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DECISION

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

10,055

FILE:B-192534 DATE: May 8, 1979

CNG 01285

MATTER OF: Mainline Carpet Specialists, Inc.

[Protest Alleging Inability of Awardee to Meet Contract Specifications at Bid Price]

DIGEST:

1. Government's acceptance of bid submitted without taking exception to specifications binds offeror to deliver product exactly meeting those specifications, and if offeror fails to do so, contract may be terminated for default. Whether contractor actually meets specifications is matter of contract administration, and does not fall under GAO Bid Protest Procedures.

2. If Government's minimum needs are overstated in two-step procurement, proper remedy is to cancel step-two invitation for bids and reopen step one, giving all offerors opportunity to submit proposals meeting relaxed specifications.

3. Below-cost bid, of itself, is not reason for rejection of that bid; there must also be a finding that offeror is not capable of performing contract.

4. First step of two-step procurement is qualifying, not competitive, phase, and procuring agency should make reasonable efforts--through discussion--to bring proposals to acceptable status, thus increasing competition.

5. Mere speculation is not sufficient to sustain allegation of bias.

6. There is no legal basis for allowing unsuccessful bidder to recover anticipated profits, and bid or proposal preparation costs may be recovered only when it is shown that except for Government's

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arbitrary and capricious action, claimant would have been awarded contract.

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Mainline Carpet Specialists, Inc. (Mainline) protests the award of a contract for reproduction carpeting for the Chief Factor's House at Fort Vancouver National Historical Site, Vancouver, Washington. DLG 01507 The Department of the Interior's National Park Service (the Park Service) has made award to Newbury Design, Inc. (Newbury). DLG 01506

Mainline primarily alleges that Newbury will not supply carpet meeting Park Service specifications, and cannot do so at its offered price. Newbury, however, took no exception to the specifications at the time of submitting its bid, and is contractually bound to comply with them. Therefore, we find no legal basis for sustaining the protest.

This was a two-step, formally advertised procurement; in the first step, the Park Service requested unpriced proposals for the purpose of obtaining color diagrams, sketches, or photographs of documentable English designs of the period 1820 - 1840.

Mainline's proposed designs were based on three color plates of carpets manufactured in England between 1815 and 1836. Newbury submitted more than a dozen photographs of the "approximate time period 1820 - 1840," but stated that truly accurate documentation, in the form of manufacturers' records or specimens, was impossible. Newbury offered to reproduce any old specimen or "document" which the Park Service had. Mainline also has challenged this lack of documentation by Newbury.

Evaluating the two proposals on the basis of period authenticity, color, pattern, and completeness, a Park Service committee found both technically acceptable. Rather than inviting the offerors to bid on the patterns which they had proposed, however, the committee

itself selected two designs which it wished to have reproduced, specified colors, and in the second step of the procurement, asked both Mainline and Newbury for prices for the required amount of carpeting for three rooms and additional runners. The specifications at issue were as follows:

> " * * * 27-inch wide Brussels weave, very low looped pile (.150 inch pile height), 2-ply 100-s 1/ 100 percent all finely spun woolen yarn. The weave shall consist of 9 rows of yarn per inch of the length of the carpeting and 9 rows of yarn per inch of the width of the carpeting. The yarn must be folded double in the weaving process."

Mainline submitted two bids. One was marked "equal to specification and meets Buy American Act;" the other "an exact duplicate of specification but made in Europe." Newbury submitted one bid, also based on use of yarn manufactured in Europe. A 12 percent evaluation factor was added to the latter two bids, and of the three, Newbury's evaluated price was lowest. A $15,014 contract was awarded to Newbury on July 28, 1978.

Following award, a report submitted to our Office by the Park Service reveals, a number of contract changes were approved by the Fort Vancouver curator. For example, Newbury provided samples of various designs, colors, and qualities with a letter dated August 15, 1978, and asked whether two-ply 50-s, which

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1/ Two-ply 100-s yarn is defined in the contracting officer's report as two strands of wool, twisted (plied) together, which would weigh one ounce when stretched to 100 yards. Two-ply 50-s, by contrast, would weigh one ounce when stretched to 50 yards. Folded double, the two-ply 100-s would consist of four fine strands and would weigh one ounce when stretched to 50 yards.

it was willing to supply for 10 percent less than its bid price, would be acceptable; the curator's marginal notes on this letter, returned to Newbury, say "go with 2/50's." Such changes, however, were beyond the scope of the curator's authority, and he was replaced as the contracting officer's representative on September 29, 1978. Newbury was advised to disregard any of his instructions and was reminded that the contract required a trial sample of the carpeting to be approved by the contracting officer for both design and color before the entire lot was woven. Because Mainline has alleged that the contracting officer is not qualified to determine whether Newbury actually is meeting Park Service specifications, particularly with regard to the two-ply 100-s yarn, the Office of the Secretary of the Interior has agreed that a knowledgable individual (whom we are advised will be from the Smithsonian Institution) also will approve the trial sample.

We have examined Newbury's bid, and find that the firm took no exception to the requirement for two-ply 100-s, folded double, or to any of the other specifications. Acceptance of that bid by the Government therefore bound Newbury to deliver carpet exactly meeting those specifications. Virginia-Maryland Associates, Inc., B-192275, July 21, 1978, 78-2 CPD 61. If it is determined that Newbury is not doing so, the contract may be terminated for default. This, however, is a matter of contract administration and cannot be accomplished by means of a bid protest. Southern Industrial Laundry d/b/a Alabama Laundries and Linen Supply, B-191095, April 21, 1978, 78-1 CPD 310; Cambridge Filter Corporation, B-180948, May 17, 1974, 74-1 CPD 268.

We are concerned by the apparent intent of the Park Service to relax specifications following the award to Newbury. If two-ply 50-s yarn would have been satisfactory for the reproduction carpeting, the Government's minimum needs were overstated in the solicitation. The proper remedy in that case would have been to terminate the contract, cancel the step-two invitation for bids, and reopen step one, giving all

offerors an opportunity to submit proposals for the less expensive carpet. See Standard Conveyor Company and Rhor Industrial Systems, Inc., 56 Comp. Gen. 454 (1977), 77-1 CPD 220. We do not believe Mainline has been prejudiced by the unauthorized actions of the contracting officer, however, since the contract was not actually modified.2/

Mainline has repeatedly argued that Newbury cannot meet the specifications at its offered price. But Newbury's bid included surcharges for all wool, two-ply 100-s yarn, as well as for special dyeings, design charges, and hand sewing. Newbury has provided us with a list of other historic sites for which it has supplied carpet using two-ply 100-s yarn, including Fountain Elms, Utica, New York; the Old State Capitol, Frankfort, Kentucky; the Old Capitol, Iowa City, Iowa; and Biscobel, Garrison, New York, and has assured us that its bid was figured according to its usual method. We therefore see no reason to question the price. Even if the bid were below-cost, this would not, of itself, provide a reason for rejection; there must also be a finding of nonresponsibility, i.e. that the contractor is not capable of performing, which has not been made here. See Homexx International Corporation, B-192034, September 22, 1978, 78-2 CPD 219.

As for documentation of proposed designs, Park Service evaluation reports indicate that one committee member found Newbury's proposal weak in this area and suggested that if further discussions were held, Newbury should be asked about the earliest date and place of use of specific patterns. The first step of a two-step procurement is a qualifying, rather than competitive phase, and we have held that an agency should make reasonable efforts to bring

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2/ A change order, involving colors for one pattern, was issued October 20, 1978; the Park Service states that there has been no monetary change in the contract.

proposals submitted during this step to acceptable status, thus increasing competition. Coastal Mobile and Modular Corporation, B-183664 July 15, 1975, 75-2 CPD 39. See also Federal Procurement Regulations (FPR) § 1-2.503-1(b)(4) (1964 ed.), approving discussions of step-one proposals if needed to obtain additional information. Acceptance of Newbury's proposal was consistent with this policy. Moreover, as noted above, the Park Service itself ultimately selected the patterns on which both Mainline and Newbury bid. Although Mainline now argues that documentation of these patterns also was inadequate, this basis of protest is untimely under our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1978).

Mainline has raised a number of other issues, none of which provide a legal basis for sustaining its protest. For example, the contracting officer on one occasion apparently inadvertently identified Mainline's samples, submitted with its proposal, as those of Newbury. The solicitation, however, did not require samples, and they were not considered during the evaluation process. The decision to make award to Newbury was based solely on its lower price. In addition, Mainline has alleged bias in favor of Newbury by the Fort Vancouver curator, but has provided no specific evidence other than that individual's comments on the evaluation sheet. Mere speculation is not sufficient to sustain an allegation of bias. Joseph Legat Architects, B-187160, December 13, 1977, 77-2 CPD 458 and cases cited therein.

Finally, Mainline has demanded $8070.38 in compensatory damages to cover its expenses and profits. There is no legal basis for allowing an unsuccessful bidder to recover anticipated profits, Applied Control Technology, B-190719, September 11, 1978, 78-2 CPD 183, and bid or proposal preparation costs may be recovered only when it is shown that except for the Government's arbitrary and capricious action, the claimant would have been awarded the contract in question. Documentation Associates--Reconsideration of Claim for Proposal Preparation Costs, B-190238, August 7, 1978, 78-2 CPD 93 and

court cases cited therein. There has been no such showing here.

The protest is denied.

Deputy Comptroller General
of the United States