

COMPTROLLER GENERAL OF THE UNITED STATES

WABNINGTON. E.C. 2043 40043 OCT 10 1973

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The Honorable The Secretary of Health, Education, and Walfare

Dear Hr. Secretary:

We refer to the letters of June 18 and July 2, 1973, from the Office of the Secretary submitting reports on a congressional inquiry into the propriety of the procurement methods utilized by the National Institutes of Realth (NIH), Bethesda, Maryland, under Anvitation for bids No. MIH-73B-(V)~261CG.

The invitation, which solicited bids for the supply of Golden Syrian Hansters, was issued on March 12, 1973, as a 100-percent set-aside for small business concerns. Bid opening was set for March 29. On March 28 the procurement activity received a request from ARS/Sprague-Dawley (SD) for a copy of the invitation and for an extension of the bid opening date. At that time, we are advised, the procurement activity was unaware that SD was a large business concern. Because of this request, however, a review was made of the procurement file. This review indicated that as of March 23 waly one potential bid had been received. Also, one prospective bidder bad informed the procurement solief that it would be unable to submit a bid. Because of the consequent bolief that compatition might not be obtained for the procurement, the invitation was emended to extend the bid opening date to Ayril 9, 1973. The amendmant was forwarded to the 12 firms on the Lindermal list, as well at to SD to which an invitation was also sent.

After issuance of the mandment, it was decided to contact those firms which had not replied to the invitation to datermine whithar they would be submitting bids by the new opening date. Of these firms, nine were known to be small businesses, while the statum of the others was unclear. Five of the small husiness concerns indicated they would not bid on the procurement; two were, it appears, not contacted, one because no telephone listing for the firm was found. The other two, Lakeview Harster Colony (Lakeview) and Ingle Laboratory Animals, Inc. (Engle), had submitted bids previously, the latter firm having unfortunately not received notice of the smendment before hand-delivering its bid to the procurement activity on the bid opening date. Of the four remaining firms, two indicated they would not bid, and another indicated that its subsidiary would instead bid (an invitation was subsequently mailed to the subsidiary on Harch 29). The General Hamager of the fourth of these prospective bidders, SD, telephoned the procurement office

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on April 2, and at that time it was learned that 6D was large Lusiness. During the conversation he requested that the small business set-aside requirement be deleted from the invitation so that his firm night submit a bid on the procurement. He also asked whether the requirement had proviously been restricted to small business, and when advised that it had been and that the present contractor was Lakeview, he questioned the size of Lakeview due to its alleged affiliation with Charles River Broeding Laboratories, Inc.

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In view of these facts, anondment No. 2 to the solicitation was issued on April 2, deleting the small business set-aside requirement and extending the bid opening date to April 17. We are advised that the Small Business Administration (SBA) representative was informed of this decision on April  $3_{\rm Y}$ Hu, reportedly, concurred therein.

Three bids were received under the invitation. Evaluation of each showed the following:

- (1) SD had submitted the low bid of \$40,515; however, the bid was determined to be nonresponsive because the outline of the means of transportation to be utilized, as required by the invitation, did not include the method of transportation to be used in making duliveries to the laboratories at NIH.
- (2) Lakeview submitted the second low bid of \$43,875; however, the bid was determined to be nonresponsive because evidence of a viral serology test based on a representative sample of the colony and a written description or photographs of the interior and exterior of the facilities were not submitted with the bid as was required by the invitation.
- (3) Engle submitted the third low bid of \$44,175; however, the bid was determined to be nonresponsive because the bidder did not, so required by the invitation, provide information with its bid as to the type of vehicles to be used in transporting the hamsters to and from the airport, the qualifications of the driver(s) of the vehicle(s), and the name of the Washington, D.C., area firm which would pick the hamsters up at the airport.

Eccause all three bids were found to be nonresponsive, it was determined that the procurement would be negotiated under the authority of 41 U.S.C. 252(c)(10) which allows negotiations to be conducted in mituations where it is impossible to secure competition for procurements of property or services.- M-178722

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Negotiations are now being conducted with Lakeview and SD under request for proposals 73P-(V)-510CC. Engle withdrew from the negotiated producemout when requirements for item No. 2, pregnant hamsters, were reduced from a quantity of 5,000 to 2,000.

As regards the decisions, first, to make the procurement a total set-askie for small business and, secondly, to delets this requirement, it has been the position of our Office that the determination of whether there is a reasonable expectation of receiving a sufficient number of bids under a total set-aside to assure reasonable prices is within the ambit of sound administrative discretion and will not be questioned by our Office without a clear showing of an abuse of such discretion. 45 1 Comp. Gen. 229, 231 (1965). We note that the total set-aside requirement was deleted on the grounds that at the time such action was taken, only one possible hld was at the procurement activity, that bid being from a firm which was alleged by a hopeful large business to be possibly large business. This, of course, ignored the fact that the size status of Lukeview was represented by that firm to be small business and no proof existed to diaprove such representation. It also ignores the fact that Engle had submitted a bid on March 29, and although it had then withdrawn its bid after the time for bid opening was extended, it could have reasonably been presumed that it would submit another bid. At minimum, the firm could have been asked its intentions when the others were, From the record it does not appear that such was done. However, in view of the concurrence of the SBA representative with the deletion of the sat-aside requirement, and the fact that Engle has now declined to bid on the procurement activity's changed needs, we will not object to the procedures currently being utilized in this instance. We do, however, recommend that any necessary action be taken to assure that in future procuremants, the decisions to make a total set-asido, or the deletion thereof, be carefully considered, potential sources of small business interest be thoroughly investigated, and the basis of the determination be fully explained and documented.

Concerning the determination that all three bids were nonresponsive to the invitation and, consequently, that the procurement should be a negotiated one, 30 believe the procurement activity to have been in error. Firstly, we do not believe that information as to how the hamsters would be transported to the procurement activity goes to any question other than the bidder's ability to perform. The same is true for the description or photographs of the bidder's facilities. These are questions of a bidder's responsibility. Further, although in this case evidence of viral serology was required with the bid rather than as preaward testing, ... we believe that the requirement for that avidence also was properly a question of the bidder's responsibility rather than of the responsiveness

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of the bid. Sea D-169330, May 14, 1970. The bidder bound himself under the specifications to deliver hemsters "in physically sound and healthy condition \* \* \* free of wounds, scars, external parasites, and clinical signs of disease or of sub-clinical diseases such as actrowalis and lymphocytic choriomeningitis."

In this regard we are advised by the agency that a bidder would be rejected only if the animals tested had actrometia or lymphacytic choriomeningitis. Results of testing for other subclinical diseases were to be used only by the agency official accepting delivery to determine for which tests t's hamster could be used. 'If such is the case, we believe the agency has not clearly expressed its needs. The specifications state that the animals shall be free of all subclinical diseases, not just the two' enumerated. In this respect also, the specifications call for "evidence of viral serology." The agency interprets this, apparently, to require submission of a test report from an independent the sting laboratory. Lakeview enumerated the appropriate diseases in its bid and following these stated:

"Tests have been negative for all but FVM and Sendai, Samplis are submitted to Seton Hall and to Charles River Breeding Laboratories."

This would appear to meet the specifications requirement. If the agency wanted more, then such should be spelled out in the specifications.

Although we conclude that award should have been made to the low the bidder under the invitation for bids and that conducting subsequent negotiations instead was improper, we will not object to the megotiations now being conducted under the recently issued request for proposals that innamuch as the needs of the agency have changed since the opening of bids : and inamuch as up do not believe that use of negotiations will, in this case, negate the maximum possible compatition which advertised producements attempt to further. It seems apparent from the facts that those two firms engaged in the negotiations are the only ones which would compete on this procurement in any case.

We trust that actions will be taken to ensure that deficiencies such it. . as these enumerated above will not occur in future procurements.

Vincerely yours,

