148619

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Paul J. Vignola Electric Company, Inc.

File: B-250770

Date: February 22, 1993

Brian Cohen, Esq., Sadur, Pelland & Rubinstein, for the protester.
Warren E. Lightfoot for Cherokee Enterprises, Inc., an interested party.
Lester Edelman, Esq., and Nikki E. Koulizakis, Esq., Office of the Chief of Engineers, Department of the Army, for the agency.
Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against award to sole bidder under solicitation set aside for small disadvantaged business (SDB) concerns on the basis that awardee's bid for base item was more than 10 percent higher than the government's estimate for that item, and funds available at bid opening were only sufficient for procurement of base item and not additive item, is denied where contract award included both base and additive items due to increase in available funding, and sole SDB bidder's total bid was only 1.34 percent higher than the revised total government estimate.

DECISION

Paul J. Vignola Electric Company, Inc. protests the award of a contract by the Army Corps of Engineers to Cherokee Enterprises, Inc. under invitation for bids (IFB) No. DACA31-92-B-0345, set aside for small disadvantaged business (SDB) concerns, for lighting of recreation areas at Fort Belvoir, Virginia. The protester contends that Cherokee was not eligible for the award based upon the amount of funds available at the time of bid opening (which were sufficient for an award of the base item only and not the additive item). Vignola states that since Cherokee's bid for the base item was more than 10 percent higher than the government's estimate for that item, and an award cannot be made under an SDB set-aside for an amount more than 10 percent higher than the fair market price of the goods or services, the bidder should have been declared ineligible

for award at the time of bid opening (because of the limited amount of funds then available) despite the fact that additional funds became available to allow an award of both the base and additive items.

The protest is denied.

The IFB, issued on August 26, 1992, contemplated the award of a firm, fixed-price contract under which the contractor would furnish all labor, materials and equipment involved in the installation of lighting systems for the recreation fields. Bidders were required to provide prices for a base item, lighting for a baseball field, and an additive item, lighting for the basketball and tennis courts.[1]

Cherokee, an SDB contractor, submitted the only bid received at the scheduled September 28 bid opening. Cherokee bid $170,000 for the base item and $170,000 for the additive item, resulting in a total bid of $340,000. The government's original estimates at the time of bid opening were $133,900 for the base item, $175,500 for the additive item, and $309,400 for the total contract amount. After bid opening, the agency reexamined its estimates and, having found that calculation errors occurred in the formulation of the original estimates, revised the estimates to the following amounts: $151,700 for the base item; $183,800 for the additive item; and $335,500 for the total contract amount. Under the government's revised estimates, Cherokee's bid was found to be 12.1 percent higher than the government estimate for the base item, 7.5 percent lower than the government estimate for the additive item, and only 1.34 percent higher than the total government estimate for the award of a contract for both items.

The initial amount of funds available for award, as recorded prior to the time of bid opening, was $262,100. On September 30, however, after reviewing the revised government estimate, the agency made available additional funding of $83,400, for a total available amount of $345,500 for the award of a contract under the IFB. An award was made to Cherokee on the same day for both the base and additive items at a total price of $340,000. This protest followed.

---

[1]The use of a bid schedule with a base bid item covering the general work requirement and a list of priorities that contains one or more additive items which add specified features of the work is appropriate where it appears that sufficient funds may not be available for all the desired features. See generally Defense Federal Acquisition Regulation Supplement (DFARS) § 236.303-70.

Vignola, which is not an SDB, contends that Cherokee's bid was more than 10 percent above fair market price, and for this reason, the SDB set-aside was required to be withdrawn pursuant to applicable regulations. Those provisions provide that an SDB set-aside should not be withdrawn "for reasons of price reasonableness unless the low responsive responsible offer exceeds fair market price by more than 10 percent," DFARS § 219.506(a), and that one precondition to setting aside an acquisition for SDBs is an expectation that "award will not be made at more than 10 percent above fair market price." DFARS § 219.502-2-70(a)(2).

As discussed above, Cherokee's bid was more than 10 percent above the government estimate for the base item (12.1 percent higher), but only 1.34 percent higher than both items actually awarded. Vignola's argument rests on a regulation governing the use of additive or deductive items in determining the low bidder for award. DFARS § 252.236-7007, entitled "Additive or Deductive Items" (dated December 1991), provides as follows:

> "(a) The low offeror and the items to be awarded shall be determined as follows--
>
> (1) Prior to the opening of bids, the Government will determine the amount of funds available for the project.
>
> (2) The low offeror shall be the Offeror that--
>
> (i) Is otherwise eligible for award; and
>
> (ii) Offers the lowest aggregate amount for the first or base bid item, plus or minus (in the order stated in the list of priorities in the bid schedule) those additive or deductive items that provide the most features within the funds determined available. . . .
>
> "(b) The Contracting Officer will use the list of priorities in the bid schedule only to determine the low offeror. After determining the low offeror, an award may be made on any combination of items if--
>
> (1) It is in the best interest of the Government;

(2) Funds are available at the time of award; and

(3) The low offeror's price for the combination to be awarded is less than the price offered by any other responsive, responsible offeror."

The protester argues that whether the low offeror is "otherwise eligible for award" includes whether the low bid exceeds the fair market price of the goods or services by more than 10 percent. Vignola states that under DFARS § 252.236-7007, Cherokee's "eligibility" for an award under the IFB must be determined at the time of bid opening on the basis of only those items that could then be awarded within the initial amount of funds determined to have been available. In other words, the protester contends that since the funds available at bid opening were only sufficient for an award of the base item of the IFB, and Cherokee's base item bid was in excess of 10 percent higher than the government's estimate for that item, Cherokee was not eligible for any award under the IFB because the SDB firm submitted an unreasonable price for the base item. Vignola requests that the agency terminate its contract award, withdraw the SDB set-aside restriction and resolicit the requirement.

The agency contends that Vignola is improperly interpreting the "otherwise eligible for award" language of subsection DFARS § 252.236-7007(a)(2)(i). The Corps states that whether an SDB bidder's price is unreasonably high relates to the actual award under an IFB (which award, as here, includes both the base bid and additive items due to additional funding having been made available after bid opening), upon a determination of the reasonableness of the bidder's price for those individual items that could have been awarded within the funding available at bid opening.

The Corps contends that this "otherwise eligible for award" language in DFARS § 252.236-7007(a)(2)(i)--which is new to the 1991 edition of the DFARS--was [illegible] intended to include a determination under DFARS § 219.5[illegible] regarding the withdrawal of an SDB set-aside on the basis of price unreasonableness. The Corps states that the DFARS provisions requiring award to SDB firms only where the award price is within 10 percent of the fair market price relate to a price determination which is to be made based upon, and up until the time of, the actual award by the agency. See DFARS §§ 219.502-2-70 and 219.506(a).

We believe that DFARS § 252.236-7007 does not preclude award to the sole SDB bidder here where additional funding became

available and award was made within 10 percent of the fair market price for the full requirement. First, the additive or deductive items clause has no application to the award determination here. This clause provides a formula to identify which of multiple bidders is to be considered the low bidder for award when funds are not available at bid opening for an award of all of the solicitation's schedule items. In procurements where more than one bid has been received, the clause functions to prevent displacement of an apparent low bidder in line for award with another bidder of choice simply by manipulation (after bid opening) of the amount of funds available for the requirement. See generally Huntington Constr., Inc., 67 Comp. Gen. 499 (1988), 88-1 CPD ¶ 619. Such concerns are not present where, as here, only one bid is received in response to the solicitation.

Second, we do not share the protester's interpretation of DFARS § 252.236-7007. The "otherwise eligible for award" language was first included in the 1991 edition of the DFARS. The regulatory history for this new provision shows that no substantive change in policy or procedure was intended by the new language.[2] The predecessor additive or deductive items clause provided, in pertinent part, that:

> "[t]he low bidder for purposes of award shall be the conforming responsible bidder offering the low aggregate amount for the first or base bid item, plus or minus (in the order of priority listed in the schedule) those additive or deductive bid items providing the most features of the work within the funds determined by the Government to be available before bids are opened. . . . After determination of the low bidder as stated, award in the best interests of the Government may be made to him on his base bid and any combination of his additive or deductive bid for which funds are

---

[2]The current edition of the DFARS represents an effort to simplify the regulations and eliminate unnecessary language. "Unless specifically identified as a change, the rewritten version of [the DFARS provision was] not intended as a change in current policy or procedure." 55 Fed. Reg. 45904 (1990); see, e.g., Dawkins Gen. Contractors & Supply, Inc., B-243613.11, Sept. 21, 1992, 92-2 CPD ¶ 190. No such change in policy or procedure was identified for the new additive or deductive items clause. As such, we believe it is reasonable to interpret the change in language as only an administrative attempt to introduce "plain English" to the provision to make the regulation more easily accessible and understandable to the procurement community without changing the meaning of the provision.

> determined to be available at the time of the award, [p]rovided that award on such combination of bid items does not exceed the amount offered by any other conforming responsible bidder for the same combination of bid items." (Emphasis in original.)

DFARS § 252.236-7082 (1988 ed.)

Thus, the language in the earlier clause replaced by the "low" bidder that is "otherwise eligible for award" required that the awardee be the low "conforming responsible" bidder. The question, then, is whether the determination of whether the low bidder is "conforming" and "responsible" includes the price restriction on SDB bids.

The term "responsible" refers to a prospective contractor's capability of performing the required work, and the general standards for determining responsibility are listed in Federal Acquisition Regulation (FAR) § 9.104-1. The bid price may have a role in that determination if it is so low that the bidder's ability to perform is called into question. See Pasco Realty, B-245705, Jan. 8, 1992, 92-1 CPD ¶ 39. However, whether the price is unreasonably high does not reflect upon the bidder's capability of performing in accordance with the contract statement of work. Any bid "that fails to conform to the essential requirements of [an] invitation for bids" must be rejected pursuant to FAR § 14.404-2(a). This conformance is generally referred to as the bid's "responsiveness." It involves determining whether the bid "unequivocally offers to provide the exact thing called for in the IFB, such that acceptance of the bid will bind the contractor in accordance with all the IFB's material terms and conditions. Luhr Brothers, Inc., B-248423, Aug. 6, 1992, 92-2 CPD ¶ 88. This determination also is distinct from the contracting officer's obligation to ascertain whether the bid exceeds a reasonable price. FAR §§ 14.404-2(f), 14.407-2.

Accordingly, since Cherokee's bid conforms to the IFB's requirements, the firm was found to be responsible (a determination not challenged by Vignola), and award was made at a reasonable price, we have no reason to question the propriety of the award. The protest is denied.

Robert P. Murphy
for James F. Hinchman
General Counsel