



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Bollinger Machine Shop and Shipyard, Inc.
File: B-258563; B-259265
Date: January 31, 1995

Marcus B. Slater, Jr., Esq., and Jennifer J. Zeien, Esq., Fort & Schlefer, for the protester.
 Robert A. Evers, Esq., and L. Stephen Quatannens, Esq., Gardner, Carton & Douglas, for Hike Metal Products, Ltd., an interested party.
 Danielle M. Conway, Esq., U.S. Army Corps of Engineers, for the agency.
 Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's failure to set procurement aside for small businesses is sustained where agency anticipated the receipt of bids from at least two small businesses and did not have a reasonable basis for concluding that award at a fair market price could not be expected.

DECISION

Bollinger Machine Shop and Shipyard, Inc. protests the failure of the U.S. Army Corps of Engineers to set aside for exclusive small business participation invitation for bids (IFB) No. DACW61-94-B-0027, for design and construction of a fisheries research vessel. Bollinger also protests the agency's failure to include in the IFB notification that the procurement is subject to the requirements of 10 U.S.C. § 7309 (Supp. V 1993), a provision prohibiting construction of vessels for any of the armed forces in foreign shipyards.

We sustain the protest.

BACKGROUND

The Corps of Engineers conducted this procurement on behalf of the Department of the Interior, National Biological Survey (formerly the Fish and Wildlife Service (FWS)). Prior to issuing the solicitation, the Corps issued--and subsequently canceled--IFB No. DACW61-94-B-0006, which also requested bids for the design and construction of a

fisheries research vessel.¹ The earlier IFB was issued on an unrestricted basis and included a clause instructing bidders that pursuant to 10 U.S.C. § 7309, construction of the vessel in a foreign shipyard was prohibited.² Seven bidders responded by the December 8, 1993 opening date with the following prices and indicated size status:

<u>Bidder</u>	<u>Small Bus.</u>	<u>83' Vessel</u>	<u>93' Vessel</u>
American Shipyard	Yes	\$2,197,000	\$2,249,000
Hike Metal Products	Yes	\$2,343,977	\$2,421,711
Bollinger Machine	Yes	\$2,988,892	\$3,081,409
Halter Marine	No	\$3,021,500	\$3,151,805
Peterson Builders	Yes	\$3,055,612	\$3,115,983
Marquette Marine	Yes	\$3,500,000	\$3,589,842
Bender Shipbuilding	Yes	\$4,007,655	\$4,219,450

The Corps rejected the two lowest bids because the bidders had failed to submit bid bonds in the required amount. The remaining bids exceeded the amount--\$2,980,000--that FWS had available for the procurement during fiscal year 1994. The Corps also determined that the specifications required revision. It therefore rejected all of the remaining bids and canceled the solicitation on February 28, 1994.

On April 29, 1994, the Corps issued IFB No. DACW61-94-B-0027, with a bid opening date of June 2, which was subsequently extended to September 14. The new solicitation, which sought bids for a faster 93-foot vessel, did not contain a provision advising bidders that construction of the vessel in a foreign shipyard was prohibited. The solicitation was initially set aside for small business concerns since the agency anticipated receipt of reasonably priced bids from two small businesses, Hike and Bollinger. Specifically, according to the Corps, the contracting officer expected that Hike would correct its bond defects and that Bollinger would make an effort "to come within the funds available for the project," but that

¹The earlier IFB requested bids on an 83-foot vessel and included an option to increase the boat length by 10 feet.

²10 U.S.C. § 7309(a) provides as follows:

"Except as provided in subsection (b) [which authorizes the President to grant exceptions to the prohibition when he determines that it is in the interest of national security to do so], no vessel to be constructed for any of the armed forces, and no major component of the hull or superstructure of any such vessel, may be constructed in a foreign shipyard."

American Shipyard, the low bidder under the earlier IFB, would be incapable of obtaining the required bonding and that the other small business concerns she earlier solicited would not submit bids within the funding available.

After the Small Business Administration (SBA) notified the contracting officer that Hike, a Canadian corporation, could not be considered a small business because it did not have a shipyard located in the United States,³ she determined that reasonably priced bids from two small businesses within the funding available could no longer be anticipated; the Corps accordingly amended the IFB on May 6 to withdraw the small business set-aside.

On May 19, Bollinger filed an agency-level protest objecting to the cancellation of the original solicitation, to withdrawal of the set-aside restriction on the second solicitation, and to the omission from the second IFB of a clause prohibiting construction of the vessel in a foreign shipyard. By decision dated September 8, the agency dismissed in part and denied in part the protest.

On September 14, the agency proceeded with bid opening. Five bids were received as follows:

<u>Bidder</u>	<u>Small Business</u>	<u>Price</u>
Hike Metal Products	No	\$2,938,451
Bollinger	Yes	\$3,181,982
Peterson Builders	Yes	\$3,190,052
Trinity Marine/ Halter Marine	No	\$3,482,823
North Florida Shipyard	Yes	\$5,013,967

On September 21, Bollinger filed a protest with our office, renewing its assertions that the procurement should have been set aside for small business competition and that the IFB should have been restricted to performance in the United States pursuant to 10 U.S.C. § 7309.⁴

³See 13 C.F.R. § 121.403(a) (1994).

⁴On November 7, after receiving the agency report responding to its September 21 protest, Bollinger filed a second protest with our Office objecting to the cancellation of IFB -0006. The protester argued that it had not become aware of its grounds for objecting to the cancellation until it received the agency report, which included documentation that--according to the protester--established that sufficient funding had in fact been available at the time the agency canceled the original solicitation. (The

(continued...)

ANALYSIS

As a general rule, a procurement must be set aside for small businesses where the contracting officer determines that there is a reasonable expectation that offers will be received from at least two responsible small business concerns and that award will be made at a fair market price. Federal Acquisition Regulation (FAR) § 19.502-2(a). For the most part, we view this determination as a business judgment within the contracting officer's discretion. FKW Inc. Sys., 68 Comp. Gen. 541 (1989), 89-2 CPD ¶ 32. We will examine the record to determine whether the agency made reasonable efforts to identify prospective small business bidders with the required capabilities, however, Neal R. Gross & Co., Inc., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53. In addition, where an agency declines to set aside a procurement on the basis that award at a fair market price cannot be expected (despite the fact that bids from two or more small businesses are anticipated), we will examine the record to determine whether the agency had a reasonable basis for this conclusion. Neal R. Gross and Co. Inc.; Capital Hill Reporting, Inc., 72 Comp. Gen. 23 (1992), 92-2 CPD ¶ 269; Ann Riley & Assocs., Ltd., 71 Comp. Gen. 117 (1991), 91-2 CPD ¶ 544, recon. denied, Ace-Fed. Reporters, Inc.; Federal Energy Regulatory Comm'n--Recon., B-245149.2; B-245149.3, Apr. 6, 1992, 92-1 CPD ¶ 347.

⁴(...continued)

documentation to which the protester refers was a letter from FWS to the Army Corps of Engineers dated September 23, 1993, which stated that in addition to the \$2,980,000 available for award during fiscal years 1993 and 1994, FWS had been assured that \$300,000 would become available in fiscal year 1995, and that FWS planned to use the combined total of \$3,280,000 in selecting an awardee.) The protester maintains that until it received this document, it had no reason to question the Corps' assertion that insufficient funding was available.

We think that Bollinger's protest of the cancellation of IFB -0006 is untimely and will not consider it. Although the protester contends that it had no reason to question the agency's representation that funding was inadequate for an award, the fact is that it did question that representation: it protested the cancellation on this ground to the agency on May 19. The agency responded to the protester's objections in its decision dated September 8. If the protester wished to take issue with the agency determination regarding the propriety of the cancellation, it should have done so within 10 days after its receipt of the agency determination. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1994).

Here, the record--in particular, the results of the bidding under IFB -0006--clearly establishes that bids from two or more small businesses could be expected under IFB -0027 and does not reflect a reasonable basis for the conclusion that award at a fair market price could not be anticipated.

According to the contracting officer, she concluded that because no two small businesses had submitted responsive bids within the range of funds available for the first procurement, bids from at least two small businesses at a fair market price could not reasonably be expected under the second. Funding availability is not equivalent to fair market price, however. It is clear from the record that one of the problems with this procurement was, in fact, that the funding available was less than the fair market price of the work to be accomplished under the solicitation. In this regard, the approved government estimates for the 83-foot and 93-foot vessels were \$3.3 million and \$3.6 million, respectively, yet the amount budgeted by FWS for the acquisition was only \$2.98 million. Moreover, an Army Corps of Engineers memorandum furnished to us as part of the agency report reveals that the Corps concluded early in the procurement process that the funding budgeted by FWS was insufficient,⁵ and that it therefore recommended that FWS obtain additional funding, which FWS did. (According to the Corps, FWS requested and programmed an additional \$300,000 for this acquisition into its fiscal year 1995 budget.)

We also fail to see any reasonable basis for the contracting officer's conclusion that Bollinger could be expected to reduce its price enough to come within the funding available for the acquisition, but that no other small businesses could be expected to do likewise. Peterson Builders' base price under the first procurement was not significantly higher than Bollinger's (\$66,720, compared with an overall acquisition value of approximately \$3 million). Moreover, since, as previously noted, FWS had sought additional funding for the acquisition, the level of funding available had increased.

Given that the contracting officer erroneously based her decision to withdraw the set-aside on a comparison of the bids received under the first IFB with the then-available funding, we have examined the record to see if there is

⁵According to an internal Army Corps of Engineers memorandum, "early in the Project Definition Stage, [the Marine Design Center of the Corps] concluded that [the Fish and Wildlife Service] did not have sufficient funds for the vessel they envisioned."

other support for the agency's decision. We conclude that there is not.

The FAR defines fair market price as "a price based on reasonable costs under normal competitive conditions and not on lowest possible cost," and instructs agencies to determine the fair market price of small business set-asides in accordance with the reasonable price guidelines in FAR § 15.805-2. These guidelines permit the use of a variety of price analysis techniques--including comparison with the proposed prices received in response to the solicitation and comparison with the government estimate--in determining what a reasonable--or fair market--price would be.

Here, a comparison of the bids of Bollinger and Peterson Builders to the government estimates for both the 83-foot and the 93-foot vessels demonstrates that the prices of both bidders were reasonable. The agency contends that the approved government estimates of \$3.3 million for the 83-foot vessel and of \$3.6 million for the 93-foot vessel were inflated and that the correct estimates for the vessels were \$2.87 million and \$3.13 million, respectively. The Corps derived these figures by adjusting the approved estimates after receipt of Bollinger's agency-level protest. The agency explains that revision of the approved estimates downward by 14 percent was required because the estimates incorrectly included a 4-percent markup for inflation⁶ and because they were calculated using the upper end of a 10-percent "range of accuracy" specified to MTI. Even assuming that revision of the estimate downward by 4 percent to delete the markup for inflation was appropriate--which would reduce the estimate to \$3.18 million for the 83-foot vessel and to \$3.47 million for the 93-foot vessel--we fail to understand why calculation of the estimate based on the lower end of the range of accuracy specified to MTI was any more appropriate than computation of the estimate based on the upper end of the range.⁷ It would seem to us only

⁶According to the Corps, it initially increased the estimate of \$3,183,337, which had been prepared by an independent contractor, Marine Technology Inc. (MTI), by 4 percent since it routinely includes a 4-percent markup for inflation when bids are not to be opened in the year in which the estimate was created. The Corps contends that such a markup was unwarranted here, however, since bids were opened during the same calendar year in which the estimate was created and since recent bid openings have not supported the need for an inflation or escalation rate.

⁷We also note that there is no evidence in the record that the estimate prepared by MTI in fact represented the upper end of such a range.

logical that if the reasonableness of a bid was to be evaluated based on a comparison with the government estimate, then any bid within the range of accuracy (i.e., \$2.87 million to \$3.18 million for the 83-foot boat and \$3.13 to \$3.47 million for the 93-foot boat) would be viewed as reasonable. Both Bollinger's and Peterson Builders' prices for the 83-foot vessel fell within this range, and both bidders' prices for the 93-foot vessel were in fact lower than the bottom end of the range.

For the second procurement, the agency adjusted its estimate to \$2.9 million; however, the agency concedes that this estimate was miscalculated. According to our calculations, correction of the error conceded by the agency would increase the estimate by \$250,151 to \$3,152,932,⁸ an amount greater than the prices bid by both Bollinger (\$3,081,409) and Peterson Builders (\$3,115,983) for the 93-foot vessel under the first IFB. Moreover, the record shows that bids from both Bollinger and Peterson Builders within the range of the government estimate and within available funding, which has been increased to \$3,280,000, were in fact received in response to IFB -0027.⁹

We also note that in withdrawing the set-aside, the agency failed to comply with FAR § 19.506(a), which requires that before withdrawing a set-aside, the contracting officer consult with the agency's small and disadvantaged business utilization specialist (SADBU) and the SBA procurement center representative, if one is assigned. The record here does not show that either the SADBU or an SBA procurement center representative was notified of the decision to withdraw the set-aside prior to its effectuation. In this

⁸The Corps calculated the second estimate by reducing MTI's estimate for the construction phase of the work by 20 percent to account for the range of accuracy that it thought had been specified to MTI. According to the Corps, it was later "revealed that due to customer sensitivity to conservative cost estimates, the range specified to MTI was -0% to +10%." The estimate for the construction phase of the work should therefore have been increased by 10 percent--or \$250,151--at a minimum.

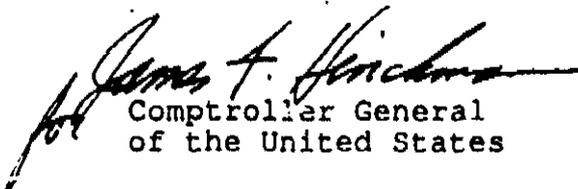
⁹As previously noted, correction of the government estimate to account for the error conceded by the agency yields a sum of \$3.15 million. If this sum is further adjusted, as discussed above, to reflect a range of accuracy of 10 percent (as opposed to simply the lower end of that range), the government estimate would encompass a range of \$3.15 million to \$3.47 million. Both Bollinger's bid of \$3,181,982 and Peterson's bid of \$3,190,052 fall within this range--and both are, in fact, very close to its bottom end.

regard, a memorandum explaining the decision not to set aside the procurement was forwarded to the SADB on May 16, 1994--10 days after amendment 0001 to the IFB, which withdrew the set-aside, had been issued. Further, there is no evidence that the SADB concurred in the decision to withdraw the set-aside since the contracting officer entered her own signature in the blank where the SADB was supposed to sign. In addition, the memorandum did not explain that a set-aside was being withdrawn--i.e., that an earlier decision to set aside the procurement was being reversed--and it did not accurately summarize the basis for the decision not to set aside. (The memorandum stated that the low responsive bid from a small business under the earlier procurement had been rejected as unreasonable--which was not the case--and that the agency could therefore not be assured of receiving two reasonably priced bids from small businesses under this IFB.)

CONCLUSION AND RECOMMENDATION

Based on our review of the record in this case, we conclude that the contracting officer should reasonably have expected bids from at least two responsible small businesses and award at a fair market price and that she should therefore have set the procurement aside for small businesses.¹⁰ Accordingly, we sustain the protest. We recommend that the IFB be canceled and reissued as a small business set-aside. In addition, we find that Bollinger is entitled to recover the costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1994). In accordance with 4 C.F.R. § 21.6(f), Bollinger's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.


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¹⁰Because we conclude that the Corps should have set aside this acquisition for exclusive small business participation, which would preclude the participation of a foreign shipyard in the competition, see 13 C.F.R. § 121.403(a), we need not address the protester's second ground of protest concerning the applicability of 10 U.S.C. § 7309 to the acquisition.