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DECISION



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

FILE: B-204524.5

DATE: May 7, 1982

MATTER OF: Roarda, Inc.

DIGEST:

1. A procuring agency is not required to delay award indefinitely while a bidder attempts to cure the causes for the firm being found nonresponsible. Thus, where the low bidder fails to supply required information prior to contract award, after having been provided ample opportunity to do so, an agency reasonably may find the low bidder nonresponsible.
2. Basic principles of competitive bidding require that invitations for bids offer equal and unambiguous terms and conditions of award to all bidders. Thus, rejection of low bid solely for failure to meet criteria not clearly set forth in an invitation would be improper.
3. Where an invitation permits bidders to use changes in their own selling prices as a basis for price adjustment during the contract term, it must also require that these prices reflect some objective standard. Otherwise, it is impossible to determine which bid ultimately will result in the lowest cost to the Government.
4. A bid is responsive where it complies with an invitation's material terms and conditions.

Roarda, Inc. protests the rejection of its bid and the subsequent award of a contract to Jackson Oil Company under invitation for bids (IFB) No. 0064-AA-91-0-2-PF, issued by the District of Columbia (D.C.) Government. The procurement was for the supply of all petroleum products required by the city for one year, with renewal options for four additional years.

Roarda initially protested the D.C. Government's determination that the firm was nonresponsible. After filing its protest here, Roarda also filed a complaint in the Superior Court of the District of Columbia (Roarda, Inc. v. District of Columbia, Civil Action No. 18107-81) alleging that the D.C. Government's determination of nonresponsibility was unlawful and that the economic price adjustment clause contained in the IFB and therefore Jackson's contract rendered the award to Jackson illegal. The court has requested our opinion on these issues, and Roarda has amended its protest to include its allegations concerning the economic price adjustment clause.

We deny the protest.

I. Relevant Solicitation Provisions

Pursuant to the D.C. Government's "sheltered market" program, D.C. Code § 1-1147 (1981), the IFB required the prime contractor to utilize as subcontractors for the delivery of all petroleum products only those Minority Business Enterprises (MBEs) listed in the solicitation, who had been certified by D.C. as eligible for participation in the program. The IFB also stated that certain minority requirements would be negotiated with the low bidder, including minimum requirements that the proposed MBEs had to meet. Among these minimum requirements were the following:

"(1) Prior to August 15, 1981, a [MBE] firm must own a minimum of one (1) POL [petroleum, oil, lubricants] delivery tankwagon or truck-trailer with a capacity of 2000 gallons or more. * * *

"(2) * * * A maximum of one (1) leased truck per two trucks owned up to a maximum of three (3) leased trucks can be dedicated to the sheltered market POL program. * * *

"(3) Prior to award, the selected prime contractor will have requested and shall have received copies of ownership documents, lease documents, registration documents and inspection certificates of all delivery trucks that are dedicated to the sheltered market POL programs. Failure to submit appropriate document by the time requested may render your firm

ineligible for award.

In addition, the IFB provided that:

"The offeror agrees to assist the subcontractors to the fullest extent practical in the areas of: (1) Logistical requirements, (2) Preventive maintenance practices, (3) Employment, (4) Budgeting, (5) Accounting, (6) Financing, (7) Marketing, (8) Scheduling, (9) Acquisition and integrity of supply, (10) Acquisition of rolling stock, (11) Acquisition of Storage and rack facilities, (12) Developing Commercial Market.

"The offeror shall include with the response to this IFB a comprehensive written plan that outlines specific details regarding the level of assistance the MBEs will receive in each area during the term of the Contract. The plan will be used in the evaluation and award process."

Concerning payment to the subcontractors, the IFB stated, "Bid prices shall be all inclusive of the price payable to sub-contractors * * * [which] shall be that price which the prospective prime contractor and sub-contractor negotiate and mutually agree to."

Finally, with regard to economic price adjustment, the IFB contained the following provision:

"The prices payable under the contract shall be subject to adjustment, as required, upward or downward in accordance with the provisions * * * below:

* * * * *

"(1) The Contractor is authorized to pass-through to the District all increases/decreases in rack price that occur on and after the bid opening date.

"(2) When there is an increase/decrease in the rack price, the unit base (bid price at time of bid opening) shall be adjusted upward or downward by the difference between the rack price in effect on bid opening date and the most recent rack price change. * * *"

Addendum No. 1 to the solicitation added a requirement that the bidder "include the rack or wholesale price in the bottom margin of [specified] pages for each product type * * *."

II. Nonresponsibility Determination

A. Background

Bids were opened on August 28, 1981 at which time Roarda was revealed to be the low bidder, based on evaluation of unit prices offered. On September 21, the D.C. Government hand-delivered to Roarda a pre-award survey questionnaire which required submission of certain information, much of which related to the MBE subcontracting and assistance provisions of the IFB, e.g., requirements for submission by the prime contractor of MBE vehicle ownership, lease, and registration documents, and of a detailed MBE assistance plan. Also included was a requirement that the prime contractor establish, as part of its MBE assistance plan, a written "unit price payable" agreement with each MBE. As required, Roarda responded to the pre-award survey questionnaire by September 25, 1981.

On September 28, Roarda and D.C. Government representatives met to discuss Roarda's MBE assistance plan. The only documentation of this meeting in the record is inconclusive concerning the matters which were discussed, but does appear to indicate that Roarda's MBE assistance plan as outlined was deemed acceptable and that because of the short time frame originally imposed, Roarda was given until October 2 to complete and file all parts of the plan. By letter of that date, Roarda forwarded agreements signed by four MBEs acknowledging the acceptability of Roarda's assistance plan, which included a proposal to pay each subcontractor \$0.045 per gallon for tank wagon deliveries.

On October 15, 1981, the Executive Director of D.C.'s Minority Business Opportunity Commission (MBOC) advised the Director of the D.C. Department of General Services that MBOC had reviewed Roarda's MBE assistance plan and found it unacceptable. (D.C. Code § 1-1149(8) provides that MBOC shall review bids in the sheltered market program). MBOC found that Roarda had addressed only three of the twelve areas set forth in the IFB in which the bidder was required to assist the subcontractors to the fullest practical extent. Further, MBOC found that Roarda had failed to submit adequate written price payable agreements, and objected to the proposed payment terms of \$0.045

per gallon for tank wagon deliveries. MBOC felt this price was insufficient to provide the MBEs with an adequate profit margin and thus subjected them to a high degree of risk, factors which were considered inconsistent with the goals of the MBE assistance program.

By letter to Roarda dated October 22, the D.C. Government set forth the deficiencies found by MBOC in Roarda's MBE assistance plan. The letter also stated that Roarda had failed to supply the ownership, lease, and registration documents, and inspection certificates required by the IFB. Roarda was advised that unless it corrected the deficiencies within five days of its receipt of the letter, its bid would be rejected. On November 2 (11 days later), Roarda advised D.C. that it was taking corrective action and that it had serious questions concerning certain aspects of the October 22 letter. Roarda asked that a meeting be held to discuss these questions.

On November 5, counsel for Roarda spoke with a D.C. Government employee who informed him that Roarda's bid was being rejected for failure to correct the deficiencies noted in the October 22 letter, and that a meeting would serve no useful purpose. Roarda filed its protest here on November 16, objecting to the D.C. Government's rejection of its bid.

By letter of November 19, the D.C. Government asked Roarda to state in writing the questions referenced in its letter of November 2. Roarda responded on November 30, generally disagreeing with D.C.'s reasons for rejecting its MBE assistance plan. Roarda also forwarded all vehicle documentation furnished up to that time by the MBEs. On December 10, the contract was awarded to Jackson Oil Company (the second low bidder) who by that time had been sent, and determined to have adequately responded to, the pre-award survey questionnaire.*

B. Allegations and Analysis

(1) Vehicle documentation and MBE plan

With respect to the D.C. Government's concern that Roarda failed to provide the required vehicle documentation and, in its MBE assistance plan, did not address

*It is not clear from the record precisely what Jackson furnished in the way of vehicle documentation or what the ultimate details of its MBE assistance plan are.

nine of the twelve required areas of assistance, Roarda argues that D.C. improperly refused to receive and consider additional information concerning these allegedly readily curable matters. In support of its position, Roarda cites several decisions of this Office in which we have stated that a determination regarding a prospective contractor's responsibility should be based on the most current information available. See, e.g., 51 Comp. Gen. 588 (1972); 49 Comp. Gen. 139 (1969); B&W Stat Laboratory, Inc.; Qual-Med Associates, Inc., B-188627, August 26, 1977, 77-2 CPD 151; Inflated Products Company, Incorporated, B-188319, May 25, 1977, 77-1 CPD 365.

While we agree that a determination of responsibility should not be made on the basis of "stale" information, we also believe that a procuring agency is not required to delay award indefinitely while a bidder attempts to cure the causes for its being found nonresponsible. See Noble Pine Products Co., B-189421, July 24, 1978, 78-2 CPD 65; Inflated Products Company, Incorporated, supra. In this case, we conclude that the D.C. Government reasonably determined to proceed with contract award in the face of Roarda's continued failure to supply the information required by the IFB.

By November 30, the date of Roarda's last submission to the D.C. Government, more than two months had passed since Roarda was initially asked to respond to the pre-award survey questionnaire; over one month had passed since Roarda was notified of the specific deficiencies found in its plan. While it appears that Roarda had some questions concerning the propriety of the finding that certain aspects of its plan were deficient, the requirements for submission of vehicle documentation and a comprehensive MBE assistance plan were clearly set forth in both the IFB and the questionnaire, and we believe Roarda was afforded ample opportunity to respond to them.

While Roarda was given only five days to reply to the D.C. Government's October 22 letter specifying the deficiencies found in its MBE assistance plan, Roarda did not respond to this letter at all within the required time frame, not even to request an extension of response time. Rather, it waited eleven days to advise the D.C. Government that it was taking corrective action, while at the same time stating that it had questions about certain unspecified aspects of the letter.

Further, although D.C. initially refused to consider additional information after receipt of Roarda's November 2 response, it later asked Roarda to submit in writing its questions about D.C.'s October 22 letter. Roarda apparently viewed this as an opportunity to submit additional information, since it did so by letter of November 30. It is not clear to what extent the D.C. Government considered this information at the time; however, it now states that the November 30 letter did not in fact cure the deficiencies in Roarda's bid. In view of this conclusion (which we consider reasonable as discussed, infra) we believe D.C. was justified in proceeding with award to Jackson on December 10 without further delay. In this regard, we note that existing fuel supply contracts had expired on November 30, and petroleum needs were being met by extensions of these contracts.

As to the vehicle documentation specifically, in its November 30 letter, Roarda included all such information received by that date from participating MBEs, but this did not include all of the required documentation. Although it may be true, as Roarda notes, that this information was in the hands of the MBEs, Roarda had been aware of the need to meet the requirement for more than two months. At no time did it indicate to the D.C. Government any specific problems in obtaining this information or otherwise indicate any special efforts made to obtain it, other than stating that the information had been requested from the MBEs. Consequently, we find no basis to question the D.C. Government's conclusion that Roarda failed to satisfy the IFB requirements in this regard.

Regarding the specific areas of assistance required to be addressed in its MBE plan, Roarda stated in its November 30 letter that it believed its original plan submitted in response to the pre-award survey questionnaire in fact addressed all the required areas. Roarda also indicated that it intended to provide "specially tailored consulting services" to each participating MBE in all twelve areas.

As stated above, the IFB required that the bidder address in detail how it would assist subcontractors in 12 specified areas:

"(1) Logistical requirements, (2) Preventive maintenance practices, (3) Employment, (4) Budgeting, (5) Accounting, (6) Financing,

(7) Marketing, (8) Scheduling, (9) Acquisition and integrity of supply, (10) Acquisition of rolling stock, (11) Acquisition of Storage and rack facilities, (12) Developing Commercial Marke.,"

Roarda stated in its pre-award survey response, however, only that it would provide unlimited credit based on receivable financing, and business consulting services in accounting, legal, financial, operational and marketing areas (no further details were supplied), and specified the terms of the delivery package it was offering the MBEs. We believe that the D.C. Government reasonably determined that Roarda failed to meet the IFB requirement for a "comprehensive written plan" outlining "specific details regarding the level of assistance the MBEs will receive in each [of twelve specified areas]."

Therefore, we conclude that the D.C. Government's rejection of Roarda's bid was proper due to Roarda's failure to supply the required vehicle documentation and details of its MBE assistance plan in a timely manner.

(2) Price payable agreements

Our conclusion above essentially renders academic the propriety of the D.C. Government's other reasons for rejection of Roarda's bid, i.e., the perceived deficiencies in its price payable agreements with the MBEs. However, because the court has requested our opinion on this matter and because we would have serious concerns about the propriety of bid rejection for that reason alone, we will address it.

The D.C. Government took exception to Roarda's price payable agreements with the MBEs primarily because it concluded that the proposed \$0.045 payment per gallon for tank wagon deliveries was insufficient to provide the MBEs with an adequate profit margin. Roarda argues that such a determination is improper because it has no basis in any statutory requirement or in the terms of the IFB, which provides only that the price payable to subcontractors shall be that to which the prime contractor and subcontractors mutually agree.

The D.C. Government argues that its imposition of a requirement for a fair and reasonable delivery rate is consistent with the Minority Contracting Act of 1976,

D.C. Code § 1-1141 et seq., and further that the IFB constructively imposes such a requirement. However, the D.C. Government does not contend that such a requirement is either specifically mandated by the Minority Contracting Act or clearly set forth in the IFB.

Basic principles of competitive bidding do not allow award to depend on the low bidder's ability to negotiate matters to a result that was not mentioned in the solicitation. See Illinois Equal Employment Opportunity Regulations for Public Contracts, 54 Comp. Gen. 6 (1974), 74-2 CPD 1. Bidders must be clearly advised, before going through the effort and expense of competing for a contract, of the minimum standards or criteria against which they will be judged. Id.; 48 Comp. Gen. 326 (1968). As we said in 48 Comp. Gen., supra at 328:

"Unless the invitations are definite and complete as to all essential requirements there can be no accurate and indisputable basis on which to determine which bid offers compliance with contract conditions and fulfillment of all project needs at the lowest price. Further, where material conditions and requirements are not clearly defined, such circumstance gives rise to the opportunity for favoritism, arbitrary action and abuse of authority in the awarding, or approving of proposed awards, of the contracts."

We believe that these principles apply to the D.C. Government's imposition of MBE assistance requirements in its procurements. The IFB in this case did not set a minimum subcontract price agreement that a bidder had to meet before the bid could be accepted. Rather, as Roarda points out, the IFB simply defined the price payable to an MBE subcontractor as whatever price the prospective prime contractor and the subcontractor "negotiate and mutually agree to."

Also, while the MBE assistance plan provision discussed above, which was to be used in the evaluation and award process, does reflect the D.C. Government's concern that the prime contract benefit the MBE subcontractors involved, it only requires that the prime contractor plan to "assist the subcontractors to the fullest extent practical" in

twelve management related areas. We do not view the requirement for such a plan as precluding the prospective prime contractor and qualified MBE subcontractors from mutually agreeing to whatever subcontract price they conclude will allow them to win the competition and secure the contract.

Thus, the D.C. Government may not properly reject a bid in an advertised sheltered market procurement such as this one solely because it believes that a prospective MBE subcontractor may have negotiated a price agreement that may not be profitable for that firm, unless there is a clear indication in the IFB that bids will be evaluated against that criterion. As stated above, the D.C. Government concedes that there was no such indication in this IFB, nor in the statute establishing the "sheltered market" program requirements. Nevertheless, we find no basis to sustain the protest in this case since Roarda's bid was properly rejected for other reasons.

III. Economic Price Adjustment

Roarda argues that the economic price adjustment (EPA) clause contained in the IFB, and subsequently in Jackson's contract, is defective and resulted in an illegal contract award to Jackson. The EPA clause provided for price escalation or de-escalation in accordance with changes in "rack price." Although this term was not defined in the IFB, the parties apparently agree that it commonly is understood to mean that price which a seller of petroleum products establishes for commercial customers purchasing products F.O.B. the seller's terminal.

Roarda argues that the EPA clause is deficient because it sets no ceiling on price escalation; does not require a bidder to identify whose rack price it will use as a basis for price adjustment, which allows a bidder to use its own rack price for this purpose as Jackson in fact did; and contains no requirement that the rack price used be demonstrated to track the market. This, Roarda alleges, enables Jackson unilaterally to set the prices that will be paid during performance, since it can almost indiscriminately cause the unit price payable to increase by increasing its own rack price. As a result, Roarda contends, the D.C. Government cannot be assured that what appears the low bid at bid opening, based on the unit prices offered, actually reflects the lowest ultimate cost to the agency.

Roarda cites our decision in Hampton Metropolitan Oil Co., Utility Petroleum, Inc., B-136030, E-186509, December 9, 1976, 76-2 CPD 471, to support its position. There, we upheld a contracting officer's decision to cancel a solicitation for petroleum products which required bidders to submit "reference" prices to be used in conjunction with the IFB's EPA provision. The IFB, which contemplated multiple awards of fixed-price contracts, did not define "reference" price other than to state that it should be a posted or published price. Two of the low bidders used their own postings as their reference price, but could not demonstrate substantial commercial sales of their products at that price. The contracting officer determined that this was an unacceptable basis for adjustment because these reference prices did not come within his intended meaning of "published" (contained in a known trade journal) or "posted" (based on sale in substantial quantities to many customers). The requirement for published or posted prices within these definitions was viewed as protecting the Government by tying price adjustments to increases or decreases competitively determined by the marketplace. We concluded that the IFB properly was canceled because it was impossible to insure that bidders would not indiscriminately raise their posted prices after contract award, and therefore impossible for the Government to determine which bids ultimately would result in the lowest cost.

Hampton thus indicates that award to a bidder which is permitted to use its own prices as a basis for price adjustments during performance is improper when doing so allows the bidder to inflate its prices artificially during the contract term. Since the D.C. Government's IFB did not require any bidder, including Jackson, to demonstrate that its rack prices reflected some objective standard, e.g., that they were either published or based on substantial commercial sales, we agree with Roarda that the IFB was deficient.

Nonetheless, we are not persuaded that this deficiency provides a basis for recommending termination of Jackson's contract.

The D.C. Government admits that there were defects in the original EPA clause and has recently entered into a contract modification with Jackson which is designed to cure them. Among these provisions is identification of

the rack prices to be used as a basis for price escalation, which for certain grades of fuel oil and for gasoline are the prices of other petroleum companies, and for other grades of fuel oil are Jackson's own prices. For those products for which Jackson's rack price is used, the modification provides that the parties shall mutually agree upon an appropriate comparable substitute for rack price to determine price adjustments if at any time in the future Jackson does not have substantial commercial sales at its rack price for that product, or the contracting officer reasonably determines that Jackson's rack price for the product does not fairly reflect prevailing market prices. Jackson is required to maintain documentation to establish substantial commercial sales at its rack prices and agrees that the contracting officer shall have the right to examine these documents as well as its books and records. A price escalation ceiling of ten percent of Jackson's unit bid price also is set.

While we recognize that in Roarda's opinion this modification does not adequately correct the deficiencies in the EPA provision, we believe that the precise substance of the corrective modification necessarily must be left to the D.C. Government as a matter of contract administration, not our Office. See Brandon Applied Systems, Inc., 57 Comp. Gen. 140 (1977), 77-2 CPD 486.

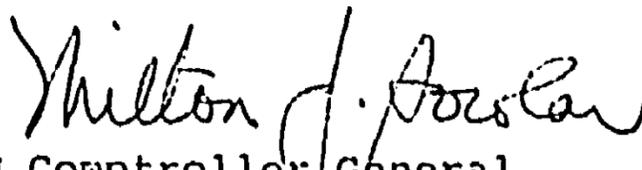
Roarda also argues that Jackson's bid was "nonresponsive" because it did not indicate whose rack price would be used for purposes of price adjustment, thus enabling Jackson to affect the acceptability of its bid after bid opening. A nonresponsive bid, however, is one that does not comply with an invitation's material terms. 49 Comp. Gen. 553 (1970). As Roarda admits, the IFB did not require Jackson, or any other bidder, to identify the basis for its price adjustment prior to contract award. Therefore, Jackson's bid was "responsive" even though it did not identify the basis for its rack price.

Moreover, the IFB did not provide for evaluation of rack price or price adjustment and these were not in fact used in the D.C. Government's determination of the low bid. Rather, the evaluation was based only on the unit prices offered. Consequently, Jackson's failure to indicate the basis for its rack price did not enable it to affect the acceptability of its bid after bid opening since rack price had no bearing on the D.C. Government's determination of the low bid. We find no merit to Roarda's position in this regard.

IV. Other Issues

In its comments on the D.C. Government's report to this Office, Roarda states that although the court has asked our Office only for its opinion concerning the lawfulness of the rejection of Roarda's bid and of the economic price adjustment clause, we nevertheless should address the "other" issues raised by its protest. Roarda does not identify these other issues nor are they readily apparent to us, with one exception. This is an allegation that an illegal "auction" occurred in this case. Because this issue, and presumably the unspecified areas that Roarda has in mind, are before the court, but the court has not requested our opinion on them, we will not consider them. See Robert E. Derecktor of Rhode Island, Inc.; Marine Power & Equipment Co., Inc., 60 Comp. Gen. 61 (1980), 80-2 CPD 361.

The protest is denied.


Acting Comptroller General
of the United States