Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: WestByrd, Inc.

File: B-237515

Date: February 7, 1990

Benjamin N. Thompson, Esq., Lytch & Thompson, for the protester.
Herbert F. Kelley, Jr., Esq., Office of the Judge Advocate General, Department of the Army, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting officer properly determined--consistent with the view of the Department of Labor, the agency charged with implementing the Walsh-Healey Act--that the Walsh-Healey Act does not apply to contract for rental of personal property since such a contract does not involve "furnishing" equipment within the meaning of the Act.

2. Determination after bid opening that Walsh-Healey Act does not apply to contract for rental of personal property, despite inclusion of Walsh-Healey requirements in the invitation for bids (IFB), does not require cancellation of IFB, since there is no indication that competition was restricted due to inclusion of Walsh-Healey requirements and no bidders were prejudiced by agency's subsequent determination to waive Walsh-Healey requirements.

DECISION

WestByrd, Inc., protests the award of a contract to any other bidder under invitation for bids (IFB) No. DABT10-89-B-0192, issued by the Army for the rental and maintenance of heavy-duty washers and dryers at Fort Benning, Georgia. WestByrd protests that: (1) the first, second and third low bidders are not eligible for award under the Walsh-Healey Public Contracts Act requirements incorporated in the IFB; (2) the Army erred in its determination that the Act does

not apply to this procurement; and (3) the Army improperly waived the Walsh-Healey requirements in the IFB after bid opening, thus permitting consideration of bidders not otherwise eligible for award.

We deny the protest.

The IFB, issued July 17, 1989, and set aside for small business, sought bids for 1 year's rental and maintenance of at least 810 washers and 782 dryers, and for two 1-year rental options. Paragraph I-1.Q of the IFB incorporated by reference Federal Acquisition Regulation (FAR) § 52.222-20, entitled "Walsh-Healey Public Contracts Act." In relevant part, § 52.222-20 states:

> "If this contract is for the manufacture or furnishing of materials, supplies, articles or equipment in an amount that exceeds or may exceed $10,000, and is subject to the Walsh-Healey Public Contracts Act, as amended (41 U.S.C. 35-45), the following terms and conditions apply . . . ."

When a contract is covered by the Walsh-Healey Act, offerors are required to certify their status as "regular dealers" or "manufacturers" of the supplies, indicating compliance with the requirements of the Act applicable to their status. See FAR § 22.606-1 (manufacturers) and § 22.606-2 (regular dealers). The solicitation at issue required such certification at section K-9.

Bid opening was held on August 18, and nine bids were received in response to the solicitation. The four low bidders and their respective bids were: BALVA Financial Corporation, $732,715.80; Steadman Construction Company, $739,441.80; DGS Contract Services, Inc., $794,975.36; and WestByrd, $826,524. On August 22, WestByrd protested to the contracting officer that BALVA, Steadman and DGS were not regular dealers of washers and dryers as required by the Walsh-Healey Act. In response to the WestByrd protest, BALVA protested that the Walsh-Healey Act should not apply to the procurement; DGS likewise protested to the contracting officer against award to BALVA or Steadman, raising other issues.

In evaluating the bids and reviewing the protests, the contracting officer rejected the first and second low bids: he found BALVA's bid materially unbalanced, and concluded that Steadman was not a responsible bidder. In addition, the contracting officer determined that the Walsh-Healey Act did not apply to the procurement, and so informed

WestByrd by letter dated September 18. On September 26, WestByrd challenged the contracting officer's determination that the Act did not apply to this procurement, as well as the propriety of reaching that decision after bids were opened. The Army denied WestByrd's protest on October 11 and on October 20, WestByrd protested to our Office.

WestByrd asserts that the Army placed bidders on notice that it considered this procurement covered by the Walsh-Healey Act when it incorporated FAR § 52.222-20 in the IFB, and required bidders to certify their status as regular dealers or manufacturers under the Act. WestByrd protests that the Army cannot now properly consider any non-Walsh-Healey bidder for award. Further, WestByrd contends that the Army erred in determining that the Act did not apply to this procurement, and argues the Army improperly waived the Walsh-Healey requirements after bid opening.

The Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35 et seq. (1982 and Supp. IV 1986), is intended to impose certain employment standards on government contractors by providing that contracts made or entered into by the government for the manufacture or furnishing of materials, supplies, articles and equipment will include minimum wage requirements, child and convict labor restrictions, and work safety provisions. See 41 U.S.C. § 35. The Act is administered by the Secretary of Labor, and implemented with regulations published at 41 C.F.R. chapter 50 (1989). In addition, FAR subpart 22.6 sets forth detailed guidance regarding interpretation and application of the Act to government procurements.

WestByrd challenges the Army's determination that this procurement is not subject to the Walsh-Healey Act. The record indicates that the contracting officer's determination was based on a prior decision of our Office, 19 Comp. Gen. 486 (1939). In that case, we found that the Walsh-Healey Act does not apply to contracts for rental of personal property because the provision of such already-manufactured property for a fixed period of time does not constitute "furnishing" the property within the meaning of the Act and has no bearing on the goals of the Act--i.e., to eliminate " . . . unscrupulous contractors, to assure payment of proper wages, to limit labor hours, to forbid child labor and convict employment, and to afford proper working conditions for employees of manufacturers and others contracting to sell, materials, supplies, equipment, etc. for Government needs." 19 Comp. Gen. at 489-490.

The protester argues that our recent decision in Tenavision, Inc., B-231453, Aug. 4, 1988, 88-2 CPD ¶ 114, indicates

that, contrary to our earlier decision, we have concluded that the Walsh-Healey Act does apply to contracts for the rental of equipment. In that case--also an Army procurement for the rental of washers and dryers--the Army decided that the Service Contract Act was not applicable to the procurement and decided instead to treat the procurement as covered by the Walsh-Healey Act. In reviewing a challenge to that determination, we concluded that the Army's position was not unreasonable.

Certain language used in our decision in Tenavision may have created the misimpression that either the Service Contract Act or the Walsh-Healey Act must be applicable to a contract for rental equipment. We stated therein:

> "In this case, we do not believe that the determination that this contract is primarily for rental of machines, rather than their maintenance or installation, and therefore is subject to Walsh-Healey rather than Service Contract Act requirements, is clearly unreasonable or contrary to law." (Emphasis added.)

Our holding in Tenavision, however, was limited to a review of the Army's determination in that case that the Service Contract Act did not apply to the procurement at issue. The applicability of the Walsh-Healey Act was not directly in issue, and it was not our intent to convey the impression that when the Service Contract Act does not apply to a procurement, the Walsh-Healey Act must apply. To avoid future uncertainty, we affirm our 1939 decision that the Walsh-Healey Act does not apply to contracts for the rental of equipment. This position is consistent with the view of the Department of Labor, the agency charged with implementing the Act, as explained in its comments on the protest. Accordingly, applying that decision to this case, the Army properly determined that the Walsh-Healey Act does not apply to this IFB.

The protester also contends that the Army could not properly conclude after bid opening that the procurement was beyond the scope of the Walsh-Healey Act and in effect waive the Walsh-Healey requirements. As explained above, the IFB included FAR § 52.222-20, the standard Walsh-Healey Act clause, and required bidders to certify their status as regular dealers or manufacturers with their bids. We agree with the protester that inclusion of these clauses indicates that an agency considers the procurement to be covered by the Walsh-Healey Act. Likewise, inclusion of these clauses

is sufficient notice to bidders that they must be eligible under the terms of the Act to be considered for award.

Following the protester's argument to its logical conclusion, the contracting officer in this case had two choices after bid opening: either proceed with award to a bidder eligible under the requirements of the Walsh-Healey Act, bypassing lower-priced bidders as ineligible despite the inapplicability of the Act; or cancel the IFB after having revealed the prices of the nine bidders, and reissue the solicitation without the Walsh-Healey clauses.

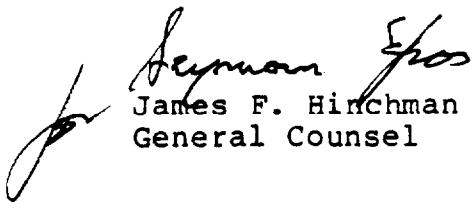
We find the Army's decision not to cancel the IFB, and at the same time not to require bidders to be manufacturers or regular dealers under the Walsh-Healey Act, to be reasonable. First, we do not believe proceeding with award under the Walsh-Healey Act would have been reasonable after the contracting officer concluded that the Act did not properly apply to the procurement. Such a course would have required rejecting lower-priced bidders who did not qualify as manufacturers or regular dealers despite the fact that the Walsh-Healey Act did not apply.

Second, we do not believe that canceling the solicitation after bid opening was warranted. Because of the potential adverse impact on the competitive bidding system of cancellation after bid prices have been exposed, a contracting agency must have a compelling reason to cancel an IFB after bid opening. FAR § 14.404-1(a)(1); Earth Property Servs., Inc., B-231715.4, Aug. 29, 1989, 89-2 CPD ¶ 183. Generally, the determination as to whether a compelling reason exists is an administrative one that we will not disturb absent a showing that it was unreasonable. Independent Gas Producers Corp., B-229487, Mar. 2, 1988, 88-1 CPD ¶ 217. Further, the fact that a particular provision of the IFB is defective does not, per se, require cancellation of the IFB after bids are opened. See Bonded Maintenance Co., Inc., B-235207, July 14, 1989, 89-2 CPD ¶ 51.

The Army's initial erroneous decision to include FAR § 52.222-20 and the certification requirements at section K-9 of the IFB did not prejudice any of the bidders, and given that nine bids were received, did not adversely affect the degree of competition received. In responding to the IFB, all bidders were on equal footing--all believing that they would have to be regular dealers or manufacturers under the Act to be eligible for award. Since the decision not to proceed under the Act was not made until after bids were received, and opened, no bidder could make use of the information to lower its price. Thus, no bidder can

reasonably claim to be unfairly treated. Similarly, there is no indication that any potential bidder was dissuaded from competing because of the Walsh-Healey provisions. Accordingly, we find that cancellation of the IFB was not warranted and that the Army acted reasonably in waiving the Walsh-Healey requirements after bid opening once it determined that the Act did not apply to the procurement.

The protest is denied.



James F. Hinchman
General Counsel