

Proc I

DECISION



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

10,032

FILE: B-192907

DATE: May 4, 1979

MATTER OF: C. R. Fedrick, Inc.

DLG 01491

[Protest Alleging Competitors' Bids Were Nonresponsive]

DIGEST:

1. Despite fact that agency questions data it obtained to determine unreasonableness of cost of domestic materials, agency states that information provided by first and second low bidders regarding the nondomestic construction material they proposed to use was sufficient for cost comparison to proceed.
2. If bidder fails to supply data concerning domestic prices, it takes the risk that procuring agency will not be able to verify fact that domestic prices are unreasonable. However, where agency is able to obtain prices on comparable domestic material, as here, bid need not be rejected because of bidder's failure to provide data regarding domestic prices.
3. GAO decision in 51 Comp. Gen. 814 (1972) distinguishable. Unlike bids of first and second low bidders, bid in that case did not include information pertaining to portion of nondomestic material to be used. Sufficient information as to nondomestic material offered was submitted here by low bidders.
4. GAO does not review protests of affirmative determinations of responsibility except in limited circumstances which are not present here. Moreover, once contract is awarded compliance with solicitation provision cited by protester is matter of contract administration which is not for resolution by GAO.

BACKGROUND

C. R. Fedrick, Inc. (Fedrick), protests the bids of Hitachi America Ltd. (Hitachi) and Nissho-Iwai American Corporation (Nissho) on invitation for bids (IFB) No. DC-7339 issued by the Bureau of Reclamation,

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Department of the Interior (Interior). The IFB is for the furnishing and installation of motor-driven pumping units and discharge valves at pumping plants located at Hacienda and Twin Lakes, Nevada.

The three low bidders are:

Hitachi	\$6,568,440
Nissho	6,625,000
Fedrick	7,247,600

The Government estimate is \$6,959,900. No award to date has been made by Interior.

The IFB included Bureau of Reclamation form 7-1532 (6-68) entitled "Representations By Bidders Pursuant To 'Buy American Act.'" The top portion on the front of this form stated that, except as noted below, the bidder be domestic materials conforming to the clause entitled "Buy American" of the IFB's General Provisions (Standard Form 23-A). Immediately following this language, space was provided for noting each item of nondomestic construction material the bidder intended to use, the quantity of such material and the cost of its delivery to the jobsite. The lower portion of the front of the form asked for a listing of the lowest-costing domestic material that was comparable to the items of nondomestic material by the bidder.

Hitachi noted a quantity of "21 sets" of "motor driven pumping unit" at \$2,677,290 as the nondomestic construction materials that it intended to furnish. An engineering fee of \$195,310 was also listed. Nissho's nondomestic construction materials were noted as eight sets of pumping units (39 units) and eight sets of metal piping supports and valves at \$3,080,000 and \$695,000, respectively. Neither Hitachi nor Nissho listed any lowest-costing, comparable domestic material. Hitachi put the words "Not Applicable" on this portion of form 7-1532. Nissho stated "No domestic material available to us."

ARGUMENTS

Fedrick alleges that the bids of Hitachi and Nissho are nonresponsive because of their failure to: (1) specifically identify the nondomestic construction materials intended to be supplied and (2) list lowest-costing domestic material comparable to the nondomestic material. Fedrick argues that Hitachi's reference to 21 sets of motor-driven pumping units is ambiguous because there is no way one can determine from this description how many pumping units are to be supplied, their precise type, or the cost of each individual pumping unit. With regard to Nissho, Fedrick admits that the description is more specific, but asserts that it is still not enough. Even assuming, arguendo, that Nissho's description of its nondomestic material is adequate, Fedrick contends that the phrase "No domestic material available to us" makes it impossible for Interior to make a cost comparison.

Fedrick takes the position that form 7-1532 requires the bidder to supply information regarding the cost of comparable domestic material. Furthermore, this information must be identical to the information specified on the form for the nondomestic material that the bidder intends to supply. Fedrick points to paragraph (b)(2) on the back of the form which provides that the bidder shall include data, based on a reasonable canvass of suppliers, demonstrating that the cost of domestic construction material would exceed by more than 6 percent the cost of comparable nondomestic construction material. Fedrick notes, moreover, that the lower portion of the front of the form is set up for the bidder to provide the name of each item of comparable domestic material, the quantity of such material, and its cost if delivered to the jobsite. Thus, Fedrick believes that it is clear from the language of the form that any bidder proposing the use of nondomestic materials must provide reliable evidence supporting such use including the results of the bidder's canvass of domestic suppliers.

Fedrick has furnished our Office with letters that it received from domestic pump manufacturers concerning the contacts that they had with Hitachi and Nissho. Fedrick asserts that these letters demonstrate that while Nissho and Hitachi did request quotes from these manufacturers for some pumps, they did not seek quotes

for all the pumps required by the IFB. In support of this assertion, Fedrick suggests that these letters indicate that Hitachi's contacts were for the purpose of obtaining quotes on the smaller, less expensive pumps only. According to Fedrick, Hitachi did not seek price quotes for pumping plants 1B, 2B, and Hacienda which required the largest, most expensive pumps. As to Nissho, Fedrick avers that while the manufacturers which Nissho contacted indicated a willingness to provide price quotes, no further effort was made by it to obtain any quotes.

Interior takes the position that the failure of Hitachi and Nissho to furnish data regarding the cost of comparable domestic construction material is inconsequential and not prejudicial to the other bidders. Interior states that the Buy American Act, 41 U.S.C. § 10a-10d (1976), requires that only domestic construction materials be used in construction contracts unless the head of the department finds that it would unreasonably increase costs to do so. Interior asserts that the Federal Procurement Regulations (FPR) on the Buy American Act speak in terms of "findings" and "determinations" which can only be made by the Government itself. Moreover, paragraph (b)(1) on the back of the form states that bids offering the use of additional non-domestic construction material may be acceptable if the Government determines that use of comparable domestic construction material is impracticable or would unreasonably increase cost. Consequently, Interior argues that even if Hitachi and Nissho had filled in the bottom portion of form 7-1532, the Government would still have the obligation to check the data provided against an independent canvass of domestic suppliers.

Interior also states that it determined that both Hitachi and Nissho furnished sufficient information on the top portion of form 7-1532 for it to proceed with a cost comparison. Further, Interior indicates that it believed that this information was sufficient to preclude any change by Hitachi and Nissho after bid opening which would affect their relative standing. Interior then contacted five domestic suppliers of pumps and requested price quotations. For the 21 units that Hitachi listed, Interior received quotes of \$3,981,523 and \$4,000,000. For the 39 units that Nissho listed, Interior received

quotes of \$3,800,000 to \$4,330,000 from one source (depending on terms of delivery, drawings required and special conditions), \$4,301,464 and \$4,863,393 from the other source.

Based on its historical records, Interior had estimated the cost of furnishing 21 domestic pumping units to be \$2,880,000. As to Nissho's 39 units, Interior's estimated cost for furnishing comparable domestic materials had been \$4,000,000. However, Interior states that the pumping units required by the IFB are not stock units and, therefore, are unique. As such, their exact cost cannot be determined. After reviewing all bids submitted and the quoted costs from domestic pump manufacturers, Interior concluded that its estimated costs were somewhat low. Using just the bids submitted and the domestic quotations for comparison, Interior found the cost of Hitachi's and Nissho's non-domestic construction materials to be substantially less than the cost of similar domestic construction material and thus acceptable under the Buy American Act.

In response, Fedrick argues that it would be prejudicial for the Government to supply information to supplement the nonresponsive bids of Hitachi and Nissho by its own survey. In Fedrick's opinion, reliance by the contracting officer on his own survey undermines the integrity of the competitive bidding system and acts to Fedrick's detriment. Fedrick asserts that a meaningful comparison of the cost of domestic material to nondomestic material can only be done within the context of the bidding process itself. When the cost of comparable domestic material is determined after bid opening, Fedrick believes that it is impossible to evaluate whether the domestic material could have been obtained at a lesser cost. Therefore, Fedrick concludes that in order to have cost comparisons of similar items under similar circumstances, a bidder who proposes to use nondomestic construction materials must submit, as required by form 7-1532, the results of his own survey of domestic suppliers of the materials.

In further support of its position, Fedrick calls attention to the fact form 7-1532 is designed in such a manner that the bidder supplies the same information for domestic material as for nondomestic material. When the information regarding the cost of comparable domestic

materials is supplied, Fedrick claims that a ready comparison can be made by the contracting officer through verification rather than independent price inquiries. In Fedrick's view, this verification could easily be accomplished by the contracting officer calling the listed sources of comparable domestic material. Also, Fedrick contends that the difficulties Interior stated it encountered in determining whether the domestic materials in its survey were similar to the listed nondomestic materials would not have existed had Hitachi and Nissho properly completed the form at the time they submitted their bids.

Fedrick further emphasizes the problems it believes are associated with a post-bid-opening survey of domestic suppliers by pointing out that Interior's survey contradicted the Government's estimates that were based on historical costs. Fedrick argues that any survey made under noncompetitive conditions gives questionable results. If Interior had used its own estimates to make the cost comparison, Fedrick observes that the cost of comparable domestic construction material would have been found to be lower than the cost of the nondomestic construction material proposed by Hitachi and Nissho. Fedrick asserts that any subjectiveness involved in making a cost comparison using information obtained after bid opening is removed when all the required information is provided by the bidder with his bid. Furthermore, Fedrick contends that in view of the requirements of the Buy American Act, it is good policy to require bidders who propose the use of nondomestic construction material to demonstrate clearly, in accordance with the instructions on form 7-1532, that their nondomestic construction materials would cost less than comparable domestic materials.

Finally, Fedrick urges that the use of information obtained after bid opening defeats the purpose of form 7-1532. In Fedrick's opinion, if the failure to furnish information on the lower portion of the front of the form does not render a bid nonresponsive, this portion of the form will become meaningless. Bidders will never supply information on the cost of comparable domestic material. Instead, they will wait for a survey to be made after bid opening by the contracting officer, where there are no pressures of competition and where the effect of inflation is already known. Fedrick

concludes that if our Office decides that the bids of Hitachi and Nissho are responsive, form 7-1532 will have to be changed since a significant portion of it will never be filled out.

Hitachi asserts that its bid was responsive, as a matter of law, to the specifications. Hitachi refers to our decisions which hold that unless something on the face of the bid, or specifically made a part thereof, either limits, reduces or modifies the obligation of the prospective contractor to perform in accordance with the terms of the invitation, the bid is responsive. See 49 Comp. Gen. 553 (1970) and 57 Comp. Gen. 361 (1978). Hitachi states that once the bids were opened, it was contractually obligated to perform the work described by the IFB specifications at the price stated in its bid. In this regard, Hitachi believes that in its bid it properly identified the nondomestic material it proposed to use and a price for such items.

#### GAO ANALYSIS

FPR § 1-18.603-1 provides: (1) that a "determination" be made that the cost of each item of nondomestic construction material offered in the bid plus 6 percent be less than the cost of comparable domestic construction material; and (2) that the bid be the lowest after adding, for evaluation purposes, 6 percent of the cost of the nondomestic construction material. All costs involved in delivery to the construction site are to be used in computing the cost of both domestic and nondomestic construction material. Further, the computations are to be based on costs on the date of bid opening. See FPR § 1-18.603-2.

The language of the Buy American Act provision that must be included in solicitations for construction work is set forth in FPR § 1-18.604. Paragraph (b)(2)(1) of this proscribed provision states that where the bidder alleges that the use of domestic construction material would unreasonably increase cost, data is to be included, based on a reasonable canvass of suppliers, which demonstrates that the cost of each item of comparable domestic construction material would exceed by more than 6 percent the cost of the nondomestic construction material offered by the bidder. Form 7-1532 provides space at the bottom

of the front portion for the bidder to list this data.

While the language of the FPR mandated provision indicates that the bidder is to provide data to demonstrate that the use of comparable domestic construction material would unreasonably increase cost, we do not, however, believe that the failure of a bidder to furnish such data is always fatal. Paragraph (b)(1) of this provision also provides that bids offering the use of nondomestic construction material may be acceptable for award if the Government determines that the use of comparable domestic construction material is impracticable or would unreasonably increase cost or that domestic construction material is commercially unavailable. Consequently, it is our opinion that regardless of whether the bidder furnishes data on the cost of comparable domestic material, the Government is still obligated to perform a cost comparison on the nondomestic construction materials offered by the bidder.

We note that Interior questions the data upon which it determined that the cost of comparable domestic construction material was unreasonable because it was not possible to create the same competitive conditions that existed at the time of bid opening. Interior states that the system established by the regulations for making Buy American Act determinations calls for a considerable amount of subjective judgment by the contracting officer in establishing the cost of the comparable domestic material. Where the prices of the nondomestic versus domestic material are close, as is the case here, Interior expresses the concern that the result of the required cost comparison will depend on the subjectivity of the contracting officer in analyzing the data available.

Despite the foregoing, Interior does indicate that the information given by Hitachi and Nissho regarding the nondomestic construction material they proposed to use was sufficient for the cost comparison to proceed. In this regard, we think that if a bidder fails to supply data concerning domestic prices, it takes the risk that the procuring agency will not be able to verify the fact that domestic prices are unreasonable. However, where the agency is able to obtain prices on comparable domestic material, as Interior was able to do here, we believe that a bid need not be rejected because of

bidder's failure to provide data regarding domestic prices.

Fedrick cites 51 Comp. Gen. 814 (1972) in support of its contention that the failure to supply data demonstrating that the cost of comparable domestic materials would exceed by more than 6 percent the cost of nondomestic materials offered is a failure that goes to the responsiveness of a bidder's bid. That decision involved in part a protest against a bid that did not include information pertaining to the portion of nondomestic materials that the bidder proposed to use. In addition, the protested bid failed to provide any data to demonstrate that the cost of domestic material would exceed by 6 percent the cost of the bidder's nondomestic material. Fedrick argues that our decision in that case makes it clear that bidders are required to provide both information concerning the amount of nondomestic material to be used and supporting data to demonstrate the unreasonableness in cost of comparable domestic material.

Hitachi asserts that 51 Comp. Gen. 814 is distinguishable. Unlike Hitachi's bid, the bid in that case did not include information pertaining to the portion of nondomestic material to be used. According to Hitachi, if such failure had been permitted to be waived, the bidder could have identified the quantity of nondomestic construction material to be used subsequent to bid opening in a manner most advantageous to itself and prejudicial to other bidders. In clear contrast to that situation, Hitachi claims that its bid committed it both as to quantity and price of the nondomestic materials it proposed to use.

We agree with Hitachi's position. Because both Hitachi and Nissho filled out the top portion of form 7-1532, we conclude that sufficient information was submitted by both bidders to preclude any change after bid opening which would affect their relative standing among the other bidders. As to any data that a bidder submits based upon its canvass of domestic suppliers, the Government would still have an obligation to check the bidder's data against its own independent canvass of suppliers and its own cost estimates. Furthermore, any data supplied by a bidder would be subject to bias and thus suspect. Therefore, in view of the fact

that the Government's obligation remains the same whether or not the data on the bottom of the front of form 7-1532 is provided, the controlling aspect of whether a bid meets the requirements of the Buy American Act pertains to the information required by the top portion of the front of form 7-1532.

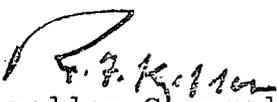
THE RESPONSIBLENESS OF HITACHI AND NISSHO

Fedrick also alleges that the bids of Hitachi and Nissho must be rejected on the grounds that neither company is a responsible bidder. Fedrick refers to Special Provision 1.2.9 of the IFB entitled "Performance and Supervision of Work By Contractor," which requires the contractor to perform on the site and with his own organization and forces on his payroll, work equivalent to at least 20 percent of the total amount of construction work at the site. Fedrick claims that while Hitachi and Nissho are large Japanese-controlled manufacturers or suppliers of a variety of equipment including pumps, they are not construction firms engaged in civil construction in the United States. Fedrick argues that the only logical implication from the background of these two companies is that they will have to rely completely on other firms for the installation of the pumps that they furnish. In addition, Fedrick claims with respect to Hitachi's pumps that the State of Nevada has had significant problems with them on other similar projects.

This Office does not review protests of affirmative determinations of responsibility unless either fraud is alleged on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Neither exception is present here. Furthermore, once the contract is awarded, compliance with Special Provision 1.2.9 of the IFB is a matter of contract administration which is for resolution by the contractor and the Government, and not this Office. Thorsen Tool Company, B-188271, March 1, 1977, 77-1 CPD 154.

Conclusion

The protest is denied.

  
Acting Comptroller General  
of the United States