

DECISION

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

6130.7

FILE: B-186298

DATE: August 9, 1976 98718

MATTER OF: A.C. Manufacturing Company

DIGEST:

IFB solicited bids to furnish 159 air conditioners. IFB also required bidders to furnish eight data items, and provided that bidders could submit firm prices for such items, or specific responses such as "No Charge," "0," or "Included in Cost of End Items." Award to low bidder, who indicated that cost of each data item was "Included in cost of end item," for only 99 units and all data items was proper since low bidder's indication cannot reasonably be interpreted as "all or none" qualification of bid.

Invitation for bids (IFB) No. DAAK01-76-B-5086 was issued on September 26, 1975, by the United States Army Troop Support Command, soliciting bids to furnish a total of 159 air conditioners. Bidders were also required to supply eight data items. Sections C-9 and C-10(a) of the IFB provided as follows:

"C-9 DATA PRICING

Offerors shall submit firm prices for each data item. If a firm price is not entered for each item, a specific response must be made indicating that all data is to be furnished as part of the consideration for the total price.

"C-10 FAILURE TO INSERT RESPONSE TO DATA ITEMS

(a) If offerors fail to insert in the schedule opposite the data items listed therein firm prices or a specific response such as 'No Charge', 'Included in Cost of End Items', 'NIC', '0', 'No Cost', 'X', or 'Included in Total Price', it shall be considered that the price of the data is included in the total contract price."

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Bids were opened on December 15, and A.C. Manufacturing Company (A.C.) was the low bidder at \$3,132.59 per air conditioner. In addition, A.C. had inserted across the "UNIT PRICE" and "AMOUNT" columns next to each of the data items the notation "Included in cost of end item." In this connection, section D-2 of the IFB, "DATA EVALUATION," provided in part:

"(a) Offerors submitting a specific response other than firm prices for data will be evaluated on the total amount of their offer. If award is made to such offerors, it will include all data items * * *."

In addition, section J-2, "FIRM DATA PRICES AFTER AWARD" provided:

"If award is made on the basis of the price of data being included in the total contract price, the contractor is required no later than 10 days after receipt of award to submit to the Contracting Officer firm prices for each data item listed in the schedule. The price for the end item(s) will be adjusted downward by the amount of such data prices and such adjusted prices will be reflected in a Modification to Contract."

Because of a reduction in the funds available for the procurement, award was made to A.C. on February 27, 1976, for only 99 air conditioners.

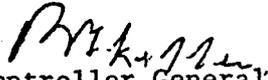
A.C. protests that the Army could not make an award for less than the quantity for which bids were solicited because Standard Form (SF) 33A, the Solicitation Instructions and Conditions, containing the provision reserving to the Government the right to make an award for less than the full quantity, was not included in the IFB furnished A.C., nor was A.C. advised where a copy of the form could be obtained. A.C. further argues that even if such award could be made, A.C.'s notation next to each data item "Included in cost of end item" qualified its bid as being on an "all or none" basis, since the notation indicated that A.C. had distributed its cost for the data items over the entire quantity bid upon. A.C. contends that award for any lesser quantity, while still requiring all data items, would, after adjustment in accordance with section J-2, result in A.C. receiving a proportionately lower price per air conditioner than it had intended to bid.

A.C. has refused to begin performance, and by letter dated May 11 was informed by the contracting officer that consideration was being given to terminating the contract for default under the Default provision of the "GENERAL PROVISIONS," SF 32.

SF 33A, which A.C. states was not included in the invitation, was incorporated by reference in section C of the solicitation, the "INSTRUCTIONS, CONDITIONS, AND NOTICES TO BIDDERS." Thus, the form had as much binding effect as if physically present. 4 Williston on Contracts § 628 (3rd ed. 1961). In addition, since SF 33A is published in the Federal Register (at 34 Fed. Reg. 9673, June 20, 1969), A.C. was on constructive notice of its contents. Cf. Twyco, Inc.--request for reconsideration, B-185126, December 23, 1975, 75-2 CPD 408; Cf. Save Our Aerospace Program, Inc.--request for reconsideration, B-184922, November 12, 1975, 75-2 CPD 299. Paragraph 10(c) of SF 33A provides in part as follows: "* * * THE GOVERNMENT RESERVES THE RIGHT TO MAKE AN AWARD ON ANY ITEM FOR A QUANTITY LESS THAN THE QUANTITY OFFERED AT THE UNIT PRICES OFFERED UNLESS THE OFFEROR SPECIFIES OTHERWISE IN HIS OFFER." Thus, the Government retained the unambiguous right to award a contract for a quantity less than that bid upon. See B-162967, February 29, 1968. Moreover, the language of that same provision afforded bidders protection from receiving a contract for a reduced number of units at a price allegedly calculated on an award of all units, by allowing them to restrict the scope of their bids by so specifying on the invitation. See B-150197, November 14, 1962.

A.C.'s notation "Included in cost of end item" was a "specific response" to pricing data as contemplated by section C-10(a) of the IFB, quoted above. It cannot, therefore, reasonably be interpreted as specifying that A.C.'s unit bid price was only applicable in the event that the maximum quantity would be awarded. If A.C. had in fact intended to bid on an "all or none" basis, it should have so stated with clarity. 45 Comp. Gen. 19, 23 (1965). Moreover, we note that A.C. had the option under the terms of the solicitation to submit a firm price for each data item.

In view of the above, the Government had the unqualified right to award a contract to A.C. for less than the quantity bid upon, and the protest is denied.


Deputy Comptroller General
of the United States