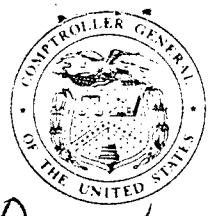
18145 Boyle

DECISION



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

[Protest of Department of Agriculture Contract Award]

FILE: B-202114 DATE: May 20, 1981

MATTER OF: Bell & Howell Co.

DIGEST:

1. Protester contends that procuring agency should have applied Buy American Act differential to cost of replacement parts to be used by contractor in connection with maintenance service. GAO concludes that contractor's responsibility for repair or replacement of parts is basically an agreement for services; since services are outside scope of Buy American Act, procuring agency properly did not apply the differential to foreign bid prices for portion of maintenance services related to parts.

2. Where IFB provides that certain prompt-payment discounts will be considered in evaluating bids for award, GAO does not object to method of evaluation which was reasonable, consistent with method contemplated by IFB and applicable procurement regulation.

3. Protest based on alleged impropriety in invitation for bids is untimely when filed after bid opening and will not be considered on merits.

Bell & Howell Co. (B&H) protests the award of a contract to Canon U.S.A., Inc. (Canon), under invitation for bids (IFB) No. ASCS-4-I-81DC issued by the Department of Agriculture for 54 microfiche reader/printers and certain optional maintenance service.

B&H essentially contends that Agriculture made three errors in computing the evaluated prices used

~~016949~~ 115256

in determining the low bidder: (1) the Buy American Act differential was not properly computed; (2) the present value of Canon's prompt-payment discount was not considered; and (3) for evaluation purposes, Agriculture should not have assumed that each of the 54 optional maintenance agreements would be utilized and that each prompt-payment discount would be earned. Since the evaluated price difference between B&H and Canon was less than $70, B&H would be entitled to award if correct on any of the three contentions. Agriculture and Canon report that the Buy American Act differential was properly computed and that B&H's other contentions are untimely. We conclude that the protest is partially untimely and the remainder without merit.

Buy American Act Differential

Item 1 of the IFB requested a price for 54 microfiche reader/printers. Amendment No. 2 to the IFB requested prices for optional maintenance service agreements for 5 succeeding years after the warranty period expired. Items 2 through 6 requested these prices for years 1 through 5, respectively. Amendment No. 2 stated that bids would be evaluated on the basis of total cost for the 54 units plus the optional maintenance service; bidders were warned that the initial award would be for the equipment only.

The bids revealed these prices.

Firm	Item	Amount
B&H	equipment	$ 60,091.20
	maintenance	84,672.00
		$144,763.20
Canon	equipment (plus 6% Buy American Act differential) (less 7% prompt-payment discount)	$ 75,590.83
	maintenance (less 7% prompt-payment discount)	69,102.72
		$144,693.55

Agriculture determined that Canon was the low bidder and made award to Canon.

B&H contends that Agriculture should have applied the Buy American Act 6-percent differential to the portion of the maintenance cost attributable to foreign replacement parts. B&H computes that if only 2 percent of that maintenance service cost was for parts, then B&H would have been the evaluated low bidder.

Agriculture explains that since replacement parts were only a minor portion of the maintenance service requirement, it would not be proper to apply the Buy American Act differential to this aspect of the price comparison.

Both Agriculture and B&H cite our decision at 53 Comp. Gen. 259 (1973) as support for their positions. That decision held that the price of services (installation engineering services and related travel costs) rendered after delivery of the foreign material (circuit breakers) was not to be included in the foreign bid price to which the differential was applied because it was not the price of articles, materials, or supplies of a component of the delivered end item. We do not believe that this decision directly supports either position since B&H contends that the differential should be applied to replacement parts only and that decision considered only services and not incidental replacement parts.

More appropriate for consideration is our decision in the matter of Bell Helicopter Textron, 59 Comp. Gen. 158 (1979), 79-2 CPD 431, which involved a contract for helicopters, logistics support, training and warranties. We stated that although materials and supplies may be used in training, they were merely incidental tools used in performing training services. Citing several authorities, we further held that a contractor's responsibility for repair or replacement of parts is basically an agreement for services, and services are outside the scope of the Buy American Act. Thus, we concluded that line items for services must be excluded from application of the Buy American Act differential.

In the instant matter, we conclude that Agriculture properly applied the Buy American Act differential to the equipment line item and properly excluded Buy American Act application from the maintenance service line items. Thus, this aspect of B&H's protest is without merit.

Present Value of Prompt-Payment Discount

B&H points out that the Government would not realize the full benefit of the prompt-payment discount until the last payment was made. Thus, B&H urges that Agriculture evaluate the present value of Canon's 7-percent prompt-payment discount regarding the maintenance service agreements. Using its computation of that present value, B&H concludes that it would have been the evaluated low bidder.

Agriculture and Canon contend that the argument is untimely and should not be considered.

We believe that B&H is questioning the application of the IFB's disounts provision; thus, the matter is timely and will be considered. The IFB provided that certain prompt-payment discounts based on time would be considered in evaluating bids. Canon submitted one of the prompt-payment discounts to be evaluated for award. The method of discount evaluation used by Agriculture is not objectionable because we believe that the evaluation was reasonable, consistent with the method contemplated by the IFB and Federal Procurement Regulations (41 C.F.R. § 1-2.407-3 (1979)).

Evaluation of All 54 Maintenance Options

B&H contends that Agriculture's cost-comparison evaluation was improper because it was based on the unreasonable assumption that all 54 maintenance agreements would be elected and all payments would be made promptly so that the discount would be earned. Instead, B&H believes that Agriculture should have estimated the number of maintenance agreements that would be elected and the number of times the discount would be earned and

used those reasonable estimates in the cost-comparison evaluation.

Agriculture and Canon argue that B&H's contention is untimely.

In our view, amendment No. 2 to the IFB clearly notified bidders that bids would be evaluated on the basis of the total price for equipment and maintenance services. As noted, other IFB provisions outlined that certain discounts would also be evaluated. Agriculture reasonably followed the bid evaluation scheme set forth in the IFB. Therefore, we must conclude that B&H's suggestion that the evaluation be performed in a manner other than the one set forth in the IFB was presented too late. Under our Bid Protest Procedures, protests against alleged improprieties in an IFB must be filed prior to bid opening. 4 C.F.R. § 20.2(b)(1) (1980). Since B&H first raised this objection after bid opening, it is untimely and will not be considered on the merits. Dynation Corporation, B-201342, December 10, 1980, 80-2 CPD 423.

Accordingly, B&H's protest is denied in part and dismissed in part.

Milton J. Socolar

Acting Comptroller General
of the United States