

01503

DECISION



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

*D. Ruppert
Proc I*

FILE: B-187462

DATE: February 2, 1977

MATTER OF: Stuart Petroleum Company

DIGEST:

Offer price for fuel oil stated as "\$.3262 less TEA [temporary entitlements allowance] \$.02" is offer of \$.3062. Intention to apply offeror's TEA, as opposed to TEA of firm whose price was included is evident from information in offer.

Stuart Petroleum Company (Stuart) protests the proposed award of a contract for item number 2400-54 to Waller Petroleum Company (Waller) under invitation for bids (IFB) DSA600-76-B-0410, issued by the Defense Fuel Supply Center (DFSC), Alexandria, Virginia. The IFB contemplated multiple awards of fixed-price economic price adjustment contracts on an item-by-item basis to all responsive bidders submitting the low bid on one or more items. The item in question is No. 5 fuel oil in the estimated amount of 1,990,000 gallons.

Stuart contends that its unit price of \$0.31286 for the item constituted the low responsive bid and that an award should be made to it. Waller's offer price was "\$.3262 less TEA \$.02." Stuart contends that Waller's bid is nonresponsive for failure to state a firm offer price or, in the alternative, that Waller's bid must be considered to be an offer for \$0.3262 per unit and, therefore, not the low bid.

The IFB required bidders to submit a price data card with the bids. The card required the following entries: (1) bidder's name, (2) bidder code, (3) bid item number, (4) offer price, and (5) six data items to identify the reference price for economic price adjustment purposes.

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The contracting officer reports that Waller was considered to be the low bidder with an offer price of \$0.3062. The following information was included on the price data card submitted by Waller:

"Offer Price \$.3262
less TEA .02

- "(1) DATE POSTED OR PUBLISHED PRICE SELECTED. 7/27/76
- "(2) POSTED OR PUBLISHED PRICE IN EFFECT ON ABOVE DATE.
\$.3098
- "(3) CITY OR LOCATION WHERE SUCH POSTED OR PUBLISHED PRICE APPLIES. Baltimore
- "(4) METHOD OF DELIVERY APPLICABLE TO THE POSTED OR PUBLISHED PRICE. T/T
- "(5) COMPANY POSTING OR PUBLICATION PUBLISHING SUCH PRICE.
Exxon Journal of Commerce
- "(6) TYPE OF PRODUCT TO WHICH SUCH POSTED OR PUBLISHED PRICE APPLIES. #5 1/S"

Clause L135. "Economic Price Adjustment (DFSC 1976 JUN)," part A, provides in part:

"(a) The term 'base price' means the unit price bid for the item of supply identified by the item number of the applicable price data card (DFSC form 11.31) and is set out on the card as the offer price.

"(b) The term 'Reference Price' is the price set out on the Price Data Card in Block 2 under the heading, 'Posted or Published Price' with which the base price is to fluctuate. Such price shall be held to include all bona fide discounts or temporary voluntary allowances. Accordingly, changes in discounts or allowances shall be treated as changes in the reference prices provided such discounts or allowances are offered in substantial quantities to the general public."

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Waller offered a "base price" of "\$.3262 less TEA \$.02" to fluctuate with Exxon Journal of Commerce #5 L/S (#5 fuel oil low sulfur), Baltimore, Maryland. The contracting officer reports that on July 27, 1976, Exxon Journal of Commerce posted \$13.01/BBL (\$.3098/Gal) for #5 fuel oil 1 percent sulfur with the notice that an \$0.83 per barrel entitlement allowance is granted on certain residual fuel sales through East Coast Terminals where Exxon is the importer of record.

The contracting officer takes the position that it is clear from Waller's bid price of "\$.3262 less TEA \$.02" that Waller intended a \$0.02 TEA reduction of its base price and that the TEA would fluctuate correspondingly with the established price escalation provisions of the contract. The contracting officer agrees with Steuart that the better method of bidding would have been to state the unit price, having already deducted the TEA, and then to make a notation in block (2) of the posting data that there was a \$0.02 Waller TEA in effect. Nevertheless, the contracting officer contends that the failure to so state the TEA was a minor informality and not an error affecting responsiveness.

The issue for our resolution is whether Waller's bid in the manner submitted is the low responsive bid. We believe that the term "less TEA \$.02" clearly evidences an intent to have \$0.02 deducted from Waller's offer price. This view is supported by Waller's letter of July 27, 1976, which accompanied its bid and stated:

"Our delivered prices for #6 (i.e., #5) oil reflect a \$.02 per gallon Temporary Entitlements Allowance which is the result of a program initiated by the Federal Energy Administration.

"The amount of the TEA will vary from time to time as a result of the application each month of a formula devised by the Federal Energy Administration.

"Under normal circumstances our price would change only with a change in the Posted Price but our net delivered price will now also be affected by the Entitlement Program."

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Steuart contends that if it was Waller's intention to actually offer a unit price of \$0.3062 in accordance with economic price adjustment clause L133, then that should be the amount shown in the offer price block, with the TEA of \$0.02 per gallon shown as a function of the "reference price" along with Exxon's posted price, and not as a function of the bid price. Steuart contends that the offer price as bid by Waller cannot be considered a "unit price" since the TEA fluctuates. Therefore, Steuart contends that Waller has not submitted its bid in accordance with clause L133 and is therefore nonresponsive. Steuart states that as a fluctuating item it cannot legally be a part of the "offer" price and that any escalations must be set forth in the reference price description under blocks 1 through 6 of the price data card.

Steuart further states that effective June 1, 1976, residual fuel oil was removed from price controls (see 41 Fed. Reg. No. 64, pp. 13896-13906) and that since that date it has not been mandatory that adjustments be passed on to the customer. Steuart notes that as a matter of practice, in order to be competitive in the market, such adjustments allowed by refiners and major suppliers to distributors have been voluntarily passed on to the consumer. Thus, Steuart argues that the TEA has become a voluntary allowance along with other voluntary allowances. Assuming, arguendo, that the TEA's as computed by the FEA are voluntary as of June 1, 1976, this fact would have no bearing on the question of the responsiveness of Waller's bid, since its cover letter indicated Waller's intent to pass the TEA on to the Government. Further, clause L135, "Temporary Voluntary Allowance," is incorporated in the IFB on page 3 and provides in part:

"(a) If, after the exact time and date set for bid opening (or the contract date if this is a negotiated contract), a voluntary allowance goes into effect or an existing allowance is increased, the prices otherwise payable under this contract for affected items shall be reduced as of the date the voluntary allowance goes into effect, by the amount thereof, provided such voluntary allowance shall not have been reflected in any change made pursuant to the clause entitled Price Escalation.

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"(b) The contract price for affected items which have been reduced pursuant to paragraph (a) above shall be increased by a like amount as the allowance described in (a) above is removed.

"(c) The term 'affected items' as used herein shall mean (i) items of the contract calling for like method of delivery at points within the area where a voluntary allowance is offered by the Contractor to a majority of its consumer customers, and (ii) all items of this contract covering products for which the Contractor receives a voluntary allowance from its supplier.

"(d) The Contractor shall immediately notify the Contracting Officer, Defense Fuel Supply Center, Cameron Station, Alexandria, Virginia 22314, whenever a voluntary allowance goes into effect, or is withdrawn or modified."

Clause L135 also contemplates the application of voluntary allowances. If a TVA has been increased or decreased, the prices payable for "affected items" are required to fluctuate. Therefore, a TEA that is voluntary is a part of the contract. Under these circumstances, the fact that the TEA fluctuates from month to month is immaterial in determining whether Waller's bid is responsive.

It has been the consistent position of this Office that the responsiveness of a bid, that is, the bidder's intention to comply with all IFB specifications, must be determined from the face of the bid itself. B-176699, November 30, 1972. Since Waller did not take any exception in its bid to the IFB requirements, its bid is responsive unless Waller's bid price is not ascertainable from its bid. Steuart contends that it is unclear from Waller's bid what offer price it intended and that if the bid is considered responsive, the correct evaluated unit price offered must be considered to be \$0.3262.

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By letter of November 11, 1976, Steuart states:

"It is not, however, apparent from Waller's bid whether the TEA of \$.02 is Waller's TEA or Exxon's TEA. If it is Waller's TEA, where is it published, and how will it escalate or change? Waller could withdraw or not even have a TEA at any time it may choose. Apparently, Waller is also using Exxon's TEA as a fluctuating item because Exxon's posted or published price of \$.3098 (Block 2) is Exxon's gross price excluding entitlements of \$0.82 per barrel (\$.02 per gallon) as published in the Journal of Commerce. (Block 5) Under these circumstances, is Waller offering two TEAs, its own and Exxon's?"

We do not agree with Steuart's contention that it is not apparent from Waller's bid whether the \$.02 TEA is Waller's or Exxon's and, therefore, there is no way for the contracting officer to verify the fluctuation of Waller's own TEA. Waller's offer of a \$.02 per gallon TEA is equivalent to offering a TEA of \$.84 per barrel (there are 42 gallons per barrel which when multiplied by a \$.02 per gallon TEA amounts to \$.84 per barrel). Inasmuch as the Waller offer price was carried to four decimal places and the Exxon TEA at \$.83 per barrel (indicated in the July 27, 1976, Journal of Commerce) amounts to \$.0198 per gallon, it seems that if Waller had intended to deduct the Exxon TEA from the offer price it would have deducted the four place decimal \$.0198 TEA from the four place decimal offer rather than the two place decimal \$.02 TEA. Moreover, since Waller showed the Exxon posted price as \$.3098 and did not deduct the \$.0193 TEA applicable when Exxon is the importer of record, the natural inference is that Waller was bidding as the importer of record and did not include the Exxon TEA. In the circumstances, and as Waller's bid shows that \$.02 is to be deducted from \$.3252, we conclude that the bid properly was considered to be a unit price of \$.3052 and that the \$.02 TEA is Waller's and not Exxon's TEA. Waller's TEA is verifiable from information published in FEA's monthly "Notice of Entitlements" along with information regarding other firms such as Exxon and Steuart.

Steuart contends that, if the foregoing rationale is applied to the Roarda Inc. bid, Waller is not the low bidder. Roarda's price after deduction of the prompt payment discount is \$.32006. Roarda submitted the following information on the price data card in the space provided for the published price:

".3095
-195TVA
.2900"

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Stewart contends that, if the ".195 TVA" is deducted from Roarda's offer price, Roarda is the low bidder. However, the situation in the Roarda bid is different from that in the Waller bid. The latter bid indicated that the "\$.02 TEA" is to be deducted from the offer price, which results in a bid of \$0.3062. On the other hand, the Roarda bid only indicates that the ".195 TVA" is to be deducted from the posted price. Therefore, the \$0.32006 offer price remains unchanged and Waller is the low bidder.

Accordingly, Stewart's protest is denied.


Deputy Comptroller General
of the United States