



The Comptroller General
of the United States

Washington, D.C. 20548

W. J. Hall - McNeil

Decision

Matter of: Northwest Piping, Inc.
File: B-233796
Date: March 30, 1989

DIGEST

1. General Accounting Office will not disturb agency's determination that an individual surety is acceptable where the record does not show that procuring officials acted in bad faith in making the determination or that there was no reasonable basis for the determination.
2. Protest that low bid should have been rejected as non-responsive because it contained unit prices that were not consistent with the bid total is denied where two of the errors were de minimus and the other was properly correctable by the agency under mistake in bid procedures, which permit correction of a discrepancy in a bid where the discrepancy admits to only one reasonable interpretation that is ascertainable from the face of the bid in light of the government estimate, the range of other bids, or the contracting officer's logic or experience.
3. Argument that solicitation should have been set aside for 100 percent Indian-owned firms where solicitation explicitly stated that procurement was set aside for 51 percent Indian-owned firms is untimely where protester did not object to the provision until after bid opening.

DECISION

Northwest Piping, Inc., protests the award of a contract to R&D Construction under invitation for bids (IFB) No. RDSA00-0638, issued by the Bureau of Indian Affairs, Department of the Interior, for road construction on the Cheyenne River Indian Reservation in Ziebach County, South Dakota. Northwest argues that R&D's bid should have been rejected because the net worth of the two individual sureties listed on its bid bond were inadequate and because R&D's bid was improperly corrected by the contracting officer. The protester further contends that only

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100 percent Indian-owned and operated concerns should be eligible for award under the solicitation, which was set aside for Indian firms pursuant to the Buy Indian Act, 25 U.S.C. § 47 (1982).

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

The IFB required each bidder to submit a bid guarantee and advised that failure to submit the required guarantee might result in rejection of the bid. The IFB further stated that for each item bidders should enter both a unit price and an extended price for the estimated quantity indicated in the bid schedule. It also stated that in the event of a discrepancy between the unit and extended prices, the unit price would be presumed to be correct.

R&D's bid price of \$1,296,289.07 was the lowest of the three announced at the August 16, 1988 bid opening. Northwest was second low at \$1,474,437.85. The contracting officer discovered that R&D had made three errors in extending its unit prices. After discussing the discrepancies with representatives of R&D, the contracting officer determined that the extended prices were in error and corrected those prices for the three items. R&D's total price, as corrected, \$1,386,822.73, remained low.

R&D's bid contained a bid bond listing two individual sureties. The affidavits of individual surety furnished by the two indicated that one had a net worth of \$60,547,355 and the other a net worth of \$60,311,291. Both sureties cited real estate holdings valued at more than \$60 million, but neither had completed the blank on the affidavit indicating the amount of assessed valuation of his real estate for taxation purposes.

The contracting officer sought further information concerning the ownership and value of the realty. In response, R&D furnished documentation from its two sureties indicating that they held title to the realty as trustees of two trusts, and that the beneficiaries of the trusts had empowered them to guarantee the performance of contracts using trust assets as security. The sureties also submitted a letter of appraisal from an independent appraiser indicating that as of August 15, the market value of the property held by the first trust was \$27,100,000 and the market value of the property held by the second was \$101,400,000.

The protester first challenges the agency's determination that R&D's sureties were acceptable. Northwest argues that it was unreasonable for the contracting officer to rely on

the sureties' representations regarding their net worth. In this regard, the protester contends that the documentation provided was suspicious and that the land claimed by the sureties is in fact owned by "over 1,000 other individuals." The protester contends that the contracting officer should have conducted his own independent investigation, which, according to the protester, would have revealed that the sureties did not own the real estate that they claimed in their affidavits.

The agency responds that it asked for and reasonably relied on additional information and documentation, including statements by a certified public accountant, concerning the sureties' financial holdings. According to the agency, it may rely on the information submitted by the sureties without undertaking its own independent investigation.

The accuracy of information concerning a sureties' financial condition is a matter of responsibility. Transcontinental Enterprises, Inc., 66 Comp. Gen. 549 (1987), 87-2 CPD ¶ 3. In reviewing a bidder's responsibility, including situations like the one here concerning the responsibility of an individual surety, the contracting officer is vested with a wide range of discretion and business judgment, and we will defer to his affirmative determination unless the protester shows that procuring officials acted in bad faith or that there was no reasonable basis for the determination. See Eastern Metal Products & Fabricators, Inc., B-220549.2 et al., Jan. 8, 1986, 86-1 CPD ¶ 18.

The essence of the protester's argument appears to be that the sureties do not hold title to the land listed on their affidavits because the grantor of the land did not in fact own it and therefore did not have the authority to convey it to them. Based on the information in the record, which, in addition to the information contained in the affidavits, included deeds to the land, and considering the broad discretion enjoyed by the contracting officer, we do not believe that the decision to accept the sureties was either made in bad faith or without any reasonable basis. Moreover, we do not think that it was unreasonable for the contracting officer to rely on the documentation submitted

by the sureties without further conducting his own investigation. See Synthes (U.S.A.), B-231748, Aug. 19, 1988, 88-2 CPD ¶ 164.1/

Northwest also argues that R&D's bid should have been rejected as nonresponsive because the unit prices were not consistent with the extended prices under three line items.

Under line item No. 603(1c), which called for an estimated 166 feet of pipe, R&D had entered a unit price of \$19.72 and an extended price of \$3,272.52. The contracting officer corrected the extended price to \$3,273.52. Under line item No. 607(1), for an estimated 92,300 feet of fencing, R&D entered a unit price of \$1.09 and an extended price of \$10,068.70. Here, the extended price was corrected to \$100,607. Finally, under line item No. 633(2), which called for an estimated 4.5 square feet of signs, R&D had entered both unit and extended prices of \$210. The contracting officer corrected the extended price for that item to \$945. These corrections changed R&D's overall bid price from \$1,296,289.07 to \$1,386,822.73. The corrected price was still lower than the protester's next low bid of \$1,474,437.85.

With regard to the most significant correction, that concerning line item No. 607(1), the fact that the bid contained a discrepancy between the unit and extended prices did not render it nonresponsive since the error was correctable under mistake in bid procedures. Rut's Delivery Service, B-217286, Apr. 26, 1985, 85-1 CPD ¶ 474. Here, the contracting officer concluded that it was clear that the

1/ The protester notes in its comments on the agency report that if the contracting officer does not review and revise his determination regarding the acceptability of R&D's sureties, "it wishes to reserve its right to supplement this protest pursuant to 4 C.F.R. § 21.3(1)" to show that the responsibility determination was not made in good faith.

Section 21.3(1) of our Bid Protest Regulations does not confer upon protesters the right to raise additional grounds of protest while their protests are under consideration. Any allegation of bad faith relating to the agency's decision not to reverse its determination regarding the acceptability of R&D's sureties should have been raised within 10 working days of the report's receipt since the agency's position that it did not intend to reverse its determination was clear from the report. 4 C.F.R. § 21.2(a)(2).

error was in the extended price as the unit price was within a few cents of the engineers' estimate and within the range of the other bids. Therefore, we think that this error was properly correctable under the rule contained in the Federal Acquisition Regulation (FAR) which permits the correction of an error where the error admits to only one reasonable interpretation that is ascertainable from the face of the bid in light of the government estimate, the range of other bids, or the contracting officer's logic or experience. See FAR § 14.406-2(a); Argee Corp., B-230165.3, May 20, 1988, 67 Comp. Gen. _____, 88-1 CPD ¶ 482; Patterson Pump Co., et al., B-200165 et al., Dec. 31, 1980, 80-2 CPD ¶ 453.

As far as the discrepancy in line item No. 633(2) is concerned, the agency concedes that it is not clear whether the error was in the unit price or the extended price since neither was in line with the engineers' estimate. Since the difference between the extended price as entered by R&D on its bid schedule (\$210) and the extended price as corrected by the agency (\$945) is only \$735, whereas the overall difference between R&D's bid and Northwest's bid is over \$87,000, the effect of the mistake is de minimus and whether or not it is corrected will not prejudice or displace other bidders. Porterhouse Cleaning and Maintenance Service Co., Inc., B-225725, May 18, 1987, 87-1 CPD ¶ 522. Therefore, we do not believe the protester has a basis upon which to object to the agency's correction here. Similarly, the discrepancy of \$1 between the extended price for line item 603(1c) as entered by R&D on its bid schedule and as corrected by the contracting officer is de minimus and does not provide a basis of protest.

The protester argues finally that the IFB, which was set aside for 51 percent Indian-owned and controlled firms, should instead have been set aside for 100 percent Indian-owned firms. Northwest alleges that the agency violated the Administrative Procedures Act, 5 U.S.C. § 553 (1982), by redefining what constitutes an Indian-owned concern from 100 percent Indian-owned to 51 percent Indian-owned without following rule-making procedures.

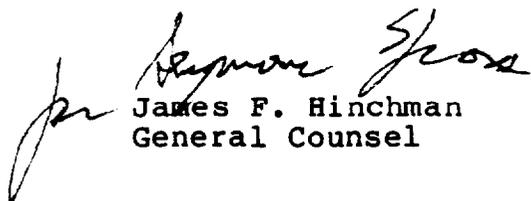
We will not consider this issue because it was not raised in a timely manner. The cover page of the solicitation explicitly stated that the procurement was set aside for 51 percent Indian-owned and controlled firms. To be timely, a protest based upon an alleged impropriety in a solicitation which is apparent prior to bid opening must be filed before bid opening. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1988). Any protest that Northwest wished

to raise against the 51 percent ownership standard should therefore have been raised prior to the August 16 bid opening.

The protester urges us to consider this issue under the exception in our Regulations for significant issues. 4 C.F.R. § 21.2(b). Under this exception, our Office may consider an untimely protest if the subject matter of the protest is of widespread interest to the procurement community and has not been considered on the merits in previous decisions. Northwest argues that although the subject matter here is not of widespread interest to the procurement community in general, it is of widespread interest to the Indian procurement community.

We decline to invoke the significant issue exception here. Not only is the issue not one of interest to the procurement community in general, but furthermore it will have no impact on the disposition of this particular case since there is no evidence that the change in definition actually benefited R&D. The agency found--and has submitted documentation supporting that finding--that R&D is in fact 100 percent Indian-owned and controlled, which means that the firm would have qualified as a Buy Indian concern under either definition. Furthermore, the contracting officer found no evidence to support the protester's allegation that R&D was a front for Kjelbertson Construction Company, a firm which allegedly is less than 51 percent Indian-owned and controlled. The evidence gathered by the contracting officer, which included a notarized statement from the former president of the Kjelbertson Company, in fact indicated that the firm had gone out of business in December 1985.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel