



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Emerson Electric Co.
File: B-232234
Date: December 2, 1988

DIGEST

1. Proposal which did not contain prices of batteries in the unit prices for equipment as required by the solicitation may be accepted where the unit prices for the equipment, including batteries, can be readily ascertained from other information in the proposal.
2. Concept of responsiveness generally does not apply to negotiated procurements, and offer that reflected gradual increase in price of battery packs, one component of uninterruptable power systems, over term of multi-year contract, may be accepted notwithstanding solicitation provision stating that such offers will be "nonresponsive," where offer remains low under any interpretation and where protester fails to show that it was prejudiced by acceptance of the offer.

DECISION

Emerson Electric Co. protests the award of a contract to Exide Electronics, Inc. under request for proposals (RFP) No. F04606-87-R-0313, issued by the Sacramento Air Logistics Center, McClellan Air Force Base, California for uninterruptable power systems (UPS). The protester alleges that Exide's offer was "nonresponsive" because the firm failed to include the prices of batteries for the equipment in the unit prices for contract line item numbers (CLINs) 0001-0074 of the schedule, failed to comply with the RFP's level pricing requirement, and failed to offer delivery on a f.o.b. destination basis as required by the solicitation.

We deny the protest.

On May 5, 1987, the agency issued the RFP to meet the agency's requirements for UPS, which protect electronic equipment from power anomalies both by controlling the flow of current from commercial utilities and by providing power

in the event that service is interrupted. The RFP contained 74 different CLINs covering UPS from 1 KVA through 750 KVA; additional CLINs 0075 through 0091 covered optional equipment, services, spares, and data associated with maintenance of the UPS.

The agency solicited offers on a single year and a multi-year basis and advised potential offerors that offers would be evaluated by determining the lowest overall evaluated cost for the aggregate best estimated quantity (BEQ) on both a single year and a multi-year basis. The RFP required offerors to submit a single unit price on the schedule as the BEQ price for each program year. Amendment No. 0005 reminded offerors that a "single unit price (level price) [was] to be submitted for each program year" and that failure to do so would "cause the offeror to be considered nonresponsive." The decision whether to award on a single or multi-year basis would be based on a comparison of the multi-year cost with the cost of buying the agency's requirements in successive independent quantities. The RFP contained the standard Federal Acquisition Regulation § 52.215-16 (FAC 84-17) Contract Award clause providing for award to the responsible offeror whose offer conforming to the solicitation would be most advantageous to the government, cost or price and other factors specified in the solicitation considered. Apart from the multi-year evaluation, the RFP provided for no other evaluation factors besides first article costs and the cost of renting government production and research equipment. Thus, the competition was essentially based on price alone, with award to be made to the low technically acceptable offeror.

The agency received two technically acceptable offers, from the awardee and the protester on February 18, 1988; on April 4, the agency issued amendment No. 0008 to consolidate the solicitation document for award and to establish a date of April 8 for submitting best and final offers (BAFOs). Exide's price of \$26,734,671 for the BEQ was substantially lower than the protester's price of \$65,161,404; the agency awarded the contract to Exide on May 6, 1988. After several Freedom of Information Act (FOIA) requests by Emerson, this protest followed.

Emerson first argues that Exide failed to include the prices of batteries in its unit prices for CLINs 0001-0074, even though the cost of batteries typically accounts for one-half of the cost of each UPS. The record shows that Exide, starting in its initial proposal, employed the following pricing methodology. Where a battery was a standard component of the particular UPS requested by each CLIN, Exide included the battery price in its CLIN unit price

(e.g. CLINs 0001-0027). Where a battery was not a standard item for the particular UPS hardware, Exide priced the batteries under CLIN 0075 by use of a pricing matrix contained in Volume II, Section III of its initial proposal which was subsequently incorporated by reference in the contract documents. The matrix contains battery prices for CLINs with various options available to the purchaser, such as 10-year or 20-year batteries. Moreover, the agency states, and the record shows, that the total price for each UPS, including batteries, could easily be ascertained by evaluating each CLIN unit price in conjunction with the battery matrix.^{1/} Indeed, the record contains a comparison of Exide's and Emerson's proposed prices for the estimated quantities, including batteries, which shows that Exide's proposal is still approximately \$35 million below Emerson's proposal.

Based on the above, we find that Exide's use of a separate matrix to price batteries constitutes, at most, a discrepancy which is a matter of form rather than substance. Indeed, we note that even in sealed bidding, omission of unit prices does not necessarily make a bid nonresponsive when it can be evaluated on a basis common to all bids from other information in the bid; under such circumstances, we have held that such an omission constitutes a minor informality that may be waived. See, e.g., Gem Engineering Co., Inc., B-231605.2, Sept. 16, 1988, 88-2 CPD ¶ 252. Similarly, we cannot conclude that the protester was prejudiced where the awardee's unit prices with battery packs and optional equipment were readily ascertainable from documents submitted with Exide's offer, and were lower than the protester's under any reasonable interpretation. Accordingly, since Exide's prices, including batteries, could be readily ascertained from information in its proposal, we do not think that Exide's use of a separate pricing matrix required rejection of its proposal.

Next, Emerson alleges that Exide failed to offer level pricing for batteries and other items. The record shows that the prices contained in the battery matrix (CLIN 0075) were not level-priced. Also, certain labor rates (CLINs 0076, 0079, 0082 and 0085) were not level-priced. (Exide did submit level prices for CLINs 0001-0074, although, as discussed above, under some of these CLINs the unit prices

^{1/} The proposal also includes prices for remote status panels, low input filters, battery breakers, and maintenance bypass switches. The cost for these items was also erroneously alleged by Emerson to be missing from Exide's proposal.

for these CLINs did not include battery prices.) Regarding the awardee's failure to offer level pricing for batteries, we note first that the concept of responsiveness, i.e., a bidder's unconditional offer to comply with the terms of an invitation, generally does not apply to negotiated procurements. See Kaufman Lasman Associates, Inc. et al., B-229917 et al., Feb. 26, 1988, 88-1 CPD ¶ 202. Further, even in sealed bidding, notwithstanding a solicitation provision warning that bids offering non-level pricing will be rejected as nonresponsive, we have held that the failure to comply with a level pricing provision does not automatically preclude acceptance of a bid. The contracting officer must first consider whether such noncompliance is prejudicial to other bidders. InterTrade Industries, Ltd., B-225702, June 3, 1987, 87-1 CPD ¶ 567. Considering the price difference between the two offerors, it is inconceivable that such a minor deviation from the terms of the RFP would work to Emerson's prejudice. For example, even assuming that each CLIN in the battery matrix is priced and evaluated at the highest fifth-year price, Exide's evaluated offer still remains approximately \$35 million below Emerson's price for CLINs 0001-0074. The protester has offered nothing beyond speculation to show otherwise, nor does a contrary conclusion otherwise suggest itself to us. We therefore have no basis in the record before us to object to the agency's acceptance of non-level pricing for battery packs.

Finally, Emerson contends that Exide's proposal failed to include transportation costs as required by the solicitation. The agency advises that in issuing amendment No. 0008, a clerical error caused the RFP to call for f.o.b. origin pricing. Exide advised the contracting officer of the error by telephone and advised that its BAFO should be considered as having been submitted on a f.o.b. destination basis. In fact, the record shows that Exide's proposal had always been priced to include transportation costs, and that Emerson and Exide were both evaluated on this basis. Exide has executed a no-cost contract modification recognizing the error and changing the term to f.o.b. destination. Thus, we also consider this as a minor irregularity that had no effect on the evaluation.

The protest is denied.

John F. Mitchell
for James F. Hinchman
General Counsel