

DECISION

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

61137

FILE: B-185411

DATE: July 14, 1976

MATTER OF: Becker Instruments & Photographic Optics

1976 97927

DIGEST:

1. Contention that protester was unfairly underbid is untenable in formally advertised procurement when all bidders had same information available in IFB upon which to base bids.
2. Where bidder excludes no end products from Buy American certificate in bid and does not otherwise indicate that it is offering anything other than domestic end products, acceptance of offer, if otherwise responsive, will result in obligation on part of bidder to furnish domestic end products, and compliance with obligation is matter of contract administration which has no effect on validity of contract award.
3. Assertion that successful bidder violated wage determinations is incorrect where hourly rate bid exceeded minimum wage requirements provided by and under existing laws.
4. Protest challenging 400-mile radius in IFB is rejected as untimely, since protest was filed after bid opening and GAO Bid Protest Procedures provide that protest based upon alleged improprieties in solicitation which are apparent prior to bid opening must be filed before opening.
5. Inquiries concerning contract administration will not be considered since such matters are not for resolution under Bid Protest Procedures which are reserved for considering whether award, or proposed award, complies with legal requirements.

The Naval Supply Center at Oakland, California (NAVSUP), issued invitation for bids (IFB) N00228-76-B-4247 soliciting a microfilm and diazo microfilm duplicating and reproduction contract. Options in the IFB covered extension of the contract's duration beyond the initial 1-year period under Lot I, adding 2 more years under Lots II and III. Although initially award would be made only

for the first year, the IFB indicated that the bids would be evaluated on the basis of the total of Lots I, II, and III. The second low bidder, Becker Instruments & Photographic Optics (BIPO), protested the award made to RCI Microfilm.

BIPO protests that bidders (including BIPO) who attended an optional prebid conference were penalized in that they were told that although there would be no escalation clause in the contract, bidders could anticipate inflationary cost increases by computing such factors into their bid prices. BIPO surmises that RCI could not have known that there would be no escalation clause because RCI did not attend the prebid conference at which the clause was discussed. BIPO complained to NAVSUP:

"It is obvious from the bids that RCI did not build in a cost of living increase for Lots 2 and 3. By your statements, you are inferring that the people that attended the pre-bid conference deserve to be penalized."

In formally advertised procurements, the terms of the solicitation become the terms of the contract. See 10 U.S.C. § 2305(c) (1970) which provides that "Awards shall be made * * * to the responsible bidder whose bid conforms to the invitation * * *." Where provisions are absent in the IFB, as were escalation provisions here, they cannot be deemed to be part of the contract. Thus every bidder, upon reading the IFB, had notice that the contract included no escalation clause and that bidders could at their discretion build future cost of living increases into their bid prices. In any event, RCI's affidavit states that a phone call made after the prebid conference to the contract negotiator confirmed that there would be no escalation clause and that RCI computed its bid accordingly. Therefore, it is clear that RCI had neither more nor less information on which to base its bid than had the other bidders and that BIPO was in no way prejudiced.

BIPO also contends that NAVSUP wrongfully permits RCI to use foreign-made material in violation of Buy American Act (41 U.S.C. § 10a (1970)) provisions in the contract. RCI has certified that it will furnish a domestic end product. Where a bidder excludes no end products from the Buy American certificate in its bid and

does not otherwise indicate that it is offering anything other than domestic end products, the acceptance of the offer, if otherwise responsive, will result in an obligation on the part of the bidder to furnish domestic end products, and compliance with that obligation is a matter of contract administration which has no effect on the validity of the contract award. 50 Comp. Gen. 697 (1971); B-174281, December 17, 1971; B-174184, May 24, 1972; B-174850, April 6, 1972; Unicare Vehicle Wash, Inc., B-181852, December 3, 1974, 74-2 CPD 304. Accordingly, it is our view that the contention raised concerning RCI's compliance with the Buy American Act does not affect the validity of the award to RCI.

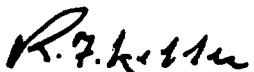
Similarly, BIPO argues that NAVSUP, by accepting RCI's hourly rate bid, wrongfully permits RCI to violate wage determinations " - even if there were no wage determination." However, the record shows that RCI's hourly rate bid for certain functions exceeded minimum wage requirements provided by and under existing laws. A prerequisite for implementation of the Service Contract Act (41 U.S.C. § 351 (Supp. IV, 1974)) is the insertion of certain wage determinations into the bid specifications. Since the immediate IFB contained no Service Contract Act wage determinations, RCI is not required to comply with Service Contract Act wage determinations. Further, RCI's bid rate of \$2.50 per hour exceeds both Walsh-Healey Act (41 U.S.C. § 35 (1970)) minimum wage requirements which peak at \$2.30 per hour in 1976 (41 C.F.R. § 50-202.2 (1974)) and Fair Labor Standards Act (29 U.S.C. § 206(b) (Supp. IV, 1974)) minimum wage requirements which peak at \$2.30 per hour in 1977.

BIPO also protests that the use of a radius of 400 miles for the solicitation, rather than a radius of 200 miles as was used for a prior similar solicitation, was "for RCI's benefit." Since the geographical scope of the solicitation was obvious before bid opening, this portion of BIPO's protest must be rejected as untimely. Our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1976), provide that protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be filed before bid opening. Because this protest was filed after opening, BIPO's challenge to the 400-mile radius of the solicitation is untimely and thus not for our consideration. Antenna Products Division, DHV, Inc., B-184879, February 11, 1976, 76-1 CPD 89.

B-185411

Finally, BIPO has made inquiries about the propriety of matters of contract administration by the procuring activity. Matters of contract administration are not for resolution under our Bid Protest Procedures which are reserved for considering whether an award, or proposed award, of a contract complies with statutory, regulatory and other legal requirements. Inter-Alloys Corporation, B-182890, February 4, 1975, 75-1 CPD 79. Therefore, we will not consider the questions raised by the inquiries.

To the extent that the protest has been considered, it is denied.


Deputy Comptroller General
of the United States