



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Satin American Corporation

File: B-261068

Date: August 16, 1995

M. B. Kaminski, Esq., East Mountain Law, for the protester.
Lester Edelman, Esq., and Matthew R. Keiser, Esq., Department of the Army, for the agency.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Under a small business set-aside invitation for bids (IFB) for supplies, a bid is nonresponsive where it does not clearly indicate that the end products will be manufactured or supplied by a small business concern as required by the IFB.
2. Nonresponsive bidder is an interested party to maintain protest against the reasonableness of the awardee's price, where the awardee was the only responsive bidder.
3. Agency did not have a reasonable basis to determine that the award price was reasonable under an invitation for bids, where there was no independent government estimate, procurement history, or current market analysis, and no consideration was given to the significantly lower nonresponsive bids, whose nonresponsiveness was related solely to noncompliant small business certifications; the fact that the awardee submitted its high-priced bid in a competitive environment does not necessarily mean it is reasonable as to price or satisfy the agency's independent obligation to determine the price was reasonable prior to making award.

DECISION

Satin American Corporation protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DACW57-95-B-0012, issued by the United States Army Corps of Engineers, Portland District, for 50 lots of various arc chute parts. Alternatively, Satin protests that the award was not made at a reasonable price.

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As explained below, while we agree that Satin's bid was properly found nonresponsive, we conclude that the award was improper because the agency could not reasonably determine that the awardee's price was reasonable. Accordingly, we deny the protest in part and sustain it in part.

On October 26, 1994, the Corps issued this IFB, as a total small business set-aside, to obtain 50 lots of arc chute parts, which are components in circuit breakers for interruption of electrical short circuits. These were to be installed in circuit breakers at the John Day Powerhouse project in Rufus, Oregon. The certifications section of the IFB incorporated the Small Business Concern Representation provision that required the bidder to certify its status as a small business and that "all end items to be furnished would be manufactured or produced by a small business."

The Corps received three bids by the November 9 bid opening, as follows:

<u>BIDDER</u>	<u>PRICE</u>
Satin	\$197,000
Argo International	\$327,075
McGarry Machine, Inc.	\$387,650

Both Satin and Argo certified themselves to be small businesses under the "Small Business Concern Representation" of their bids, but both bids indicated that not all end items would be manufactured or produced by a small business. Therefore, the Corps rejected the two low bids as nonresponsive, and made award on December 29 to McGarry, as the low responsive and responsible bidder with a reasonable price.

On January 19, 1995, Satin filed an agency-level protest. Satin maintained that it mistakenly certified that not all end items would be manufactured by a small business and urged the Corps to waive the errant certification as a minor irregularity, since Satin's bid identified another small business in the place of performance clause and did not specifically object to the requirement that all end items be manufactured or produced by a small business.¹ In the alternative, Satin

¹Satin noted that some of the components of the arc chute parts to be provided are products manufactured by large businesses and it believed that it therefore had to disclose that these components were large business products. Satin did not realize, until after its bid was rejected and the reasons explained by the agency, that the fabrication of the required arc chute parts using these components by its small business subcontractor, as identified in its bid, meant that Satin would comply with the requirement that the parts be manufactured or produced by a small business.

contended that McGarry's bid price was unreasonable, as indicated by Satin's much lower bid price, and that the procurement should therefore be canceled and the requirement resolicited. On March 27, the Corps denied Satin's protest. On April 10, Satin filed this timely protest on the same bases with our Office.

As a general matter, where, as here, a bid on a small business set-aside fails to establish the bidder's legal obligation to furnish end items manufactured or produced by a small business concern, the bid must be rejected as nonresponsive; otherwise, the small business contractor would be free to provide the end items from either small or large businesses as its own interests might dictate, thus defeating the purpose of the set-aside program. Federal Acquisition Regulation (FAR) § 14.404-2; Delta Concepts, Inc., 67 Comp. Gen. 522 (1988), 88-2 CPD ¶ 43. While Satin contends that its mistaken certification should be waived as a minor irregularity because it identified another small business in the place of performance clause, this factor is not a legal basis for determining that Satin obligated itself to furnish only products manufactured or produced by a small business. See Midlantic Steel Co., Inc., B-237030, Sept. 22, 1989, 89-2 CPD ¶ 267. This is so because identifying a small business in the place of performance clause generally does not obligate the bidder to use that location, since, absent a provision in the solicitation to the contrary, the place of performance may be changed at any time at the discretion of the bidder. See Wright Assoc., Inc., B-238756, June 12, 1990, 90-1 CPD ¶ 549; Midlantic Steel Co., Inc., *supra*. Since Satin's obligation to furnish small business manufactured or produced products was at best ambiguous under its bid, given its certification that it would not furnish products manufactured or produced by a small business, the Corps properly rejected Satin's bid as nonresponsive. See Delta Concepts, Inc., *supra*. Accordingly, we deny Satin's protest against the rejection of its bid.

Alternatively, Satin argues that its much lower-priced bid that took no exception to the IFB's technical requirements should have demonstrated to the Corps that McGarry's bid was unreasonably high in price.

The Corps first responds that Satin is not an interested party to protest the reasonableness of the awardee's price. Under our Bid Protest Regulations, only an interested party may protest a federal procurement. 4 C.F.R. § 21.1(a) (1995). An interested party is an actual or prospective bidder whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. 4 C.F.R. § 21.0(a). Determining whether a party is interested involves consideration of a variety of factors, including the nature of the issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. Black Hills Refuse Serv., 67 Comp. Gen. 261 (1988), 88-1 CPD ¶ 151. Here, even though Satin's bid was properly rejected as nonresponsive, the award, which was assertedly not made at a reasonable price, was made to the only responsive bidder. Thus, if Satin's protest were upheld, we could recommend that the award be terminated, the

IFB canceled, and the requirement resolicited, in which case Satin would be eligible to compete. Thus, Satin has a sufficient stake in the outcome of the protest to render it an interested party to protest that award was not made at a reasonable price. Id.

The contracting officer has an affirmative obligation to determine that the award price is reasonable before awarding a contract under an IFB, and is obligated to reject a bid that is determined to be unreasonable as to price.² FAR §§ 14.404-2(f); 14.407-2(a). An agency's determination of price reasonableness involves the exercise of broad discretion on the part of the contracting officer, which our Office will not question, unless it is clearly unreasonable or there is a showing of fraud or bad faith on the part of the contracting official. See Sigma West Corp., B-247916, July 20, 1992, 92-2 CPD ¶ 31. An agency may base a price reasonableness determination upon a comparison with such factors as government estimates, past procurement history, current market conditions, or any other relevant factors, including those which have been revealed by the competition received. FAR §§ 14.407-2(a); 15.805-2; Sigma West Corp., supra.

In responding to this protest ground, the Corps initially reported that it utilized a government estimate of \$550,000 to determine that McGarry's bid price was reasonable; the Corps specifically stated that "there [was] no evidence here that the government estimate is questionable." After our Office requested a copy of the estimate, however, the Corps admitted that the agency had never prepared a formal government estimate, and that the referenced \$550,000 figure was merely a projection from what the government paid (\$11,000 each) for two prototypes of arc chute parts, which did not consider the economies of scale available in a production contract, as called for here. The Corps further reports that the unique new design of the arc chute parts prevented an estimate of price reasonableness from past procurement history or current market analysis. Thus, the Corps now asserts that "the only apparent means to determine price reasonableness was from competitive bids—including [McGarry's]" and "therefore the awardee's bid was reasonable."

We agree with the Corps that in this case the agency must look to the bids received as indicators of price reasonableness. However, the fact that McGarry submitted its bid in a competitive environment in response to the IFB does not necessarily mean that it is reasonable as to price. A contracting officer has an affirmative obligation to determine the bid price is reasonable before making award, FAR § 14.407-2(a),

²Similarly, an award may not be made under a small business set-aside unless the award price does not exceed a fair market price. See FAR §§ 19.501(i); 19.502-2(a); 19.506(a).

and the Corps offers no reasons why McGarry's bid was reasonably priced in light of the two lower-priced, albeit nonresponsive, bids received from Satin and Argo.

Both Satin and Argo's bids were determined to be nonresponsive due solely to their small business certifications, and, at least in Satin's case, Satin claims that its certification was an error and that it would have complied with the IFB's requirements at its bid price. The Corps neither asserts that Satin's or Argo's bids are unreasonably low, or that these firms are not capable of successfully performing the contract in accordance with the IFB. Although a contracting agency should exercise caution when using a nonresponsive bid as the only benchmark of price reasonableness, primary reliance on a nonresponsive bid may be appropriate where other methods of determining current market price are not reasonably available. See Sigma West Corp., supra. In this case, there is no suggestion that the nonresponsiveness in Satin's bid affected its bid price or made it an unreliable indicator of price reasonableness. On this record, we find that the Corps could not reasonably determine McGarry's bid price to be reasonable. See Black Hills Refuse Serv., supra. We therefore sustain the protest on this basis.

We have been advised that the contract is substantially complete with final delivery of parts expected in October. Thus, we do not find it practicable to recommend that McGarry's contract be disturbed. However, Satin is entitled to recover its costs of filing and pursuing the protest ground on which its protest was sustained. 4 C.F.R. § 21.6(d). Since its bid was properly determined to be nonresponsive, Satin is not entitled to recover its bid preparation costs. See Maintenance and Repair, B-251223, Mar. 19, 1993, 93-1 CPD ¶ 247. The protester should submit its certified claim for costs directly to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is denied in part and sustained in part.

\s\ Robert P. Murphy
for Comptroller General
of the United States