



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: U.S. Elevator Corporation
File: B-224237
Date: February 4, 1987

DIGEST

1. Contention that the sole responsive bid received under a small business set-aside is unreasonably priced is without merit where the contracting officer determined that the price was reasonable and the protester has not shown this determination to be unreasonable.
2. Recovery of the costs of pursuing a protest may not be allowed where the protest has been found to be without merit.

DECISION

U.S. Elevator Corporation (USEC) protests the award of a contract to Hotchkiss Elevator Co., Inc., the sole small business bidder under invitation for bids No. 678-25-87, issued as a small business set-aside by the Veterans Administration Medical Center, Tuscon, Arizona. USEC, the only other bidder and a large business, contends that the Hotchkiss price of \$63,672 for the required elevator/dumbwaiter maintenance services was unreasonable since it was nearly twice the price of \$32,700 submitted by USEC. The protester principally argues that the agency did not obtain the adequate competition that is required to insure the receipt of reasonable prices. USEC contends that the agency should terminate the contract and should resolicit the requirement on an unrestricted basis.

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

Initially, we note that by letter to the contracting officer, dated August 22, 1986, USEC protested the fact that the procurement was competed as a small business set-aside, rather than on an unrestricted basis. The contracting officer orally denied this protest. Bid opening took place on September 17, and USEC filed its protest with our Office on September 30. In November, USEC raised with our Office the issue of whether the procurement was properly competed as a small business

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set-aside. USEC also contended that the oral denial of its protest to the agency was insufficient and should have been made in writing.

These two matters are untimely since they involve the initial protest to the agency and our regulations require that after an initial agency protest, any subsequent protest to our Office must be filed within 10 days after actual or constructive knowledge of initial adverse agency action. At the latest, the protester was on constructive notice of initial adverse agency action when the agency proceeded to bid opening without withdrawing the set-aside. See 4 C.F.R. § 21.0(a) (1986); McAllister Bros., Inc., B-223888, Aug. 27, 1986, 86-2 CPD ¶ 235. We therefore will not consider these issues.

USEC timely argues that the contracting officer abused his discretion and acted unreasonably in making the award since insufficient small business competition was received to enable him to find the Hotchkiss price reasonable and since a comparison of the Hotchkiss price with the price submitted by USEC showed the former price to be unreasonable. USEC notes that in Stacor Corp.; et al., 57 Comp. Gen. 234 (1978), 78-1 CPD ¶ 68, we held that where six of the seven small business bids on a total small business set-aside were found to be nonresponsive and the remaining responsive bid was 58 percent higher than the low nonresponsive bid, the contracting officer's decision to cancel the solicitation and to resolicit on an unrestricted basis was reasonable due to the lack of adequate small business competition and the unreasonably high price of the responsive bid.

USEC also notes that we have stated that a bid submitted by a large business, even though nonresponsive to the set-aside requirement, may be considered in determining whether a price submitted by a small business bidder is reasonable. Tufco Indus., Inc., B-189323, July 13, 1977, 77-2 CPD ¶ 21. In this respect, USEC notes that the Hotchkiss price was nearly 100 percent higher than the price submitted by USEC. While it agrees that its bid took exception to the requirement for the maintenance of plungers and hydraulic lines, it contends that an appropriate upward adjustment in its price would not have been significant. Recognizing that the government may pay a premium in order to award contracts to small businesses under total set-asides, Society Brand, Inc., et al., 55 Comp. Gen. 475 (1975), 75-2 CPD ¶ 327, USEC argues that small businesses should not be subsidized to such an extent that unreasonable prices are paid.

Under Federal Acquisition Regulation, 48 C.F.R. § 14.404-2(f) (1986), the contracting officer may reject a bid if he determines the price of the bid to be unreasonable. However, it does not follow that simply because a small business bidder's price on a small business set-aside is greater than the price submitted by an ineligible large business, the small business bidder's price must be deemed unreasonable, since there is a range over and above the price submitted by the large business that may be considered reasonable in a set-aside situation. Any determination regarding price reasonableness is basically a matter of judgment within the administrative discretion of the contracting officer. Because of this, we do not question a determination of this nature unless it is clearly unreasonable or was made fraudulently or in bad faith. Warren/Dielectric Communications, B-212609, Jan. 26, 1984, 84-1 CPD ¶ 121.

USEC has not alleged that the determination was made fraudulently or in bad faith. Therefore, the question is whether the contracting officer reasonably determined the Hotchkiss price to be reasonable. While USEC has cited decisions of our Office in which various percentage differentials between bids were found to be indicative that a small business' bid price was unreasonable, those percentages are not binding on any determination here because whether a particular price is unreasonable depends upon the circumstances of each case. Saratoga Indus.--Reconsideration, B-202698.2, Jan. 22, 1982, 82-1 CPD ¶ 47.

Under the circumstances of this case, we believe that the determination made by the contracting officer was reasonable. The record shows that the procurement of these services in fiscal year 1986 resulted in the receipt of a bid of \$45,366 from Hotchkiss and a bid of \$56,131 from a large business. The procurement for fiscal year 1987, which is being protested here by USEC, consists of additional services to those procured in fiscal year 1986. A comparison of the prices received in fiscal year 1986 with the Hotchkiss price for fiscal year 1987 reasonably supports the conclusion that Hotchkiss' protested price is reasonable, taking into account the passage of 1 year and the additional services being required.

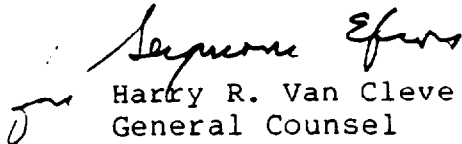
While USEC's price may be considerably lower than the price of Hotchkiss, USEC's price was based on a refusal to repair or replace plungers and hydraulic lines because USEC did not want to be responsible for conditions which did not allow for visual inspection. Thus, USEC's price cannot be used for the purpose of determining the reasonableness of the Hotchkiss

price. Further, the refusal of USEC to submit a bid which complied with all requirements of the solicitation creates doubt as to what USEC actually would have bid had it agreed to comply fully with all the solicitation's requirements.

Finally, we note that the fact that only one bid was received from a small business has no bearing on the validity of the award in view of the fact that the price of that bid was properly determined to be reasonable. See Advanced Constr., Inc., B-218554, May 22, 1985, 85-1 CPD ¶ 587; Warren/Dielectric Communications, supra.

The protest is dismissed in part and denied in part.

USEC also requests that we award it the costs of pursuing its protest, including attorney's fees. We deny the claim since we have found the USEC protest to be without legal merit. Hispanic Maintenance Servs., Inc., B-220957, Feb. 7, 1986, 86-1 CPD ¶ 142.


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General Counsel