

DECISION



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

7563

FILE: B-191607

DATE: September 7, 1978

MATTER OF: Patriot Oil, Inc.

DIGEST:

1. Bidder did not submit with bid, as required, valid reference prices for each of its bid item prices with result that contracting activity had no basis for postaward price adjustments to item prices based on market changes in reference prices. Thus, bidder had option of providing or not providing activity with correct reference prices after bid opening and, therefore, was in position of accepting or declining award. Bid was therefore properly found to be nonresponsive and not subject to correction. Delay in making such decision does not affect validity of action taken.
2. Nonresponsive bid may not be accepted by contracting activity even if it is sole bid received.
3. Fact that price adjustment provision has been changed or revised for procurements made subsequent to protested procurement gives no basis for permitting award to bidder submitting nonresponsive bid on protested procurement because, even assuming for sake of argument, that changes show old provision was defective, proper course of action would be to cancel solicitation and resolicit with revised provision.
4. Question concerning rejection of protester's bid for certain items because of unreasonable prices raised 4 months after initial protest is untimely and not for consideration.

Invitation for bids No. DLA600-78-B-0004 was issued by the Defense Fuel Supply Center (DFSC) for the procurement of various petroleum products. Bidders were advised that bids would be acceptable (responsive) only if submitted on an escalated price basis (Provision C44, Solicitation Instructions and Conditions, Master Solicitation). Accordingly, bidders were to bid on each item they submitted a price for by submitting a "base price," the unit price the bidder would charge for the item (subject, of course, to escalation and deescalation), and the applicable "reference price" (Provision L133 ECONOMIC PRICE ADJUSTMENT (DFSC 1977 JUL), Part A, General Provisions). Both of these prices were required so that, as regarded payment under any resultant contract, the base price bid for an item might be "increased or decreased by the amount that the reference price for the applicable item shall have increased or decreased to and including the date of delivery." (Provision L133, supra, Part C).

The term "reference price" (or "Posted or Published Price") was defined in Provision L133, Part A, supra, as an "established price" which is:

"(c) * * *(i) a current market price established in the usual and ordinary course of trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or vendor, or (ii) a catalog price. A catalog price is one which is established in the usual and ordinary course of trade between the seller (which maintains it) and buyers who are free to bargain. It is a price included in a catalog, price list, schedule or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public. A commercial item is one which is regularly used for other

than Government purposes and is sold or traded in the course of conducting normal business operations. Commercial items are sold to the general public when all of the following criteria are met: (A) Sales to the general public are not negligible in themselves and total 55% or more of all sales made for the same or similar product to the same class of purchaser; (B) 75% or more of those sales made to the general public are made at the established price. An item is sold to the general public if it is sold to other than affiliates of the seller for end use by other than the Government. Items sold to affiliates of the seller and sales for end use by the Government are not sales to the general public."

Patriot Oil, Inc. (Patriot), submitted bids on 35 of the items in the invitation. Because the contracting officer noticed that the reference prices submitted by Patriot for the same types of products fluctuated, Patriot was queried as to these "inconsistent" prices. As a result of this query Patriot, by letter of January 24, 1978, advised that it now realized that under Provision L133 Patriot did "not have the sales to substantiate a [reference] price [the reference prices Patriot had bid had been based upon its own sales], utilizing our company as posting such price, therefore, our posted price as stated * * * was based on our buying price and expenses." Attached to this letter was a quote from the Murphy Oil Corporation (Murphy) (Patriot's supplier) containing its "posted" prices for each of the petroleum product types involved in the Patriot bid. Patriot requested that these prices be inserted in its bid in place of the Patriot reference prices as the Murphy quotes were the buying prices, ostensibly, to which Patriot added its expenses in determining its original reference prices. Because the reference prices originally submitted by Patriot did not meet the requirements in Provision L133 and because it was determined that to allow Patriot to submit "new" reference prices would not be acceptable, the contracting officer rejected the Patriot bid as nonresponsive by letter of March 9, 1978.

Patriot protested on March 29, 1978, questioning the rejection of its bid for various reasons. It notes that it did not attempt, as the contracting activity states, to change its bid prices, which have always remained the same. Rather, Patriot contends that it merely clarified the reference prices which it had submitted with each item price bid. Initially Patriot had based these prices on its supplier's prices and its own expenses, thereby reaching what Patriot calls an adjusted reference price. This adjusted reference price also took into account the quantity of the product involved and the distance to transport it. When Patriot discovered that its reference price could not be computed in this manner, Patriot states that it merely substituted the quotes (i.e., the costs to Patriot without Patriot's additional expenses) of its supplier as its reference prices. And, consequently, since any price increases under a contract would depend on the fluctuations of its supplier's reference prices, Patriot believes the contention that Patriot would control the prices charged under the contract is invalid.

Patriot also notes that the DPSC has had problems with Provision L133 and has used an amended provision on later procurements. Patriot apparently believes that the items on which it bid low should be awarded it since the defect in its reference prices is negated by the fact that Provision L133 was also, allegedly, defective. Finally, Patriot contends that it will cost the Government more to meet its needs if it does not award Patriot those items on which it was low, and it is maintained, citing specific items on which the DFSC has refused to make award to Patriot, that at a minimum Patriot should receive award on those items upon which it submitted the only bid prices. As an additional matter Patriot queries as to why, if the DFSC now maintains its original bid was nonresponsive, the DFSC waited approximately 3 months to so determine. In that time period Patriot points out it was requested to furnish additional information, as well as put through a pre-award survey. Notwithstanding the claim by the DFSC that this delay resulted from Patriot's efforts to clarify its reference prices, Patriot notes that a good portion of the delay was caused by the DFSC.

We believe that the bid of Patriot was, as submitted, nonresponsive to the requirements of the invitation and as such could not be accepted for award. As noted previously, submission of valid reference prices with the bid was required. By failing to submit these required prices (valid ones), Patriot put itself in the position of being able to provide the DFSC with valid prices after bid opening or to decline to provide them. Since no award could be made without the inclusion of these prices in the contract, Patriot thereby put itself in the position of being able solely on its own accord to decide to accept or refuse the award of a contract. Under such circumstances, a bid must be considered nonresponsive. Mills Manufacturing Corporation, B-188672, June 15, 1977, 77-1 CPD 430. While there may have been an inordinate delay in reaching the conclusion that the bid of Patriot was nonresponsive, such delay does not provide a basis for making an improper award.

As regards the willingness of Patriot to provide correct reference prices and to accept award for the items upon which it is the only bidder, award under the invitation would be improper since Patriot's bid was nonresponsive as submitted and may not be corrected to render it responsive. General Electric Company, B-184873, May 4, 1976, 76-1 CPD 298.

Concerning Patriot's belief, that since the price adjustment provision is defective its defective reference prices may be waived and award may be made to it, is without merit since there is no basis for making an award on a nonresponsive bid. Where a specification is defective and where it thus precludes bidders from bidding on the same basis or withholds from potential bidders the proper information on which to base a determination of whether or not to submit a bid, the proper course of action is to cancel the procurement, to revise the specification, and to resolicit the procurement. Dyneteria, Inc. and La-Tex Foods, Inc., B-190029, December 16, 1977, 77-2 CPD 475; Armed Services Procurement Regulation § 2-404.1(b)(i) (1976 ed.).

Concerning Patriot's question, raised for the first time in its letter of July 18, 1978, as to why its bid was rejected for three items because of unreasonable prices, it is untimely raised and not for

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consideration, 4 C.F.R. § 20.2(b)(1) (1978). In any event, since its total bid was properly found non-responsive an award could not be made to it for any of the items.

Accordingly, the protest is denied.

R. F. Koppen
Deputy Comptroller General
of the United States