



Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: Reliable Mechanical, Inc.; Way Engineering Company, Inc.

File: B-258231; B-258231.2

Date: December 29, 1994

G. Bruce Duthie for Reliable Mechanical, Inc.; E. Manning Seltzer, Esq., and Mark E. Davis, Esq., Seltzer and Rosen, for Way Engineering Company, Inc., the protesters.

John K. Lottinville, Esq., National Aeronautics and Space Administration, for the agency.

C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where invitation for bids required bidders to list model offered for purpose of calculating energy usage factor to be added to bids for price evaluation, and protester's bid listed a model number which does not conform to the specifications, agency properly rejected bid as nonresponsive.

2. Protest challenging rejection of bid for failure to acknowledge solicitation amendments is untimely where not filed within 10 days of notice that agency had rejected bid.

DECISION

Reliable Mechanical, Inc. and Way Engineering Company, Inc. protest the rejection of their bids submitted in response to invitation for bids (IFB) No. 9-BG6-T17-4-11B, issued by the National Aeronautics and Space Administration (NASA) for rehabilitation of a cooling system at the Johnson Space Center (JSC). Reliable contends that the agency improperly found its bid nonresponsive because the agency believed that a model cited in Reliable's bid would not meet solicitation requirements. Reliable points out that the solicitation did not require the submission of descriptive literature; contends that it did not qualify its bid; and argues that in the absence of any qualification of the bid, the agency could and, in fact, should have allowed it to supply a model

that met specifications. Way protests the rejection of its bid for failure to acknowledge amendments to the solicitation.

We deny Reliable's protest; we dismiss Way's protest.

On April 20, 1994, NASA issued the solicitation for a firm, fixed-price contract for rehabilitation of chilled water equipment at the JSC; firms were to provide a base bid for replacement of four 2,000-ton electric drive chillers and additional work, as well as a bid price for additive alternatives (a halogen gas detection system), in accordance with specifications attached to the solicitation. The IFB contained Federal Acquisition Regulation (FAR) § 52.214-19, the standard clause providing for award to the low responsible bidder, considering only price and other price-related factors.

With respect to the evaluation of price, the IFB provided for award to the bidder with the lowest total base bid, additive alternate, and manufacturer's energy evaluation value (EEV). Paragraph L.31 of the solicitation advised potential bidders that in order to provide for the most cost effective installation over the useful life of each chiller, the agency would add the EEV to the bid for purposes of determining the apparent low bidder. The solicitation provided for computing the EEV by adding data submitted by the bidders to a formula set forth in paragraph L.31, as follows:

"Energy Evaluation Factor is equal to
 \$3,532/chiller/kW required to operate the chiller
 at rated conditions at 2,000-ton capacity.
 Therefore the EEV is :
 "EEV = \$3,532 x 4 chillers x (___kW/chiller)"

To complete the calculation, the agency required each bidder to provide a manufacturer's certified maximum kilowatt input required to operate each chiller at 2,000-ton capacity under specified operating parameters. Bidders were to enter this data into attachment J-3 to the IFB, which requested information such as the manufacturer's name, model number, chiller cooling capacity, and full power input (in kilowatts) "for each model proposed." Bidders were advised that failure to provide the data in attachment J-3 would render bids nonresponsive.

During the time in which the agency was defining its requirements for the solicitation, the Houston Trane Company had contacted JSC regarding the benefits of the Trane model LHCV large tonnage centrifugal chiller system with respect to the proposed project. Trane believed that the specifications, which Trane acknowledged precluded the use

of the model LHCV, were too restrictive. Trane questioned whether the agency had an actual need for "synchronous motors of 0.8 loading factor"; Trane advised that it could provide hermetic drive chillers with the same 0.8 loading power factor using external capacitors. Further, Trane asked whether it was necessary for the chillers to use refrigerant R134A, since Trane chillers used a different refrigerant. Trane suggested that a modification of the agency's requirements, to allow bidders to offer the Trane model LHCV, would enhance competition and probably result in meeting the agency's needs at a lower price.

Shortly after issuance of the solicitation, on May 11, a member of Congress contacted the agency, writing on behalf of Trane and expressing concern at the restrictions in the specifications. Although the agency advised Trane and the Congressman that the specifications had been "the object of intense scrutiny for several months" prior to the issuance of the solicitation, the director of JSC had bid opening extended by 45 days to allow an independent assessment of the agency's needs, giving consideration to Trane's recommendations for relaxation of the specifications.

By letter dated July 27, the director advised Trane and the Congressman of her determination not to relax the agency's stated requirement, as follows:

" . . . As discussed in our meeting in your office on May 18, 1994, and outlined in my June 6, 1994 letter to you, we established an independent third-party review of our equipment requirement. Members of that review committee included mechanical engineers with extensive experience in designing and/or operating large chiller plants with both commercial and industrial grade cooling equipment. They represent both public and corporate organizations facing similar reduced resources. We believe the team performed a fair and impartial assessment of our engineering judgment. The committee findings disclosed several shortcomings in our current specification which are being corrected prior to bid opening. However, the collective judgment of the committee supported our basic approach and found no reason to materially change the current specifications."

The record shows that agency personnel were very familiar with the technical parameters of the Trane model LHCV, since the use of that model had been the subject of long-term, high-level discussion.

By the date when it had completed this review, NASA had modified the solicitation to extend the date for submission

of bids from June 6 to July 21, and eventually to August 4. The agency received four bids on that date. Excluding the EEV, Way submitted the low bid, \$6,963,972; Young Enterprises was second-low, \$7,091,596; with Reliable third, \$7,524,690. Reliable received a substantial advantage under the EEV factor from its relatively low kilowatt rating of 1,134 kilowatts/chiller, 69 kilowatts lower than Way's 1,203 kilowatts/chiller and 81 kilowatts lower than Young's 1,215 kilowatts/chiller. When, as provided in the solicitation, these figures were multiplied by \$14,128 (\$3,532 x four chillers), Reliable replaced Way as the low bidder, with a total evaluated price of \$23,545,842 versus Way's evaluated price of \$23,959,956; the bid of Young became third-low at \$24,257,116.

In examining bids, the agency found that attachment J-3 to Reliable's bid indicated that Reliable was bidding on a Trane model LHCV. The contracting officer believed that, in view of the extensive, 3-month, high-level agency review, he could not ignore his knowledge that the Trane model LHCV would not meet solicitation specifications. By letter of August 11, the agency therefore rejected Reliable's bid as nonresponsive, and this protest by Reliable followed.

Reliable essentially argues that nothing on the face of its bid took exception to its obligation to provide all equipment and perform all work in strict compliance with the specifications; it knew nothing of Trane's efforts to have the specifications modified and is not obligated to supply a Trane model. Since, Reliable contends, there is nothing in its bid obligating it to provide the Trane model, and since the protester remains willing and able to supply any compliant model, the bid is responsive. Further, the solicitation contained a specific provision reserving to the agency the right to an equitable adjustment if the chiller provided by the successful bidder did not provide the claimed energy savings. Since, Reliable argues, the issue of whether it intends to perform in accordance with requirements is one of responsibility, which can be decided at any time prior to contract award, Reliable urges that it should be allowed to provide a conforming chiller, with the agency taking the equitable adjustment if performance does not meet that of the Trane model referenced in its bid.

The IFB required bidders to specify the models they were offering and, as explained above, the agency knew that the

¹Even where an IFB does not ask for particular model numbers, the inclusion of a model number in a bid--such as the Trane chiller model LHCV in Reliable's bid--creates an ambiguity where there is no clear indication whether the bidder is

(continued...)

model Reliable specified did not meet the specifications. If the agency were to accept Reliable's bid despite the clear indication that it was based on a nonconforming model, Reliable would be in the position of arguing that NASA was entitled to receive only the model specified, whether or not it fully conformed to the specifications, effectively limiting the government's right to receive the performance requested. See FAR § 14.404-2(d); 49 Comp. Gen. 764 (1970). Given that the bid included a model number which the agency knew described a nonconforming product, the agency properly rejected Reliable's bid as nonresponsive. See Twehous Excavating Co., Inc., B-208189, Jan. 17, 1983, 83-1 CPD ¶ 42.

In its initial protest, Reliable contended that all the other bids were nonresponsive; the agency report disclosed that of the four bidders, the agency considered that only the bid of Young Enterprises was responsive.¹ Reliable now argues that Young's bid, which listed a York model, did not meet specification section 15674-2.2.8.1, requiring a .001 fouling factor; the York brochure supplied by Reliable shows that the offered model has a .0005 fouling factor. In contrast to its knowledge that the model specified in Reliable's bid did not meet the specifications, the agency had no basis to believe--from York's bid or otherwise--that the model York was offering was nonconforming, and thus, no

¹(...continued)
 otherwise offering to comply completely with the specifications or is merely offering to supply equipment that may or may not conform to the agency's need as set forth in the solicitation. Wright Tool Co., B-212343, Oct. 12, 1983, 83-2 CPD ¶ 457. A contracting officer must reject such a bid as nonresponsive unless either the bid contains an express statement, or the contracting officer determines from data available before bid opening, that the specified equipment conforms to the specifications. Sentinel Elec. Inc., B-185681, June 24, 1976, 76-1 CPD ¶ 405. While Reliable points to paragraph B.1 of the IFB, which states that a "contractor shall provide all resources . . . necessary to furnish the items below in accordance with the specifications," this language in itself, contained in a standard NASA solicitation clause, does not constitute an express statement of conformance to the specifications sufficient to render the bid responsive. Moreover, Reliable does not argue that the Trane model in fact complies with the specifications.

²Way failed to acknowledge the solicitation amendments, which modified the specifications. The fourth bidder failed to fill in attachment J-3.

basis to reject the bid as nonresponsive. See Champion Road Machinery Int'l Corp., B-212860, July 23, 1984, 84-2 CPD ¶ 78.

Reliable also points out that Young modified the manufacturer's certified data on attachment J-3 submitted with the bid; these modifications are not material, however, since Young is the low (and only responsive) bidder whether the bid is evaluated using the 1,226 kilowatt figure entered by the manufacturer or the 1,215 kilowatt figure with which Young replaced the manufacturer's original figure. Accordingly, the record contains no basis for rejection of the Young bid.

As noted above, after rejection of Reliable's bid, Way's bid appeared to be low; on August 31, the agency notified Way that its bid, which failed to acknowledge any of the amendments to the IFB, was rejected as nonresponsive. On September 30, our Office notified Way that in view of the rejection of its bid, it was not an interested party for purposes of participating in Reliable's protest. Although Way continued to submit correspondence to our Office, asserting its right to participate in Reliable's protest, Way waited until November 29 to formally protest the rejection of its bid. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2), require that a protest based on other than an alleged solicitation impropriety be filed not later than 10 days after the basis of protest is known or should have been known; Way's protest, filed nearly 3 months after the rejection of its bid, is clearly untimely.

We deny Reliable's protest and dismiss Way's protest.

\s\ Ronald Berger
for Robert P. Murphy
General Counsel