



The Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Washington Printing Supplies Inc.

File: B-227099

Date: September 11, 1987

DIGEST

Where bids submitted under invitation for bids (IFB) for supply of printing press are permitted to expire for lack of funds but agency's need subsequently becomes urgent as a result of which agency orally solicits price and delivery terms from prior bidders, rejection of low offer on basis that locally-based, factory-trained service personnel would not be "available" from the protester essentially was a determination that it lacked the ability to satisfy the prior IFB's specifications which served as the point of reference for the oral solicitation. Since agency found protester nonresponsive without referring the matter to the Small Business Administration for possible issuance of a certificate of competency, protest is sustained.

DECISION

Washington Printing Supplies Inc. (WPS) protests the award of a contract by UNICOR, Federal Prison Industries, Inc. (FPI), United States Department of Justice, to Heidelberg Eastern, Inc., for an offset printing press. WPS contends that it was unfairly denied the award since its low offer fully complied with the solicitation requirements. We sustain the protest.

The printing press which is the subject of this procurement is for use at the Federal Correctional Institution in Fort Worth, Texas. According to the agency, the printing plant was established at Fort Worth as a means of keeping inmates productively employed and to train them in skills which are marketable when they leave prison.

Initially, FPI sought to obtain this press through sealed bidding under invitation for bids (IFB) No. 60PI-0009-6, which was issued on September 11, 1986. The protester (which certified it was a small business concern) and Heidelberg Eastern were the only bidders to respond to the

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solicitation and offered to supply Japanese-made and West German-made presses, respectively.

It does not appear that the bids were evaluated for award, however, because the opening of bids coincided with "a difficult cash flow situation [which] surfaced at [that] time." Because of the lack of funds, and apparently in view of the bidders' reluctance to extend their bids for a protracted period because of currency fluctuations, both bidders were notified in early January 1987 that no action was to be taken under the solicitation and that the "acceptance date [would be] allowed to lapse."

According to the agency, however, beginning in February the Small Business Administration (SBA) discussed with FPI the possibility of its performing printing work at Fort Worth for the SBA. This "major contract," worth approximately \$300,000 in its first year, would be "in jeopardy" unless the Fort Worth plant was upgraded by the acquisition of a press.

The agency decided that due to these "unusual, urgent and compelling circumstances," it would obtain the press "without the use of customary formal solicitation procedures." The FPI telephonically requested prices from Heidelberg Eastern (on or about March 16) and from WPS (on or about March 25) for delivery within 15-30 days. As authority for this procurement action, the agency cites 41 U.S.C. § 253(c)(2) (1985), which authorizes the use of other than full and open competition procedures when the agency's need for supplies or services is of an unusual and compelling urgency and delay in the contract award would result in serious financial injury to the government.

FPI's contract specialist's notes of these telephone conversations are sketchy, but both these notes and the protester's account of what transpired suggest that the two firms were asked to provide their current price (the expired bids had been submitted 3-1/2 months earlier) and delivery terms. The protester offered a delivered price of \$99,015; Heidelberg offered a delivered price of \$101,380.

Although the protester's price was \$2,365 lower than Heidelberg's, and the protester offered delivery terms which were comparable to Heidelberg's and apparently acceptable to the agency, FPI proceeded with an award to Heidelberg. It did so, the agency states, because a previous unsatisfactory experience with the press offered by the protester "indicated that one key requirement of the [prior sealed bid] solicitation [specifications] would not be available: 'Service personnel must be factory trained and based locally for quick response.'"

The agency concluded that service would be "easier to acquire" for the Heidelberg press because it was in "more widespread usage" in this country. Another "important consideration" which led to the agency's award decision was that because the protester's press was found in commercial print shops "much less frequently" than the Heidelberg press, the latter would be more valuable in training inmates with skills marketable in industry upon their release from prison. It does not appear that either of these concerns was mentioned to the offerors in the telephonic solicitation.

The protester argues that it should have received the award as the lowest-priced offeror whose equipment met the agency's specifications. It disputes not only the accuracy of the agency's account of the difficulty it had in obtaining service for the protester's press, but its relevance, since that incident occurred at an institution in a sparsely-populated area of upstate New York and not in the Fort Worth metropolitan area. The protester also claims that in the past 3 years its manufacturer's placement of similar-sized equipment in the commercial market "has risen dramatically" when compared with Heidelberg.

We note that the agency originally set out to fulfill this need through the solicitation of sealed bids, and the only reason it has given for not pursuing that procurement to a conclusion was that funds were not available. Among other specification requirements in that solicitation was "service personnel must be factory trained and based locally for quick response." The solicitation lacked a section "M," "Evaluation Factors for Award," but did incorporate by reference under section "L," "Instructions, Conditions, and Notices to Offerors," the clause "Contract Award-Sealed Bidding (APR 1985)" found at the Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.214-10 (1986). This clause provides in part that the government ". . . will award a contract to the responsible bidder whose bid, conforming to the solicitation, will be most advantageous to the Government considering only price and the price-related factors specified elsewhere in the solicitation." No mention was made in the IFB of the comparative usage of equipment in commercial print shops as an evaluation factor for award. It is fair to conclude, therefore, that the IFB simply contemplated award to the lowest-priced, responsive and responsible bidder.

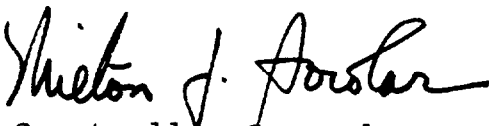
Although bids were allowed to expire under the IFB and the present oral solicitation is a separate procurement action, it is clear that the prior written sealed bid solicitation served as a benchmark or point of reference. When the

agency's need for this equipment became urgent it approached only the two firms which had responded to the IFB and, in effect, asked them to update their price and delivery terms.

The protester offered the lower price and, insofar as the record reveals, acceptably quick delivery. It was not awarded the contract, however, because the agency was of the opinion that a "key [specification] requirement" of the prior sealed bid solicitation "would not be available, i.e., the provision of locally-based, factory-trained service personnel. That was but one specification requirement of the prior solicitation (and, incidentally, not highlighted as of special importance), and like any other specification requirement, a bidder's ability to satisfy it would be a matter of the firm's responsibility. Here, the agency, in effect, improperly determined the protester, a small business concern, incapable of providing adequate local service--i.e., to be nonresponsible--without referring the matter to the Small Business Administration (SBA) for determination under its certificate of competency procedures, as required by the Small Business Act.

15 U.S.C. § 637 and FAR, 48 C.F.R. § 19.602-1; Aldan Rubber Co., B-212673, Dec. 5, 1983, 83-2 C.P.D. ¶ 645. We sustain the protest on this ground.

Since delivery of the press has already been completed, it is not practical to provide corrective action in this procurement. We find, however, that because the agency, in effect, unreasonably excluded WPS from the procurement by its failure to comply with federal procurement regulations, the protester is entitled to recover reasonable costs of preparing its offer and pursuing its protest, including attorney's fees. Leland Limited, Inc.--Reconsideration, B-224175.2, Feb. 17, 1987, 87-1 C.P.D. ¶ 168; Hobart Brothers Co.--Reconsideration, B-222579.2, Sept. 19, 1986, 86-2 C.P.D. ¶ 323. WPS should submit its claim for such costs directly to the Department of Justice. 4 C.F.R. § 21.6(f) (1987).

for 
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