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DECISION



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

4099-3

FILE: B-181226

DATE: July 31, 1974

MATTER OF: American Monorail, Inc.

[Protest of Bid Rejection as Nonresponsive

DIGEST: 1. Where invitation required delivery within stated period and bidder inserted in bid that it would not be responsible for timely delivery of materials purchased from other parties, such material deviation from invitation requirements is not waivable as minor informality and bid was properly rejected as nonresponsive.

2. Failure to formally acknowledge amendment to invitation, which included material changes as well as extension of bid opening date, may be waived as minor informality under ASPR 2-405 (iv) (A), applicable regulations, inasmuch as bid was dated and submitted on the extended opening date indicating that bidder was aware of amendment so as to charge bidder with knowledge of all information contained in amendment.

3. Fact that all of the required work was not included in current procurement will not be questioned by GAO since satisfaction of future need is procurement responsibility.

The present procurement is a second step of a two-step advertised procurement (invitation for bids No. F09650-74-B-0707) for the fabrication and installation of overhead bridge crane conveying systems at Robins Air Force Base, Georgia. Although American Monorail, Inc. (American) submitted the low bid, its bid was rejected as nonresponsive for having taken exception to the required delivery schedule of 180 and 220 days, depending on the item, after the date of receipt of a written notice of award or a fully executed and binding contract, whichever occurs first. Award was made to the second low bidder, Jervis B. Webb Company (Webb).

That portion of the American bid which was deemed to have caused its nonresponsiveness states as follows:

"AMERICAN MONORAIL INC.
STATEMENT OF INTERPRETATION

"TIME OF DELIVERY, SECTION H, PAR. H-2:

"American Monorail interprets Par. 1 as being amended by Sec. K1 that indicates that the 180 day period commences when the Secretary of the Air Force or his duly authorized representative has approved the award in writing.

"American Monorail will meet the specified 180 day delivery requirement of all equipment of its manufacture. Due to current economic conditions American Monorail cannot be responsible for the timely delivery of outside purchased commodities. Every effort will be made to cause vendors to deliver on schedule. American Monorail will attempt to find compatible substitutes if vendor deliveries are not met."

Section K-1 states that should an award in excess of \$30,000 be made under the invitation the award will not become binding until approved by the Secretary of the Air Force or his duly appointed representative.

American protests this finding of nonresponsiveness. It states that by inserting this language into its bid it was merely indicating its interpretations of section K-1 of the Solicitation Instructions and Conditions and paragraph 7-103.11 of ASPR (dealing with contractor defaults), which nothing in the bid documents precluded it from doing. American further states that it did not intend to take exception to the delivery requirements and that it fully intended to meet the delivery requirements unless prevented from doing so by an act of God.

American also protests the award made to Webb in view of the fact that Webb did not acknowledge receipt of modification (amendment) No. MO-1 to the invitation until after bid opening. The

contracting officer waived Webb's failure to acknowledge the amendment as a minor informality under ASPR 2-405(iv)(A) inasmuch as the bid was dated and submitted on the revised bid opening date contained in the modification. American protests use of this paragraph in ASPR as it was nowhere mentioned in the invitation and suggests the true solution would be to have the procurement resolicited.

Finally, American protests the fact that item No. 2 of the invitation covering the relocation of light fixtures and bus ducts does not include all the bus ducts which are to be relocated. It is American's understanding that the additional work required will be negotiated with the successful bidder rather than by amending the specifications to cover all such work, thus restricting any additional work to the successful bidder under the invitation.

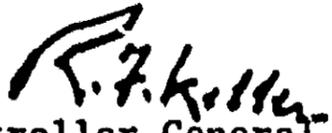
For the following reasons we agree with the contracting officer's determination and deny the protest.

While there was nothing in the bid documents which precluded a bidder from inserting in the invitation its own interpretation of a portion of the invitation, if such an interpretation is at variance with the specified requirements of the invitation, the bid may not be considered for award. We note that section C, paragraph 10, of the Solicitation Instructions and Conditions provides that award will be made to the responsible bidder whose bid is most advantageous to the Government and whose bid conforms to the solicitation. To the same effect, see 10 U. S. C. 2305(c). The invitation required delivery within a definite delivery schedule. American stated in its bid that it would not be responsible for the timely delivery of materials purchased from other parties. This constituted a material deviation from the advertised requirements and the bid properly was rejected as nonresponsive. This action was in compliance with ASPR 2-404.2 (d), which requires the rejection of bids where the bidder, as here, attempts to impose conditions which modify requirements of the invitation or limits his liability to the Government. 50 Comp. Gen. 733, 734, (1971).

Regarding the contracting officer's acceptance of the next low bid despite the fact that the bidder did not acknowledge receipt of modification No. MO-1 to the invitation, we have held that such a failure may be treated as an informality and waived where the bid itself includes one of the essential items

appearing only in the bid addendum. See B-176462, October 20, 1972. In this case, we held that where a bid evidences actual knowledge of the extension of the bid opening date (see ASPR 2-208(a)), the bidder is chargeable with all information contained in the amendment extending such date. Inasmuch as the bid was dated and submitted on the extended bid opening date, we believe that this is sufficient to constitute an implied acknowledgment of modification No. MO-1. See B-179592, February 7, 1974, Matter of Inscm Electronics Corporation, 53 Comp. Gen. _____.

Finally, as regards the final contention advanced by American that all of the bus duct relocation was not included in the invitation, it is stated in the administrative report to our Office that at the time of the procurement no provision for relocating additional bus ducts existed, and that should any additional work become necessary in the future it could be accomplished, in addition to the possibility of procurement by negotiations, by a separate contract (presumably entered into after formal advertisement), or by Air Force maintenance personnel. Since the duct work does not represent a current need as evidenced by its exclusion from the invitation and its future need is one for determination and satisfaction by the agency, we find no basis to question the alleged absence of additional duct work in the present invitation. The mode of providing such work in the future is a matter reserved to the procurement activity subject to applicable law and regulation.


Deputy Comptroller General
of the United States