

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

60076

FILE: B-184810

DATE: October 21, 1975

MATTER OF: Thomas Construction Company, Inc.

97800

DIGEST:

Where bidder under solicitation issued by recipient of Hill-Burton Act grant quoted two sets of unit prices for use in pricing possible increases or decreases in contract work, with higher prices quoted for possible increases than for possible decreases, instead of quoting single unit prices for both increases and decreases as required by solicitation, competitive bidding principles would not require rejection of bid if acceptance of bid nevertheless would be advantageous to grantee and would not prejudice other bidders. Since record does not contain information needed for that determination, matter should be resolved by grantee.

The Thomas Construction Company has protested against the award of a contract pursuant to a Hill-Burton Act (42 U. S. C. 291, et. seq.) grant from the Department of Health, Education, and Welfare (HEW) for certain additions and alterations to the Methodist Medical Center of St. Joseph, Missouri. Thomas alleges that the low bid submitted by Universal Construction Company is nonresponsive, and therefore cannot be accepted by the grantee Medical Center, because Universal did not comply with solicitation instructions to furnish prices that would be used in the event change orders increased or decreased the work required under the contract.

This matter was initially considered by the Kansas City, Missouri Regional Office of HEW. That office, after reviewing submissions from Universal and Thomas, both of which contained numerous references to decisions of this Office, determined, primarily on the basis of our decision reported at 37 Comp. Gen. 529 (1958), that the grantee could properly accept the Universal bid. Thomas then filed its protest here. In response, the Office of the Secretary of HEW forwarded certain documents to us and noted that it concurred with the decision of the Regional Office. The parties to this protest, including the grantee Medical Center, have agreed to abide by our decision.

The solicitation called for submission of base bids as well as prices (add or deduct) for various alternatives, with bids to be evaluated on the basis of the base bid and whatever alternatives were selected for inclusion in the contract award. In addition, the solicitation contained the following provision:

"CHANGES IN THE WORK - UNIT PRICE BASIS:
 "Refer to General Conditions, Article 12, for provisions related to changes in the work.

"The undersigned agrees to accomplish changes in the work on the basis of the unit prices set forth hereinafter. The unit price shall include cost of labor, equipment, and materials, and shall include Contractor's mark-up, overhead, and profit.

"Only a single unit price shall be given and it shall apply for either MORE or LESS work than that shown on the drawings or called for in the specifications or included in the Base Bid."

There followed a listing of five items (excavation, concrete, piling, wall-board painting, masonry block painting), next to which a unit price was to be inserted for each.

At bid opening it was determined that Universal was the low bidder (\$11,775,000 on the base bid and \$12,251,962 with the accepted alternates) while Thomas was second low (\$11,810,000 on the base bid and \$12,457,300 with the alternates). However, under the Changes In The Work provision, Universal inserted two unit prices rather than a single unit price for each item. Those prices, as well as those submitted by Thomas, are as follows:

| | <u>Universal</u> | <u>Thomas</u> |
|---------------------------|---------------------|---------------|
| Excavation (cu. yd.) | +\$3.20, -\$ 1.60 | \$ 3.00 |
| Concrete (cu. yd.) | +\$372.00, -\$45.00 | \$180.00 |
| Piling (lin. ft.) | +\$4.60, -\$ 4.40 | \$ 5.00 |
| Paint-Wallboard (sq. yd.) | +\$1.98, -\$ 1.62 | \$ 1.92 |
| Paint-Masonry (sq. yd) | +\$2.25, -\$ 1.89 | \$ 2.20 |

Thomas contends that the Universal bid is nonresponsive because the insertion of two unit prices, one to govern in the event of an increase in the work and the other to govern in the event of a decrease, is contrary to the solicitation provisions and works to the disadvantage of the Medical Center and because that particular method of bidding gives Universal an advantage over other bidders. In this regard, Thomas asserts that Universal's bidding enables it to "maximize its chances for gain" on additional work while minimizing its "chances for loss on a reduction in quantity," thereby negating the risk inherent in relying on a single unit price for changes in the required work. Thomas claims that its basic bid price reflects that risk and is therefore higher than it would have been had it been permitted to furnish dual prices.

On the other hand, Universal asserts that the unit prices were merely informational in nature since they were not taken into account in the evaluation of bids, and that any irregularity concerning them could be waived by the Medical Center. In support of this contention that the unit prices were merely informational, Universal refers to Article 12 of the General Conditions of the solicitation, which in pertinent part provides:

"The cost or credit to the Owner [Medical Center] resulting from a Change in the Work shall be determined in one or more of the following ways:

- .1 by mutual acceptance of a lump sum properly itemized;
- .2 by unit prices stated in the Contract Documents or subsequently agreed upon; or
- .3 by cost and a mutually acceptable fixed or percentage fee.

* * * * *

"If unit prices are stated in the Contract Documents or subsequently agreed upon, and if the quantities originally contemplated are so changed in a proposed Change Order that application of the agreed unit prices to the quantities of Work proposed will create a hardship on the Owner or the Contractor, the applicable unit prices shall be equitably adjusted to prevent such hardship."

Universal contends that since the parties could later agree as to what prices should govern and since the unit prices in the bid could be adjusted in the event of hardship, the Article permits changes to be made in the work required "with total disregard of the unit prices mentioned in the bids."

At the outset, we point out that this case does not involve a direct Federal procurement. However, the regulations implementing the Hill-Burton program require the grantee to "employ adequate methods of obtaining competitive bidding" and to "award the contract to the responsible bidder submitting the lowest acceptable bid," 42 CFR 53.128 (1975), and it is the responsibility of HEW to determine whether there has been compliance with the requirements. See 52 Comp. Gen. 874 (1973). Our role in a case such as this is to advise the Federal grantor agency if the requirements for competitive bidding have been met. Thomas Construction Company, Incorporated, B-183497, August 11, 1975, 55 Comp. Gen. ___, 75-2 CPD 101; 52 Comp. Gen. 874, supra.

It is a basic principle of competitive bidding that "in order to be considered for award a bid must comply in all material respects with the requirements of the invitation for bids at the time of bid opening." 46 Comp. Gen. 434, 435 (1966). This principle is rooted in the need to preserve the integrity of the competitive bidding system by assuring that "all bidders will have the opportunity of competing on an equal basis and to have their bids evaluated on the same basis." 41 Comp. Gen. 721, 724-5 (1962). Thus, we have often stated that bids which contain deliberate deviations from solicitation provisions, see 49 Comp. Gen. 211 (1969), or which, if accepted, would modify the resultant legal obligations of the parties, see 38 Comp. Gen. 131 (1958), cannot be accepted.

On the other hand, we have also held that bidders have no right to insist upon the enforcement of provisions in a solicitation when the waiver of such provisions would not result in the accrual of an unfair competitive advantage to other bidders. 40 Comp. Gen. 321 (1960). In this regard, we have frequently stated that "where deviations from * * * the provisions of an invitation do not affect the bid price upon which a contract would be based or the quantity or quality of the work required * * * a failure to enforce such provisions will not infringe upon the rights of other bidders and the failure of a bidder to comply with the provision may be considered a minor deviation which can be waived and the bid considered responsive." 40 Comp. Gen. at 324; see also 52 Comp. Gen. 265 (1972); 49 *id.* 749 (1974); 30 *id.* 179 (1950). Of course, when such provisions are informational in nature--either because they do not go to requirements which affect the legal obligations that would result from award of a contract, see, e. g., 53 comp. Gen. 487 (1974); 52 *id.* 389 (1972), or because they merely are duplicative of such requirements, see 53 Comp. Gen. 431 (1973); B-174216, December 27, 1971--a bidder's failure to comply with them would have no effect at all on price, quantity, quality and therefore rejection of the bid would not be required.

In 37 Comp. Gen. 529, *supra*, the invitation required bidders to insert in their bids certain unit prices which would not be considered in the evaluation of bids but which would be used as the basis for contract price adjustments in the event the work was more or less than indicated in the specifications and drawings. The low bidder failed to furnish one of the required unit prices. We noted that the unit prices were not to be considered in the bid evaluation and that under the terms of the solicitation "the Government could reject entirely the unit prices quoted * * * and leave for future adjustment * * * any changes that might occur * * *." For that reason, we stated that "it is not perceived how it can be maintained that the unit prices were an essential part of the bid." 37 Comp. Gen. at 532.

In this case, it is far from clear that the requirements for furnishing single unit prices for possible changes in the work

is merely an informational requirement. On the one hand, officials of the Medical Center have informally advised us that they do not regard the unit prices as binding in light of Article 12 of the General Conditions. As indicated above, Article 12 identifies three different methods for determining the amount by which a resultant contract would be equitably adjusted upon the issuance of change orders. On the other hand, the proposal form section of the invitation requested submission of the single unit prices and contained the statement that "The undersigned agrees to accomplish changes in the work on the basis of the unit prices set forth hereinafter." It seems to us that, when read together, those two sections reasonably appear to establish that one particular method set forth in Article 12--"by unit prices stated in the Contract Documents or subsequent agreed upon"--is to be the controlling method once a bid containing such unit prices is accepted. Certainly, the fact that those unit prices could be adjusted in the event of hardship does not negate the fact that, in the absence of hardship, those prices would be controlling. Furthermore, the statement in Article 12 providing for hardship would appear to be unnecessary if the Medical Center's view that the quoted unit prices are not binding is correct. Thus, we are inclined to interpret the unit price requirement as going to the contractual obligations of the parties with respect to price adjustments necessitated by changes in the work required rather than merely to some informational requirement.

This conclusion, alone, however, does not establish that rejection of the Universal bid is required, since it is also far from clear that in this particular situation the furnishing of dual rather than single unit prices is a material deviation from the solicitation requirements. As indicated, we have held that bid rejection is proper when acceptance of the bid would result in legal obligations other than those envisioned by the solicitation. In those cases, acceptance of the bid containing the deviation would have resulted in modification to such things as the specified warranty provision, 42 Comp. Gen. 96 (1962), the progress payments limitation imposed by the Armed Services Procurement Regulation (ASPR), 47 Comp. Gen. 496 (1968), and the cost and pricing data requirements of ASPR. 50 Comp. Gen. 11 (1970).

In other cases, however, we have held that bid acceptance would be proper notwithstanding the modified legal obligations that would result. For example, in 38 Comp. Gen. 532 (1959), we held that a bid offering to furnish whipping cream in half-pint rather than the specified 1 pint containers could be accepted, and in 51 Comp. Gen. 528 (1972), we held that the failure of a bidder to comply with instructions to quote option prices was not a material deviation and therefore did not permit rejection of the bid. A review of these various cases indicates that where the bids were rejected, the deviations went to a requirement which the Government regarded as mandatory or otherwise material. In the cases where the bids were accepted, the deviations did not adversely impact on the Government's material requirements and acceptance of the bids containing the deviations did not result in prejudice to other bidders.

Accordingly, it is our view that although acceptance of Universal's bid would result in possible legal obligations not precisely envisioned by the solicitation, rejection of the bid for that reason alone is not required by competitive bidding principles. Rather, we think what must be determinative here is whether acceptance of the bid would result in prejudice to other bidders. This in the approach we have taken in cases involving deviations from certain option and multi-year bidding requirements, which we think are reasonably analogous to this case.

These option cases involved a bidder's failure to follow a requirement that option prices be bid no higher than the basic quantity prices. In 44 Comp. Gen. 581 (1965) and in B-176356, November 8, 1972, we held that the deviation could be waived as a minor informality since the deviant bidder was low on both the basic quantity and the option quantity, and that under such circumstances no other bidder could be prejudiced by acceptance of the low bid. However, in somewhat different circumstances, we found that the low bidder's failure to adhere to the bid instructions could have worked to the prejudice of other bidders because it was conceivable that other bidders could have underbid the low bidder on the basic quantity if they too had disregarded the ceiling imposed on the option price, and that the low bid therefore had been properly rejected. ABL General Systems Corporation, 54 Comp. Gen. 476 (1974), 74-2 CPD 318. See also 51 Comp. Gen. 439 (1972). In a multi-year case, the low bidder submitted a higher unit price for the first program year than for each of the two succeeding program years, despite a solicitation provision requiring the unit price to be the same for all program years. Although the agency involved regarded the bid as nonresponsive for failing to comply with a material provision of the invitation, we held that no prejudice would result to the other bidders by acceptance of the low bid since the spread between the first and second low bidder "was so significant" that the second low bidder would not have been low even if it had been permitted to bid in the same deviant manner. Keco Industries, Inc., 54 Comp. Gen. 967 (1975), 75-1 CPD 301.

Here, it is claimed that acceptance of Universal's bid would be prejudicial to Thomas because Thomas had to take into account certain risks in computing its bid which Universal precluded by its manner of bidding. In this connection, the record contains an affidavit from the President of Thomas in which it is stated that "the base bid of Thomas was substantially increased" by taking into account "the risk involved in an increase or decrease in the work required." The record is silent, however, with respect to precisely the extent to which the Thomas bid was increased, and the record contains no other indication of the amount by which bid prices could be affected by using dual rather than single unit prices. As indicated above, some \$35,000 separates the base bids of Universal and Thomas, but more than \$200,000 separates the bids when the selected alternatives are considered. In view of this

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record, we are unable to determine whether prejudice to Thomas could result from acceptance of Universal's bid. Therefore, we believe that this determination should be made by the grantee, since we think the Medical Center itself is in a more suitable position to evaluate this matter. If it is determined that Thomas, by furnishing dual unit prices, could have bid substantially lower than it did so that it might have been the low bidder, then award to Universal would be inconsistent with the principles of competitive bidding discussed herein. Otherwise, award to Universal would not be precluded by the competitive bidding requirements of the grant.



Deputy Comptroller General
of the United States