inapplicable in light of the lapse of time from the nonresponsibility determination in August to the earliest a

new solicitation could be issued coupled with information provided by the protester indicating that it may no longer be considered nonresponsive. Therefore, since our sustaining the protest would result in FSRI's opportunity to compete for the award, we view FSRI as an interested party. See Tracor Jitco, Inc., B-220139, Dec. 24, 1985, 85-2 C.P.D. ¶ 710.

Turning to their merits, FSRI and NRG protest that SSA awarded contracts as a result of the negotiated procurement at prices higher than the lowest bid price of a responsible bidder in violation of FAR, 48 C.F.R. § 15.103(c). That section provides that:

"When the agency head has determined, in accordance with 14.404-1(e)(1), 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 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."

SSA does not deny that prices under the negotiated procurement are higher than those bid under the canceled IFB. Rather, SSA argues that the FAR provision applies only to cases where an agency negotiates after cancellation for unreasonable bid prices or collusive bidding. SSA points out that the nonresponsive bids in the instant procurement were found nonresponsive for failing to meet a bid bond requirement. According to SSA, it would be unreasonable to expect offerors to lower their prices when adding a material requirement, such as a bid bond, during negotiations.

We agree with SSA's interpretation. The only logical interpretation of the term "lowest rejected bid price" in FAR, 48 C.F.R. § 15.103(c), is that it refers to a bid price rejected as unreasonable or as not independently reached in open competition. Otherwise, as SSA states, if it applied to bids rejected as nonresponsive, bidders who did not meet all

material requirements and who thereby may have been able to bid lower than they otherwise would could not offer a higher price for adhering to all such requirements in the negotiation phase. Here, therefore, the bids of the nonresponsive bidders do not fall within the "lowest rejected bid price" language of the cited FAR section because their bids were rejected for failure to meet a bid bond requirement, not because of unreasonable prices or price collusion. Consequently, we find no merit to the protest.

FSRI also contends that SSA's administrative report should be disregarded because it was not filed with our Office within the required 10-day period. 4 C.F.R. § 21.8(d)(1). This protest basis is without merit. Where the express option procedure is used, our Bid Protest Regulations require that the contracting agency file a report with our Office within 10 days from the date it receives notice from our Office that the express option will be used. 4 C.F.R. § 21.8(d)(1). "Days" refers to working days of the federal government. 4 C.F.R. § 21.0(d). SSA received notice of the express option from our Office on December 4, 1986, and was required to file its report by December 18, 1986. SSA's report was received in our Office on December 18, 1986, within the required 10-day period as evidenced by our Office's time-date stamp.

Since FSRI's protest is without merit, we need not address its allegation that SSA violated the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(d) (Supp. III 1985), by not suspending performance of the contracts pending our decision on the protest.

FSRI's protest is denied and NRG's protest is dismissed in accordance with 4 C.F.R. § 21.3(f), since we find that based on the above holding, it is clear, without obtaining a report from the agency responsive to NRG's protest, that the protest is without merit.

Ronald Berger
fn Harry R. Van Cleve
General Counsel