



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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May 3, 1973 ✓

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AIR MAIL

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Attention: James K. Sterrett, II, Esq.

Mission Van & Storage Co.

Gentlemen:

Reference is made to the telegram dated December 27, 1972, from Mission Van & Storage Company and to your subsequent correspondence on their behalf protesting the contract award to DeWitt Transfer & Storage Company under IFB M00681-73-B-0022, issued by the Marine Corps, Purchasing and Contracting Office, Oceanside, California. Similar protests also have been filed here by AAA Van & Storage Company (AAA) and Sullivan Storage & Transfer Company (Sullivan).

The IFB covered requirements during calendar year 1973 for services and materials for the preparation of personal property of Department of Defense personnel in the Camp Pendleton area for shipment or storage and intra-city or intra-area moves. As prescribed by Armed Services Procurement Regulation (ASPR) 22-602, the required services are broken down into three schedules: I. Outbound services; II. Inbound services; and III. Intra-city and intra-area moves. Each schedule is further divided into three areas, which are based on distances from Camp Pendleton.

The IFB's General Instructions contained the clause prescribed by ASPR 22-600.3, for evaluation of bids, which provides as follows:

EVALUATION OF BIDS (1970 MAY) (ASPR 22-600.3)

(a) Bids will be evaluated on the basis of total aggregate price of all items within an area of performance under a given schedule. A bidder must bid on all items within a specified area of performance for a given schedule. Failure to do so shall be cause for rejection of the bid for that area of

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performance of that schedule. Any bid which stipulates minimum charges or graduated prices for any or all items shall be rejected for that area of performance within the Schedule.

(b) In addition to other factors, bids will be evaluated on the basis of advantages or disadvantages to the Government that might result from making more than one award (multiple awards). For the purpose of making this evaluation, it will be assumed that the sum of \$50 would be the administrative cost to the Government for issuing and administering each contract awarded under this invitation, and individual awards will be for the items and combinations of items which result in the lowest aggregate price to the Government, including such administrative costs.

* * * * *

(c) Notwithstanding (a) above, when "additional services" are added to any schedule, such "additional services" items will not be considered in the evaluation of bids.

The General Instructions also included the clause in ASPR 22-600.4, which provides for making award to the qualified low bidder by area under each of the specified schedules to the extent of his stated guaranteed daily capability and reserves the right to award additional contracts to the extent necessary to meet its estimated maximum daily requirements.

The Solicitation Instructions and Conditions, Standard Form 33A, paragraph 10, provides in pertinent part:

(a) The contract will be awarded to that responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered.

* * * * *

(c) The Government may accept any item or group of items of any offer, unless the offeror qualifies his offer by specific limitations.

The report states that the same ASPR clause concerning evaluation of bids was contained in the prior IFB issued for requirements during calendar year 1972, and that bidders had inquired of the contracting

officer as to whether or not the clause precluded "all or none" bids. In connection with the procurement of calendar year 1972 requirements the contracting officer issued a letter to all bidders stating that "all or none" bids could be considered only if the bid(s) were low in all areas of all schedules," and that a lower responsive bid for any area under any schedule, multiple-award factor of \$50 included, would receive the award and nullify the "all or none" bid. In connection with the subject procurement, Mission Van inquired (orally and by letter) of the contracting officer as to the proper interpretation of the IFB provisions in connection with "all or none" bids. Mission Van was advised, both orally and by letter, that the written advice furnished in the prior year was still applicable. The record does not indicate that any other bidder received such advice in connection with this year's procurement.

DeWitt submitted an "all or none" bid for the combined Schedules I and II and was the lowest aggregate bidder for those schedules. However, other companies submitted lower bids on Areas I and II of Schedule I. Faced with a protest by DeWitt against the rejection of its "all or none" bid, the contracting officer apparently reconsidered his position and awarded DeWitt the primary contract upon all areas of Schedules I and II. Mission Van was awarded a secondary contract on all areas of Schedules I and II and Sullivan was awarded a tertiary contract for all areas of Schedule I. There is no tertiary contract under Schedule I.

Paragraph 3 of the Solicitation Instructions and Conditions provides for explanations to offerors as follows:

Explanation to Offerors. Any explanation desired by an offeror regarding the meaning or interpretation of the solicitation, drawings, specifications, etc., must be requested in writing and with sufficient time allowed for a reply to reach offerors before the submission of their offers. Oral explanations or instructions given before the award of the contract will not be binding. Any information given to a prospective offeror concerning a solicitation will be furnished to all prospective offerors as an amendment of the solicitation, if such information is necessary to offerors in submitting offers on the solicitation or if the lack of such information would be prejudicial to uninformed offerors.

You contend that Mission Van was misled to its prejudice by the contracting officer's actions in this case and that the written representations of the contracting officer, together with the terms

of the invitation, required the rejection of the "all or none" bid since lower bids existed in two areas of Schedule I. You submit that the failure to reject DeWitt's bid was arbitrary, capricious, and an abuse of discretion exhibiting bad faith. You also contend that the award to DeWitt was in violation of the statutory directive requiring award only to "the responsible bidder whose bid conforms to the invitation" and therefore is void. 10 U.S.C. 2305(c). Finally, it is suggested that either an award be made to the low bidders consistent with the contracting officer's advice, or bids be resolicited.

While both AAA and Sullivan have protested because of the contracting officer's advice during the prior year's procurement, we believe a proper resolution of this matter should be based upon the treatment accorded Mission Van, particularly since there was no difference in the contracting officer's actions directed toward AAA, Sullivan and DeWitt.

As a general rule, a low bid on an "all or none" basis is responsive and must be accepted in the absence of a provision to the contrary in the solicitation. See 42 Comp. Gen. 748 (1963) and ASPR 22-404.5. As shown above, provisions in the invitation required bidders to bid on all items within an area of performance for a given schedule and provided for evaluation of bids and award on the basis of the total aggregate price of all items in an area of performance under a given schedule. We believe it is reasonably clear that the pertinent effect of these standard provisions, which are prescribed by ASPR 22-600.3 and 4, is to require acceptable bids to include prices for all items within an area to eliminate the prerogative which the Government otherwise would have under paragraph 10(c) of the Solicitation Instructions and Conditions to award contracts for individual items or group of items within an area of performance for a given schedule. Accordingly, we do not consider that such provisions may be reasonably construed as negating the provision of paragraph 10(c), which permits a bidder to qualify his bid by specific limitations, or to preclude consideration of bids for an aggregate of areas or schedules (provided that any such bid covers all items within the areas bid) since any award on the basis of such a bid would also meet the requirement for an award of no less than all items in an area.

Although ASPR 22-600.4 refers to awards by areas under each of the schedules, this reference is made in the context of defining the extent of the award which would be made to a low bidder in relationship to his capability, rather than providing a restriction on the method of determining that bidder which is entitled to the award as having submitted the bid "most advantageous to the Government, price and other factors considered." In this connection, we

note that none of the protestors, nor the communications from the contracting officer, has suggested that the IFB provisions precluded a bidder from submitting an "all or none" bid for more than one area or schedule. It is contended (based on the position of the contracting officer) only that such a bid may not be accepted unless it contains the low price for each individual area of all schedules. This position is considered defective in that it would have the obvious effect of forestalling the submission of "all or none" bids permitted by paragraph 10(c) of the Solicitation Instructions and Conditions, and thereby deny to the Government the most advantageous contract which could be derived from a bid offering an aggregate price for the combined quantities involved in several areas, when the aggregate bid is lower than the total price of the individual bids on those areas but is based on a higher individual price in one or more of the areas concerned.

We must conclude, therefore, that in the absence of an amendment the IFB did not preclude acceptance of an "all or none" bid which was not low in all areas included therein; that DeWitt was justified in relying upon the invitation as issued in submitting its bid; that DeWitt submitted the low responsive bid for the combined areas under Schedules I and II; and that DeWitt's contract is not subject to legal objection on the issues presented.

On the other hand, we must recognize the effects of the contracting officer's erroneous written interpretation of the IFB provisions given to Mission Van pursuant to paragraph 3 of the Solicitation Instructions and Conditions. The fact that Mission Van requested an interpretation of the bidding terms of the IFB, regarding whether "all or none" bids must be low in all areas of all schedules for acceptance, is an indication that this bidder placed some importance on that factor in preparing its bid. Moreover, we are inclined to agree with the contention of Mission Van that a requirement for an "all or none" bid to be low in all areas of all schedules in order to be acceptable would be a material factor which could affect bidding strategy and prices. Since Mission Van apparently relied upon the contracting officer's interpretation as to the "all or none" bid requirements in the preparation of its bid, it also appears that Mission Van could have been prejudiced in its bidding, as it contends, by the actions of the contracting officer.

The question therefore arises as to whether termination of DeWitt's contract is appropriate in these circumstances.

Whether an "all or none" bid must be low in all areas for acceptance under the IFB requires an interpretation of the IFB's clauses and provisions and, as such, involves a matter of law. It is not uncommon for the conclusions of well-qualified lawyers to differ in such legal

interpretations and, in our opinion, when a prospective bidder asks for the contracting officer's views on a question of law, as in the case at hand, the bidder should be regarded as being on notice of the possibility that the contracting officer's views may not be sustained upon review by other authority. In addition, the IFB indicates a means by which a prospective bidder can seek to protect himself against a reversal by reviewing officials of a contracting officer's interpretation of the legal significance of an IFB's clauses and provisions. Standard Form 33A, paragraph 3, clearly requires that material information furnished on prospective bidder be subsequently issued in the form of an amendment to the IFB. When an amendment, effecting the contracting officer's position as to the conditions under which an "all or none" bid would be acceptable, was not forthcoming, we believe a prudent bidder would have been reluctant to rely thereon and should have taken appropriate steps to obtain compliance by the contracting officer with the IFB requirement for issuance of an amendment. We have recognized that Standard Form 33A, paragraph 3, imposes no legal duty on bidders to assure that the contracting officer follows the prescribed procedures (B-169205, June 23, 1970). However, where a prospective bidder has made no effort to see that a material clarifying interpretation of IFB clauses and provisions given him by the contracting officer is thereafter issued to all prospective bidders in the form of an amendment, it is our view that the bidder may be fairly held to have accepted the risk of the contracting officer's interpretation not being sustained upon a review after bid opening.

Since there is no indication that Mission Van took appropriate steps to seek an amendment to the IFB, we believe that as a matter of procurement policy Mission Van may be fairly regarded as having accepted the risk and consequences of the contracting officer's interpretation not being adopted by reviewing officials. We therefore do not find that an adequate basis has been presented for terminating DeWitt's contract for any prejudice which Mission Van may have suffered by having relied upon the contracting officer's interpretation in the preparation of its bid.

Accordingly, your protest is denied for the reasons shown above.

Sincerely yours,

PAUL G. DEMBLING

For the Comptroller General
of the United States