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W. W. Thompson
Proc II

DECISION



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

FILE: B-187024

DATE: November 16, 1976

MATTER OF: Falcon Rule Company
Aakron Rule Corporation

DIGEST:

Protest of cancellation of small business set-aside upon determination by contracting officer that low responsive bids were unreasonably high is denied since price reasonableness is business judgment requiring exercise of broad discretion and clear abuse of such discretion is not apparent from record.

Invitation for bids (IFB) No. FPOO-EJ-48904-A was issued on March 16, 1976, by the Division of Office Supplies and Paper Products (FPO-New York), Federal Supply Service (FSS), General Services Administration (GSA) on a total small business set-aside for the procurement of an indefinite quantity of wooden desk rulers of specified lengths. Four bids were received by the bid opening date. The Falcon Rule Company (Falcon) was low responsive bidder on items 1-5, and the Aakron Rule Corporation (Aakron) was low responsive bidder on items 6-13.

Falcon's prices were 10 percent higher than they were a year before and Aakron's were 7 to 12 percent higher. GSA determined that the wholesale price indices of significant component costs did not support these price increases. Additionally, GSA found that the offered prices were higher than those on current New York City and State contracts for the same items. Consequently, the contracting officer determined that the low bid prices were unreasonably high, withdrew the set-aside, and rejected all bids. Falcon and Aakron were notified of this action by letters dated June 24, 1976.

On July 9, 1976, a revised solicitation (FPOO-EJ-48904-RA) was issued for the same items as a partial set-aside for Labor Surplus Areas. Four bids were received by the July 30 opening date. One bid was determined to be nonresponsive and one bid was rejected because the corporation misrepresented itself as being within a labor surplus area. The bids of Falcon and Aakron were

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the same as for the previous solicitation and were again rejected as being unreasonably high. A proposed determination to withdraw this solicitation and to solicit bids on a negotiated basis was made by GSA on August 27.

By letter filed in our Office on July 21, Falcon protests the GSA action on the first solicitation, and disputes the contracting officer's determination that its bid price was unreasonably high. Aakron, by mailgram filed in our Office on September 2, protests GSA's actions on both solicitations. Aakron also disputes the contracting officer's determination that its bid price was unreasonably high in the first solicitation. Additionally, Aakron contends that the bidder which was determined to be nonresponsive in the second solicitation, deliberately bid below cost with the expectation of recovering the loss through later price increases or by receiving follow-up contracts at higher prices--a so-called "buying-in" situation.

Regarding Falcon's protest of the cancellation of IFB No. FPOO-EJ-48904-A due to unreasonably high prices, Federal Procurement Regulations (FPR) § 1-1.706-3(b) (1964) provides in pertinent part:

"If, prior to the award of a contract involving an individual or class set-aside for small business, the contracting officer considers the procurement of the set-aside portion from a small business concern would be detrimental to the public interest (e.g., because of unreasonable price), the contracting officer may withdraw either a joint or a unilateral set-aside determination."

The determination of price reasonableness is basically a business judgment requiring the exercise of broad discretion. See Park Manufacturing Company; Century Tool Company, B-185330, B-185331, B-185776, April 16, 1976, 76-1 CPD 260. This determination is to be made by the contracting officer and our Office will not interfere absent a showing of a clear abuse of discretion. See J.H. Rutter Rex Manufacturing Company, Inc., B-184157, February 23, 1976, 76-1 CPD 122; Park Manufacturing Company; Century Tool Company, *supra*.

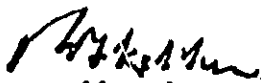
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In the instant case, GSA's determination of price unreasonableness was based on the lack of justification for a 10 percent price increase over 1975 prices and on a comparison with prices on other current contracts for similar items. While Falcon presented some evidence in an attempt to justify the price increase, we do not find in our review of the record any basis to conclude that the contracting officer's determination of price reasonableness was a clear abuse of discretion.

As provided in our Bid Protest Procedures, a protest must be filed within 10 working days after the basis of the protest is known or should have been known. It appears that Aakron learned of GSA's decision to cancel IFB No. FP00-EJ-48904-A on or about June 30, 1976. Its protest was filed in our Office on September 2, 1976 and is consequently untimely. See 4 C.F.R. § 20.2(b)(2).

Aakron protests award on the resolicitation based solely upon a suspected buying-in situation. However, no award was made and the matter is therefore academic. Further, we have previously held that the possibility of buying-in is not a proper basis upon which the validity of an award may be challenged since the fact that a low bidder may incur a loss at its bid price does not justify rejecting an otherwise acceptable bid. A.C. Electronics, Inc., B-185553, May 3, 1976, 76-1 CPD 295; Futronics Industries, Inc., B-185896, March 10, 1976, 76-1 CPD 169.

In accordance with the above, Falcon's and Aakron's protests of the cancellation of IFB No. FP00-EJ-48904-A are denied; and Aakron's protest of the assumed award under the resolicitation is dismissed.


Deputy Comptroller General
of the United States