



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Government Contracting Resources

File: B-243915

Date: August 15, 1991

J. Don Albritton for the protester.

Millard F. Pippin, Department of the Air Force, for the agency.

Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's fair market price estimate in connection with invitation for bids (IFB) set aside for small disadvantaged businesses, based solely on the estimated costs of performing the required services by military personnel in-house, is not reasonably based, since, despite regulatory direction to consider commercial prices for similar services and to obtain data from the Small Business Administration or from any other government agency, contracting agency made no reasonable effort to obtain available information upon which it could reasonably base an estimate of the price at which the services required under the IFB may be obtained from commercial sources.

2. In the absence of a reasonably-based fair market price estimate, award to a small disadvantaged business (SDB) submitting a higher-priced bid under invitation for bids set aside exclusively for SDB participation is improper where the SDB bid exceeds the low non-SDB bid by more than 10 percent; in such cases, the Department of Defense Federal Acquisition Regulation Supplement implementing the SDB set-aside program requires that the contracting officer withdraw the SDB set-aside.

DECISION

Government Contracting Resources (GCR), a small nondisadvantaged business, protests the proposed award of a contract to Blocks, Inc. under invitation for bids (IFB) No. F34612-91-B0006, issued by the Department of the Air Force as a total small disadvantaged business (SDB) set-aside. The IFB is for furniture management services at Altus Air Force

Base, Oklahoma. GCR contends that the Air Force cannot properly accept Blocks's bid since it exceeds the fair market price (FMP) of the required services by more than 10 percent.

We sustain the protest.

BACKGROUND

The IFB was issued on March 29, 1991,^{1/} and contained the following notice:

"This procurement is 100 [percent] Set-Aside for [SDB] concerns. However, if no acceptable bids are received from SDB concerns, this procurement is automatically converted to a 100 [percent] Set-Aside for Small Business. All small business concerns are invited to submit bids."

The IFB contemplated the award of a fixed-price requirements contract for a 1-year base period with up to two 1-year options. The IFB contained Federal Acquisition Regulation (FAR) § 52.217-5, the standard "Evaluation of Options" clause, which states in part that the government will evaluate bids for award purposes by adding the total price for all options to the total price for the basic requirement. Award was to be made to the bidder whose bid was most advantageous to the government considering price only.

The agency received seven bids by bid opening on April 29, four of which were submitted by SDB concerns as indicated:

| | Total price |
|-------------------------|-------------|
| GCR (non-SDB) | \$ 205,393 |
| Blocks (SDB) | \$ 273,120 |
| Logistics (non-SDB) | \$ 295,772 |
| J.R. Services (SDB) | \$ 297,023 |
| Blue's Window (SDB) | \$ 427,676 |
| Donald E. Clark (SDB) | \$ 521,965 |
| J & C Constr. (non-SDB) | \$ 896,685 |

^{1/} The services required under the IFB had been previously performed by an in-house work force. The IFB was issued pursuant to Office of Management and Budget (OMB) Circular A-76 to determine whether it would be more economical for the services to continue to be performed in-house or by contract. See Logistical Support, Inc., B-234621, May 24, 1989, 89-1 CPD ¶ 500 (where the usual criteria for setting aside the procurement are met, in the absence of authority prohibiting such, use of SDB set-aside to conduct A-76 cost comparison is not improper).

The agency states that its estimate, \$318,579, reflects the FMP of the required services for all 3 years. The agency takes the position that since the low SDB bid submitted by Blocks is considerably below the FMP as reflected in the government estimate, award to that firm under the set-aside is proper. The agency has withheld award of the contract pending resolution of this protest.

GCR contends that the Air Force has not received an acceptable bid from an SDB bidder and that, consequently, the SDB set-aside should be withdrawn. GCR states that its low bid, rather than the government estimate, more accurately reflects the FMP of the services. In this connection, GCR asserts that its bid price is based upon its experience performing similar work under contracts at other Air Force bases. The protester argues that since the higher-priced SDB bid submitted by Blocks exceeds the FMP (i.e., GCR's low bid) by nearly 33 percent, award to Blocks would be improper. GCR requests that the SDB set-aside be withdrawn and that, in accordance with the terms of the IFB, the agency convert the solicitation to a total small business set-aside.

DISCUSSION

The Department of Defense (DOD) established the SDB preference program primarily under authority of section 1207 of the National Defense Authorization Act, 1987, 10 U.S.C. § 2301 note (1988). The Act left to DOD's discretion the promulgation of regulations and procedures necessary to achieve the Act's stated objectives of awarding 5 percent of the dollar value of DOD's contracts to SDB concerns. G&D Foods, Inc., B-233511 et al., Feb. 7, 1989, 89-1 CPD ¶ 125. Under the regulations implementing the Act, the entire amount of an individual acquisition is required to be set aside for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that: (1) offers will be obtained from at least two responsible SDB concerns, and (2) award will be made at a price not exceeding the FMP by more than 10 percent. Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 219.502-72(a); Kato Corp., 69 Comp. Gen. 374 (1990), 90-1 CPD ¶ 354.

When a solicitation is issued as an SDB set-aside, contracting officers are specifically directed to withdraw the set-aside where the expectation listed in DFARS § 219.502-72(a)(2) is not realized. That is, a contract may not be awarded under an SDB set-aside where the low SDB bid exceeds the FMP by more

than 10 percent; in such cases, the contracting officer is directed to initiate a withdrawal of the set-aside. See DFARS § 219.506(a); Superior Eng'g and Elecs. Co., Inc., B-231772, Aug. 31, 1988, 88-2 CPD ¶ 197, aff'd, B-231772.2, Oct. 3, 1988, 88-2 CPD ¶ 307. GCR's protest of the proposed award to Blocks is based on its contention that the government estimate may not be relied on as the FMP and thus cannot be used to determine whether award to Blocks will result in a price not exceeding the FMP by more than 10 percent. Instead, GCR argues, its bid under the IFB represents the FMP and since Blocks's bid exceeds GCR's bid by more than 10 percent, the SDB set-aside should be withdrawn and award made to GCR, the low bidder.

Agency's FMP determination

In determining the FMP, DFARS § 219.502-72(a)(2) directs contracting officers to FAR § 19.807 (previously FAR § 19.806-2), which addresses estimating the FMP in procurements under section 8(a) of the Small Business Act. The FAR provision instructs contracting officers to consider commercial prices for similar services, available in-house cost estimates, cost or pricing data submitted by the Small Business Administration (SBA), and information obtained from any other government agency.^{2/} Given this direction, contracting agencies are expected to gather reliable, accurate, and current information upon which they may reasonably base an estimate of the prices at which the required services could be obtained from commercial sources. See, e.g., Logics, Inc., B-237412, Feb. 13, 1990, 90-1 CPD ¶ 189 (agency improperly decided to withdraw SDB set-aside where agency ignored government-issued catalog containing current market price information in calculating its FMP estimate).

Our Office will not question an agency's FMP determination unless it is not reasonably based or there is a showing that agency officials engaged in fraud or bad faith. Cherokee Enters., Inc., B-228330, Dec. 4, 1987, 87-2 CPD ¶ 552. Here, the protester does not allege and there is no evidence of fraud or bad faith. We conclude, however, based on the record before us, that the agency's FMP determination is not reasonably based.

^{2/} FAR § 19.001 defines FMP as a price based on reasonable costs under normal "competitive conditions," and not on the lowest possible cost. See also Black's Law Dictionary (6th ed. 1990), which defines FMP as usually referring to the price at which "bona fide sales have been consummated for [services] of like type, quality, and quantity in a particular market at the time of the acquisition."

The agency states that its estimate of \$318,579 was developed by the "Manpower Office (MACMET)" using an in-house "formula." Except for its conclusory statement that its estimate reflects the FMP for the required services, the agency does not explain how it arrived at that figure. Documents submitted with the agency report indicate, however, that the agency apparently calculated its FMP estimate by adding the annual pay rates for the military personnel that currently perform the services (two E-4s, at \$32,048 each, and one E-5 at \$37,785), for a total of \$101,881 annually.^{3/} The agency then calculated an estimated annual material and supply cost of \$4,312, which was added to the annual pay rates for an estimated total annual cost of performing the services in-house of \$106,193. The agency then multiplied that amount by three (\$106,193 x 3), representing the base year and 2 option years of the contemplated contract, to arrive at its total estimate of \$318,579.

The agency does not explain its rationale for concluding that its estimate, derived solely from the estimated costs of performing the services in-house, is an accurate reflection of the FMP for the services required under the IFB. We think that the agency's methodology, while ostensibly adequate for developing a cost estimate of performing the services in-house, without more, is inadequate to calculate an FMP estimate as contemplated by the FAR.

As previously stated, FAR § 19.807 directs agencies to use virtually any currently available, relevant information to arrive at its FMP estimate. Despite that specific authority, there is no indication here that the agency attempted to identify or determine the price at which the required services have been or may be obtained on the open market from commercial sources. There is no indication that the agency conducted a market survey; no evidence that it considered any commercial prices; no evidence that it obtained or considered data from SBA; and no indication that it contacted or obtained information from any other government agency. Moreover, there is no evidence that the contracting officer contacted other Air Force installations that may have

^{3/} The agency presumably obtained these pay rates from a document titled "Military Standard Composite Rates Table," a copy of which appears in the agency's report to our Office. The table lists current total annual composite military pay rates for grades E-1 to E-9 and from O-1 to O-10. It is apparently to be used in calculating costs, such as for OMB Circular A-76 cost comparison purposes, under the agency's "Commercial Activities Initiatives" program.

contracted for similar services with commercial sources.^{4/} At a minimum, the contracting officer should have made a reasonable effort to survey the marketplace and identify potential sources of reliable information regarding prices at which the required services may be obtained from commercial sources; should have gathered current price data from those sources; and should have developed an FMP estimate reasonably based upon an analysis of that information. No such attempt was made here.

The agency's application of its "formula" here may have resulted in an estimate relevant in determining the costs of performing the services in-house. There is no evidence in the record, however, upon which to conclude that the government's FMP estimate was reasonably based on prices at which the required services may be obtained from commercial sources. We therefore conclude that the agency's FMP was flawed, and cannot be used to determine whether award to Blocks will result in a price that does not exceed the FMP of the services by more than 10 percent.

The purpose of conducting a price analysis, such as contemplated by DFARS § 219.506(a), in a restricted procurement, is to determine whether the government is obtaining a fair and reasonable price under the restriction, as compared to the prices that would be available to the government under a competition conducted without the restriction. See generally Vitronics, Inc., 69 Comp. Gen. 124 (1990), 90-1 CPD ¶ 57. Any difference in prices resulting from that comparison reflects, at least in part, the cost premium to the government due to the effect of the restriction on the competition. Id.

Under DOD's SDB set-aside program, absent a reasonably-based FMP estimate,^{5/} a comparison of the low non-SDB bid and the

^{4/} In fact, the protester alleges, and the agency does not dispute, that it is currently performing contracts for the same services required under the IFB at two other Air Force bases. Additionally, in its administrative report to our Office, the agency states that Blocks, the proposed awardee, has also indicated that it is currently performing a contract for similar services at yet a third base.

^{5/} See Grove Roofing, Inc., B-240743 et al., Dec. 10, 1990, 90-2 CPD ¶ 470 (withdrawal of SDB set-asides on four IFBs would be improper where, in response to each IFB, the agency received at least one SDB bid that was within 10 percent of the agency's unchallenged FMP estimate); Americorp, B-231644, Oct. 6, 1988, 88-2 CPD ¶ 331 (withdrawal of an SDB set-aside (continued...))

higher-priced SDB bid is generally a good indicator of the cost premium to the government resulting from the SDB set-aside. Thus, for example, where such comparison reveals that, due to the cost premium in prior procurements, award to an SDB would have resulted in a price that exceeded the 10 percent ceiling established by the DFARS, contracting officers need not presume that an adequate expectation of SDB participation exists to require setting aside a subsequently-issued solicitation for similar goods or services exclusively for SDB participation. DFARS § 219.502-72(c); Commercial Energies, Inc., B-234789, July 12, 1989, 89-2 CPD ¶ 40 (agency properly determined to issue IFB unrestricted where, of the five SDB bids in the two prior procurements, the only responsive bid was 16 percent higher than prior awardee's bid).

We see no reason why a similar approach should not apply to determining whether award may be made to an SDB once the procurement has been set aside, where, as here, the government estimate of the FMP is flawed and, therefore, cannot properly be used in determining whether award to an SDB will result in a price not exceeding the FMP by more than 10 percent. See Donaldson Co., Inc., B-236795, Dec. 4, 1989, 89-2 CPD ¶ 514 (award to higher-priced SDB, based on application of SDB evaluation preference, was proper where SDB offer was within 10 percent of the otherwise low offer and therefore satisfied DFARS requirement that award price not exceed FMP by more than 10 percent). Based on the results of the competition here, the higher-priced SDB bid (Blocks's bid) exceeds the low non-SDB bid (GCR's bid) by nearly 33 percent. Since award to Blocks would result in a contract price that exceeds by more than 10 percent the lower price otherwise available to the government without the restriction, DFARS § 219.506(a) requires that the contracting officer initiate a withdrawal of the SDB set-aside.

RECOMMENDATION

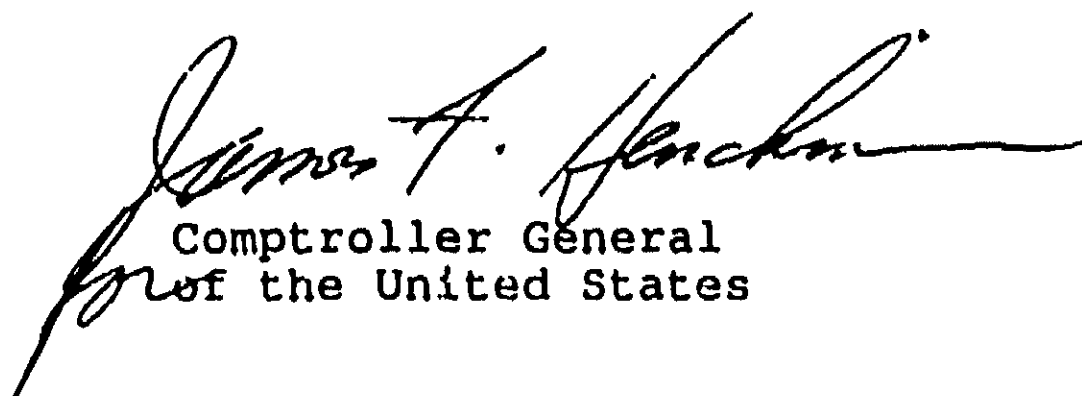
We recommend that the contracting officer withdraw the SDB set-aside in accordance with DFARS § 219.506(a), and convert the IFB to a total small business set-aside in accordance with the terms of the IFB. We further recommend that the agency award the contract to GCR if the firm is otherwise eligible.

5/ (...continued)
was proper where low SDB offer exceeded the FMP--as reflected in unchallenged government estimate--by more than 10 percent).

B-243915

We find that the protester is entitled to recover its costs of filing and pursuing its protest, 56 Fed. Reg. 3,759 (1991) (to be codified at 4 C.F.R. § 21.6(d)(1)). GCR should submit its claim directly to the agency.

The protest is sustained.


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