

DECISION



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

60531

FILE: B-184413

DATE: February 18, 1976 98594

MATTER OF: Beta Systems, Inc.
Brown-Minneapolis MTM Tank & Fabricating Co.

DIGEST:

1. Bid offering "no less than 80 percent of the quantity of any item" properly was construed as applicable to total item quantity rather than to each subline item quantity.
2. Protester's contention that it was entitled to award of total subline item quantity rather than only portion of quantity under split award is without merit where facts show that, even if split awards were not permitted by IFB, other bidder and not protester would be in line for award of entire subline item quantity.
3. Government should have evaluated f. o. b. origin bid on basis of most economical mode of transportation available, even though bid failed to list availability of such mode. Rules of competitive bidding are not violated thereby since information as to availability and charges for transportation services were extrinsically verifiable and not under control of bidder.
4. Protest requesting contract termination because of Government's failure to ferret out most economical transportation method which would have made protester's f. o. b. origin bid low is denied. Award was made in good faith and was not inconsistent with solicitation's advice that bidders furnish all available transportation modes for purposes of evaluation. Moreover, termination would involve increased costs to Government in excess of any possible savings resulting from reevaluated bids.
5. Allegation that bid erroneously states that affirmative action program required for bidders with 50 or more employees was not applicable is untimely raised. Bids were available for public examination after opening and protester should have raised argument within 10 days after agency advised bidders of award. In any event deficiency is minor pursuant to ASPR § 2-405(vi).

Beta Systems, Inc. (Beta) and Brown-Minneapolis Tank & Fabricating Company (Brown Tank) have protested the rejection of their bids for various items procured under invitation for bids No. DAAE07-75-B-0065, issued by the United States Army Tank-Automotive Command (TACOM).

The solicitation calls for bids on a total of 196 trucks and supporting data. The trucks are to be equipped with tanks varying from 1,200 gallons to 24,000 gallons for carrying gasoline, fuel, water or liquified petroleum. A portion will be gasoline driven and the remaining trucks will have diesel engines.

The Beta Protest

First, we will consider the Beta protest. Essentially, Beta contends that the bid submitted by Isometrics, Inc. for the trucks listed under Item 0001 of the solicitation was ambiguously qualified and must be rejected. The firm also contends that the Government may not make multiple or split awards for the subline items under Item 0001.

Item No. 0001 of the solicitation generally describes the aircraft fuel servicing tank trucks required. Varying quantities were separately listed by destination under subline items 0001AA through 0001BP and unit prices were to be bid for each subline item. In all, 106 trucks were required under line item 0001. We also note that certain variations in the basic truck were required for some destinations. For example, trucks destined for California (items 0001AE and 0001BN) were to be fitted with anti-pollution devices to conform to California law. Some trucks were to have heavy duty cooling systems.

Initially, Isometrics submitted an "all or none" bid by inserting in its bid the following language: "OUR BID IS FOR NOT LESS THAN 106 OF ITEM - 1. * * *." Other truck line items bid by Isometrics were qualified in a similar manner. However, prior to bid opening Isometrics modified the "all or none" qualification in its bid, as follows: "We hereby agree to accept an order for a quantity of not less than 80% of the quantity of any item on which we bid."

Beta contends that the modification by Isometrics of its "all or none" bid created a fatal ambiguity. Beta believes it is not clear from the bid as modified whether the Government is required to accept no less than 80 percent of the totality of the 106 trucks listed under line item 0001 or whether the Government is required to accept no less than 80 percent of each subline item, 0001AA et seq. Beta states that the latter interpretation is supported by the fact that in many instances the Government's solicitation makes reference to subline items as items. Beta argues that consistent with this usage the 80 percent qualification reasonably could be applied to quantities listed under subline items. Therefore, Beta believes that Isometrics could maneuver between either interpretation and conceivably could refuse any award which, after bid opening, it did not consider to be advantageous.

As a general rule, it is an essential of a valid bid or offer that it be sufficiently definite to enable the offeree to accept it with confidence and that the contract so made can be interpreted and enforced without resort to extraneous evidence. 43 Comp. Gen. 817 (1964). An ambiguity in a bid exists where the terms of a bid are subject to two or more reasonable interpretations. 51 Comp. Gen. 831 (1972); ACCESS Corporation, B-181962, November 26, 1974, 74-2 CPD 294. However, where there is a single reasonable construction as to an item in a bid, the doubt is resolved by that construction and the bid is for consideration. 51 Comp. Gen. 831, *supra*; Lashley's Landscaping Lawn Growth & Maintenance Co., B-181812, September 24, 1974, 74-2 CPD 182.

Army's position is that the 80 percent qualification refers only to line items and not to the subline items. It proposes to award 85 of the 106 trucks (i. e., 80 percent) listed under line item 0001 to Isometrics and the remaining 21 to Beta. The contracting officer points out that the word "item" is not defined in the solicitation but that the word is used in the solicitation when referring to an entire line item quantity. In addition, both the contracting officer and Beta argue that their respective positions are supported by Armed Services Procurement Regulations (ASPR) 20-303 and 304 (1975 ed.) which prescribe administrative procedures for establishing and numbering contract line and subline items.

As explained below, it is our opinion that the meaning intended by Isometrics is clear and unambiguous from the bid itself. Accordingly, we think it is unnecessary to discuss the relevance of the Uniform Contract Line Item Numbering System in Section XX, Part 3 of ASPR except to note that such regulation imposes administrative requirements upon the Government and only indirectly impacts upon the bidder's expressions.

Counsel for Isometrics argues as follows:

"Page 35 of the Isometrics bid states its original 'all or none' qualification as follows: 'Our bid is not for less than 106 of Item 1...' etc. The Isometrics bid uses the word 'Item' to mean the entire quantity of 106 units for Item 1. The Isometrics May 6 letter then qualified the previous 'all or none' limitation by stating that it would 'accept an order for a quantity of not less than 80% of the quantity of any item on which we bid.' Given the obvious fact that the May 6 letter was a modification of page 35 of the bid, the word 'Item' as used in the May 6 letter plainly refers to the previous use of the word 'Item' by Isometrics i. e. the entire quantity of 106 units under Item 1. * * *"

We fully agree with this analysis of Isometrics' bid.

Finally, we have noted that Beta argues that Isometrics considered it necessary to submit, after bid opening, a letter to the Government explaining the qualification in its bid. Beta further surmises that the Government requested the explanation. However, the record does not show that the Government requested an explanation of the bid. Rather, Isometrics volunteered the letter. Its letter also explains that the modification was intended to preclude bid rejection in the event sufficient funds were not available, an experience encountered by the firm in another procurement. Moreover, there is no evidence that Isometrics was warned by TACOM of a possible funding problem while others were not, as suggested by counsel for Beta.

Counsel for Beta also contends that the solicitation did not reserve to the Government the right to make split awards for less than subline item quantities. However, even assuming, for purposes of argument, that split awards of subline item quantities are not permitted, Beta would not be entitled to award of all subline items of Item 0001, as argued in counsel's letter of July 22, 1975, to the contracting officer. Rather, if such split awards were not authorized, Beta would be evaluated as low on only two units, that is, subline items 0001BF and 0001BG. The 50 units under subline item 0001BE would not be split as presently intended but would be entirely awarded to Isometrics at its higher unit price in order to take advantage of its overall low price, notwithstanding Beta's lower price for this subline item. Therefore, we find no basis to conclude that Isometrics' bid for item 0001 should be rejected. Accordingly, Beta's protest is denied.

The Brown Tank protest

Brown Tank contends that its f. o. b. origin bids for items 0003 and 0005 are low if the bids are evaluated on the basis of delivery of the items by motor carrier. The firm believes that such an evaluation should have been made notwithstanding its failure to provide information in its bid regarding the availability of transportation by motor carrier. Brown Tank believes the procuring officials must use the mode of transportation that results in the lowest overall cost to the Government when evaluating freight charges even though the bidder has failed to provide such information.

In this connection, the solicitation, in Section D--Evaluation Factors for Award, contained clause D01 entitled "Evaluation--F.O.B. Origin." This provided that transportation costs would be added to the offered price in determining the overall cost of

the supplies to the Government. In addition, the solicitation required, in Clause B06, that bids list on the form provided complete information relative to all modes, types and sizes of common carrier's equipment offered. It stated that this information would be utilized by the Government in evaluating offers. Bidders were expressly advised to consider all modes and methods available to them. While counsel for Brown Tank contends that the form furnished by the Government did not clearly require a bidder to state the availability of "Single Drive" mode of motor transportation and it would have been redundant for a bidder to so indicate, we disagree since clause B06, as explained above, clearly indicated the contrary.

Brown Tank's bid provided the necessary information to evaluate its bid on the basis of rail shipment. As stated, information was provided regarding the availability of motor shipments. Its "all or none" bid for items 0003 and 0005 was not low on the basis of rail shipment and awards were made to Beta and Isometrics on these items. Following the protest by Brown Tank the contracting officer obtained a reevaluation of Brown Tank's bid on the basis of motor carrier deliveries. The record shows that the protester's bid is low by \$11, 839.26 if evaluated on this basis.

Although the Army ordered Beta and Isometrics to suspend work under their contracts when, upon reevaluation of Brown Tank's bid, a possible savings became apparent, it is reported that termination for the Government's convenience would entail termination costs that would far exceed the savings apparent from the reevaluated bids.

The Army contends that the awards for these items were made in good faith without actual knowledge of the less expensive mode of transportation available to the protester. The contracting officer reports that he has no way of knowing which transportation modes may be applicable or available to a bidder other than what is stated in its bid. It is argued that the Government should not be expected to ascertain the modes of shipments available at a bidder's plant, particularly on a procurement such as this where shipments will be made to many destinations by three to five modes of shipment. The contracting officer believes that this would be placing an unreasonable administrative burden on the Government. Moreover, it is argued that to evaluate the cost of transportation modes which have not been "offered" would be contrary to fair and competitive bidding practices.

We do not agree. While the Army's report refers to the bidder's failure to provide this information as a failure to "offer" motor carrier transportation, we believe such information may be acquired from the bidder after bid opening without doing violence to the integrity of the bidding process since the availability of motor carrier services is extrinsically verifiable and is not under the bidder's control. 42 Comp. Gen. 434 (1963). In any event, the Government is not required to utilize the mode of transportation indicated by the bidders. Although bidders were requested to indicate all applicable loading and preparation charges which the Government would be required to pay the shipper, "Single Drive" motor transportation is also available which does not require the contractor to incur such additional expenses. We understand that the contractor could not require the Government to increase its bid price since there would be no loading charge for this type of motor transportation.

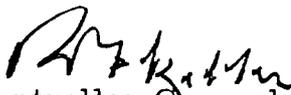
We are bringing this deficiency to the attention of the Army for future corrective action.

Nevertheless, we believe that the awards to Beta and Isometrics for the items in question should not be terminated at this time since the evaluation of the bids was made in good faith and was consistent with the advice to bidders that they consider all modes available to them and that transportation characteristics furnished in the bid would be utilized for bid evaluation purposes. Moreover, the Government should not be required to incur termination costs far in excess of the savings to be derived from the reevaluated bid of Brown Tank where the protester failed to comply with the clear informational requirement in the solicitation. In this connection, Brown Tank believes that termination action would not be financially prohibitive since the Government could require that the materials and labor expended under the contracts proposed to be terminated be applied to the contracts yet to be awarded to Beta and Isometrics for essentially the same type of truck. However, we note that termination of Beta's contract for item 3 would involve 50 trucks while the Government proposes to award the firm only 21 units under item 1. Thus, it does not appear that the Government is in a position to recoup its termination costs if it were to accept Brown Tank's all or none bid for items 3 and 5 and award 21 units to Beta under item 1. Brown Tank also argues that the contracting officer had actual knowledge of the availability of motor carrier services because of the preaward survey conducted on Brown Tank, however, the contracting officer reports that this survey was not utilized by him since he understood that Brown Tank's bid was not low as evaluated.

Finally, we note that counsel for Brown Tank asserts that Beta is a wholly-owned subsidiary of a larger concern employing 50 or more persons and that the affirmative action program of IFB clause B02 therefore is applicable. It is argued that Beta's bid is

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nonresponsive since the firm's bid erroneously stated that the clause was not applicable to Beta. However, this argument has not been timely raised since bids were available for public examination pursuant to ASPR 2-402.1 and any deficiency in this regard should have been raised within 10 days after the Army advised bidders of the award to Beta. In any case, ASPR § 2-405(vi) provides that any such bid deficiency is a minor deviation which may be corrected after bid opening.



Deputy Comptroller General
of the United States