



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

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B-176415

October 11, 1972

Dear General Robinson:

By letter dated August 4, 1972, and subsequent correspondence, the Assistant Counsel furnished our Office an administrative report on the protest of the Goodyear Aerospace Corporation against the Defense Construction Supply Center's (DCSC) award of multiyear contracts for portable expandable shelters and portable ward containers under invitations for bids (IFB) Nos. DSA700-72-B-2292 and -2296 to the Brunswick Corporation.

From our review of the record and after consideration of the submissions of the interested parties, we must conclude that there is no basis for our Office to interpose a legal objection to the awards. The circumstances and reasons requiring this conclusion are set forth below.

Both invitations requested bids for certain data terms identified as separate contract line items (CLIN's). The following preface to the schedule pricing provisions for the data CLIN's advised bidders that:

"Data must be furnished for [the] Item[s] * * * in accordance with contract line item nos. /CLIN's/ listed below covering sequences included on DD Form 1423, Attachment No. 1. Offeror must indicate opposite each CLIN, a price or - No Charge - for each element of data required. Any refusal to furnish data, or any statement which creates a doubt whether data will be furnished, will render bids nonresponsive/offers unacceptable."

With respect to evaluation and award of these CLIN's, clause D05, contained in section "D" of each invitation, provided, in part, that:

"a. If the offeror does not indicate a charge for data, the Government will consider and the offeror agrees that the data charge is included in the price of the end item.

"b. Separate awards will not be made for data CLINs, however, the right is reserved to make an award for the end item CLINs without awarding the data CLINs. If the same end item is listed in several separate CLINs (not on an 'all or

none' basis) and an offer is low on part but not all of the end item CLINs, the offeror's price for all data CLINs pertaining to the low CLINs will be considered for evaluation purposes to determine total cost to the Government and whether multiple awards will be made for the end item CLINs."

Bidders were advised that award would be on an "all-or none" basis by the invitations' incorporation by reference of clause COB of the Defense Contract Supply Center Contract Provisions (January 1971). COB provides as follows:

"Notwithstanding paragraph 10.c., Standard Form 33A (March 1969), only one award will be made for the total quantity of all CLIN(s) listed. Offers will be evaluated and award will be made on an 'all or none' basis for these CLIN(s). Offers submitted on a part of the CLIN(s) but not all will be rejected as nonresponsive. Should the Government's requirement for any or all of the CLIN(s) be reduced or cancelled prior to award, the solicitation will be cancelled with respect to the CLIN(s) involved and the requirement will be procured by a new solicitation."

That only one award would be made was reemphasized in paragraph 3C of section "D" of IFB -2292 and paragraph 3C of section "C" of IFB -2296.

Bids on both invitations were opened on June 14, 1972. Brunswick submitted the lowest bids and Goodyear was the second lowest bidder. The contracting officer advises that for the multiyear requirement under IFB -2292, Brunswick submitted a total price of \$3,444,130.20, while Goodyear bid a total price of \$3,583,995. On IFB -2296, Brunswick bid a total of \$4,225,920.20 and Goodyear bid a total of \$4,376,607. Brunswick also offered a further price reduction under each invitation provided it received awards under both invitations. On the basis of this offer, the contracting officer reports a difference of \$574,782.74 in favor of Brunswick.

An examination of Brunswick bids drew into question the adequacy of its response to data CLIN 0011 on IFB -2296 and CLIN 0015 on IFB -2292. Both CLIN's covered "Supplementary Provisioning Technical Documentation," and in response to these CLIN's, Brunswick indicated no charge for the items. However, in the case of IFB -2296, the schedule, page 23, included the following statement:

"No charge for Item 0011 provided existing Gov't. Drawing Package meets requirements of the Data Item (no cost is included for the making of any drawings)"

With the exception of the parenthetical statement, the same statement was made in reference to CLIN 0015 on the schedule, page 24, of IFB -2292.

The contracting officer advises that these data CLIN's require the contractor to provide drawings of components that were not fully described or otherwise adequately identified in existing Government drawings. In light of the data requirements, the contracting officer interpreted the qualifying statements as offering the data CLIN's at no charge if the Government drawing package was adequate, but reserving the right to charge an additional, unspecified amount if additional drawings were required. The statements, so construed, were considered material qualifications and Brunswick's bids were administratively determined to be nonresponsive.

In view of the substantial difference between the total Brunswick and Goodyear bids, DCSC requested the United States Army Mobility Command (MECOM), the requisitioning activity, to review its needs for the data CLIN's. Alternatively, it was asked to consider the possibility of cancelling the invitations on the ground of unreasonable prices and resoliciting the requirement. Balancing the speculative nature of the savings that might be realized by resolicitation against the urgent need for the units and the necessity of reprogramming the funds available if award was not made by June 30, MECOM recommended against cancellation. However, after a review of the requirements for the data CLIN's, MECOM informally advised DCSC on June 30 that the requirements were withdrawn. This advice was confirmed by telegram of the same date. With deletion of the data CLIN's, Brunswick's bids were considered responsive and the awards were made on June 30.

With respect to the responsiveness of Brunswick's bids, counsel urges that Brunswick was, as a matter of law, required to furnish the data CLIN's in question and since the Government received no consideration for the deletion of the CLIN's, the deletion can be treated as a mistake having no legal effect. Counsel traces Brunswick's obligation to furnish the data CLIN's to paragraph "a" of clause D05 which provides that if an offeror does not indicate a charge for the data, "the Government will consider and the offeror agrees" that the charge is included in the price of the end item. It is counsel's view that a bidder by signing the bid has expressly agreed to D05a and may not escape the effect of the provision

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in the absence of an express and unequivocal exception. In our view, Brunswick's bids are, at least, ambiguous. We note Brunswick has not simply signed the bids and failed to make any pricing replies to the data CLIN's in question. Brunswick's responses were made in the face of DO5a and, when viewed from this perspective, it is reasonable to say that Brunswick's responses evidence an intent to avoid the operation of the clause. Moreover, we think it is reasonable to view the language used as reserving the right to charge an additional amount, albeit unspecified, upon a determination by Brunswick that the existing data package is inadequate. Since it is conceded that data CLIN's have a substantial price impact, the ambiguity in Brunswick's bids would support a determination of nonresponsiveness. See 50 Comp. Gen. 379 (1970). Consequently, we turn to the question of the propriety of the cancellation of the data CLIN's.

It is Goodyear's contention that Brunswick's bids could not in any event be accepted in view of the language of clause CO8 and the preface to the data pricing portion of the schedules. As counsel points out, CO8 clearly states that offers submitted on a part of the CLIN's but not all will be rejected as nonresponsive. With specific reference to the pricing of the data CLIN's, the preface to the data pricing portion of the schedule reemphasized this caution:

"* * * Any refusal to furnish data, or any statement which creates a doubt whether data will be furnished, will render bids nonresponsive * * *."

Notwithstanding the mandatory character of the language used, we have recognized that a pricing response which would render the bid nonresponsive does not necessarily require rejection of the bid if the item is not to be included in the award. See B-174830, April 19, 1972; B-175055, March 28, 1972; B-169352, June 30, 1970; B-143271, October 7, 1960; B-140081, March 1962, and cases cited therein.

Goodyear, however, has raised the further question of whether under the terms of the invitation DC33 could delete the data CLIN's. While clause CO8 indicates that award will be made on an all or none basis, it further provides that if--

"the Government's requirement for any or all of the CLIN(s) be reduced or cancelled prior to award, the solicitation will be cancelled with respect to the CLIN(s) involved and the requirement will be procured by a new solicitation."

In addition, paragraph "b" of clause D05 deals specifically with the deletion of data CLIN's in the following terms: "Separate awards will not be made for data CLIN's; however, the right is reserved to make an award for the end item CLIN's without awarding the data CLIN's."

It is DCSC's position that paragraph "b" of clause D05 and the above-quoted portion of C03, taken together and read in harmony with the cautionary language relative to the necessity for data CLIN pricing, mean, in effect, that the failure to bid on a data CLIN will result in the rejection of the bid, provided the data item is the subject of an award.

In its submission of August 18, Goodyear's counsel offers the following rejoinder:

"* * * Assuming for purposes of argument that D05 is more specific than either of the other data provisions, even a cursory review of that clause reveals that its terms only go to the question of whether award will be made on an 'all or none' basis and not to whether evaluation of the bids will be made on such a basis. Stated otherwise, clause D05 does not address the question of what items must be bid on; nor does it speak to the obligations of DCSC regarding responsiveness of bids. Thus, nothing in clause D05 conflicts with or contradicts the following statement in clause C03:

Offers submitted on a part of the CLIN(s) but not all will be rejected as nonresponsive. (Emphasis added.)

Nor does anything in D05 conflict with the provision above the data CLIN's that 'any refusal to furnish data, or any statement which creates a doubt whether data will be furnished, will render bids nonresponsive....'

"Even if we were to accept for purposes of argument only, the Government's two step argument that D05 controls this case and that a bid need not be responsive to the IFB as advertised but only to the contract as awarded, the Government's position would still be untenable. D05, the very clause relied on by the Government, states on its face that, 'Separate awards will not be made for data CLIN's.' Award then, at least for the data items was stated to be on an all or nothing basis, and a bidder could have correctly bid a single price for the data items. Thus, the Government itself waived its right to delete a single data CLIN under the IFB's."

We must take issue with Goodyear's interpretation. That portion of paragraph "b" of D05 which Goodyear stresses is, in our view, simply a statement that one bidder will not be awarded an end item CLIN while another is awarded the data CLIN associated with that end item. In this regard, the remaining sentences of paragraph "b," which outline a procedure for evaluating and awarding end item and related data CLIN's where award is not on an "all or none" basis, make this clear. While the incorporation of C03 negates the applicability of this evaluation procedure, it also reemphasizes the fact that separate awards will not be made. In addition, Goodyear fails to give complete recognition to the specific reservation in clause D05 "to make an award for the end item CLINs without awarding the data CLINs." Considering this language alone, we would agree with the contracting officer's view that the right to eliminate all data items from consideration implicitly includes the right not to award a portion of the data.

Since paragraph "b" of D05 deals specifically with data CLIN's and authorizes the deletion of these CLIN's, we need not consider the question whether C03 standing alone would authorize the deletion of the data CLIN's for purposes of evaluation and award or whether, as Goodyear suggests, a reduction or cancellation of the Government's requirement for a particular CLIN necessitates a cancellation of the solicitation and readvertisement of the entire requirement. As we have indicated, this argument would be viable only if the deletion of an end item CLIN was involved. And insofar as the right to delete end item CLIN's without readvertisement is concerned, the clause has been modified to eliminate any question. See clause "C-15 -- ALL OR NONE (1972 MAR)," DCSC Contract Provisions, which states in pertinent part that: "Should the requirement for a CLIN or part of a CLIN group be reduced prior to award, no award will be made for the CLIN or CLIN group involved * * *."

Thus, we must conclude that under the terms of the invitations, evaluation and award would be subject to the Government's right to delete the data CLIN's in issue. Given this right, we can see no basis for accord- ing any significance to the factual differences between this case and the cases previously cited for the proposition that nonresponsiveness with respect to an item which will not be the subject of award does not require rejection of the bid. Waiver of the defect, or nonresponsiveness, does not result in meaningful prejudice to the other bidders. In this connection, what we said in 40 Comp. Gen. 321, 324 (1960), and quoted with approval in 44 Comp. Gen. 336, 339 (1965), is pertinent:

"Whether certain provisions of an invitation for bids are to be considered mandatory or discretionary depends upon the materiality of such provisions and whether they were inserted for the protection of the interests of the Government or for the protection of the rights of bidders. Under an advertised procurement all qualified bidders must be given an equal opportunity to submit bids which are based upon the same specifications, and to have such bids evaluated on the same basis. To the extent that waiver of the provisions of an invitation for bids might result in failure of one or more bidders to attain the equal opportunity to compete on a common basis with other bidders, such provision must be considered mandatory. However, the concept of formally advertised procurement, insofar as it relates to the submission and evaluation of bids, goes no further than to guarantee equal opportunity to compete and equal treatment in the evaluation of bids. It does not confer upon bidders any right to insist upon the enforcement of provisions in an invitation, the waiver of which would not result in an unfair competitive advantage to other bidders by permitting a method of contract performance different from that contemplated by the invitation or by permitting the bid price to be evaluated upon a basis not common to all bids. Such provisions must therefore be construed to be solely for the protection of the interests of the Government and their enforcement or waiver can have no effect upon the rights of bidders to which the rules and principles applicable to formal advertising are directed. To this end, the decisions of this Office have consistently held that where deviations from, or failures to comply with, 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 of the bidder in the event he is awarded a contract, 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 as a minor deviation which can be waived and the bid considered responsive."

With respect to the decision to delete the data CLIN's, during a conference in our Office on September 1, 1972, question was raised whether there was, in fact, no need for the data items in issue. At

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our request, the Assistant Counsel by letters, with enclosures, dated September 20 and 21, 1972, provided further clarification. Included in this correspondence is a telegram dated September 20, 1972, from MECOM which, in our view, confirms the lack of need for the data CLIN's:

"IT WAS DETERMINED THAT DATA ITEM 0011 [IFB -2295] WAS NOT ESSENTIAL AND THAT DATA REQUIRED UNDER DATA ITEM 0015 [IFB -2292] WAS REDUNDANT BECAUSE THE INFORMATION COULD BE OBTAINED FROM OTHER DATA TO BE FURNISHED BY THE CONTRACTOR; NAMELY, CONTRACT DATA REQUIREMENT, SEQUENCE 0001, PROVISIONING LIST; SEQUENCE 0002, PARTS CHANGE NOTICE, DESIGN ENGINEERING CHANGE DOCUMENTATION; SEQUENCE 0005, EQUIPMENT PUBLICATIONS, DA TECHNICAL MANUAL (TM) PARTS."

Moreover, we find no impropriety in the fact the contracting officer's and MECOM's exploration of the alternatives of either cancelling and re-advertising or deleting the data items was prompted by the substantial difference in the Brunswick and Goodyear's bid prices. Since the invitations authorized deletion of the data CLIN's and the deletion could be accomplished without meaningful prejudice to other bidders, the contracting officer could not ignore the potential savings involved and still fulfill his obligation to act in the best interests of the United States.

Accordingly, the protest is denied.

/Sincerely yours,

R.F.KELLER

[Deputy] Comptroller General
of the United States

Lieutenant General Wallace H. Robinson, Jr.
Director, Defense Supply Agency