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DECISION



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

FILE: B-203212

DATE: March 1, 1982

MATTER OF: The Goodyear Tire & Rubber Company

DIGEST:

IFB required that bids include all applicable taxes, and the low bidder excluded Federal Excise Tax because the firm expected that the contracting agency would issue a tax exemption certificate. Since there was no assurance, however, that such a certificate would be issued, acceptance of the bid would not necessarily limit the Government's obligation to the bid price. Accordingly, and since the bidder's failure to specify the amount of the tax excluded prevented evaluation of the bid on an equal basis with tax-included bids, the bid properly was rejected as nonresponsive.

The Goodyear Tire & Rubber Company (Goodyear) protests the rejection of its bid as nonresponsive by the U.S. Army Troop Support & Aviation Materiel Readiness Command (TSARCOM) under invitation for bids (IFB) DAAJ09-81-B-0061 (PFR) for pneumatic aircraft tires. TSARCOM determined that Goodyear's exclusion of Federal Excise Tax (FET) from its bid price made the bid non-responsive. Goodyear contends that it properly excluded FET from its bid because the tax does not apply to tires procured for military aircraft.

The protest is denied.

The IFB incorporated by reference the clause at Defense Acquisition Regulation (DAR) § 7-103.10(a) (1976 ed.), which provides:

"Except as may otherwise be provided in this contract, the contract price includes all applicable Federal, State and Local taxes and duties."

Bids were opened on March 6, 1981, and Goodyear was the low bidder. TSARCOM rejected Goodyear's bid as nonresponsive because the bid stated: "NOTE: PRICES QUOTED ARE EXCLUSIVE OF FEDERAL EXCISE TAX AND ARE BASED ON RECEIPT OF A PROPERLY EXECUTED EXEMPTION CERTIFICATE." Because the activity could not determine the amount of tax which, under TSARCOM's reading of the IFB, should have been included, Goodyear's bid could not be evaluated against tax-included bids. TSARCOM awarded the contract to The BFGoodrich Company (Goodrich), the only other bidder, on March 16.

Goodyear argues that it was not necessary to include FET in its bid price because military aircraft and their components are exempt from FET. Furthermore, Goodyear notes that it included an identical statement in its bid under a previous TSARCOM invitation for the same product and was awarded the contract, and states it has included such a statement and been issued exemption certificates on contracts with other activities for military aircraft tires.

We do not agree that FET is inapplicable within the meaning of the IFB's tax clause.

The tax clause indicated that the contract price would be presumed to include all applicable taxes. The regulation at DAR § 11-202 concerns FET on manufactured items. It states that no excise tax is imposed on sales of supplies and equipment generally used on military aircraft only under certain conditions: the purchase must be substantial; the contracting officer must determine at the time of purchase that the supplies are intended for use on military aircraft; and the administrative burden of insuring that the supplies are used for exempt purposes must not make the use of the exemption uneconomical. Regarding this last point, the regulation also states that "Administrative difficulties normally will not exist if the particular supply is suited exclusively for use in vessels or aircraft." The exemption is invoked by purchasing on a tax-exclusive basis and furnishing an exemption certificate as set out in DAR § 11-501.2.

Thus, before a contractor can avoid paying FET the contracting officer must make certain findings as discussed in DAR § 11-202, including a finding that the use of the exemption is economical. As a result of these conditions, the contractor cannot be assured that an exemption certificate will be issued, and the contractor therefore may have to pay FET.

The purpose of soliciting bids on a tax-included basis is to limit the Government's payment obligation to the bid price -- the contractor could not claim at a later date that the Government should reimburse the firm for any taxes that the firm ultimately has to pay which allegedly were not contemplated when the bid was submitted. See Domar Industries, 55 Comp. Gen. 1159 (1976), 76-1 CPD 361. The Government's acceptance of Goodyear's bid, however, would not necessarily limit the Government's contractual obligation to the bid price. Acceptance of the bid could only bind the bidder to what the firm offered, that is, to supply tires at a particular price which did not include FET. Because Goodyear's bid was so conditioned, if an exemption certificate were not issued Goodyear would be obligated to deliver tires under the contract only if the Government reimbursed the firm for the amount of FET paid.

Since there is no assurance that FET will not have to be paid, we believe that this case falls within the rule that where a tax is of doubtful applicability and a bidder states in its bid that it is not including the tax, the bidder must specify the tax and the amount excluded. 37 Comp. Gen. 864, 868 (1958); The George Sollitt Construction Company, B-190743, September 25, 1978, 78-2 CPD 224. The reason for that rule is not just to define the limit of the Government's obligation under the contract, but to insure that the bid can be evaluated on an equal basis with tax-included bids. 41 Comp. Gen. 289 (1961).

The Goodyear bid does not indicate the amount of the tax which was excluded from the bid price. In this respect, the burden is on the bidder, not the contracting agency, to calculate and state that amount in the bid. 41 Comp. Gen., supra. Goodrich, which did not condition

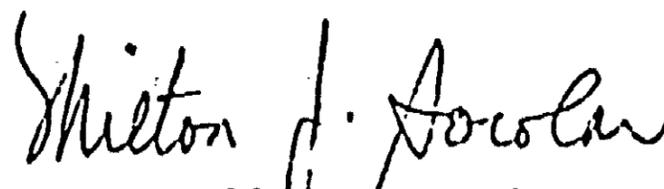
its bid, must be presumed to have included FET in the price. (This presumption is consistent with Goodrich's comments on the protest.) By submitting a bid on a tax-excluded basis in response to an invitation that contained the standard tax clause, without specifically identifying the amount of tax that has been excluded, Goodyear effectively prevented a comparison of the bid with those of its competitors. Goodyear's bid therefore properly was rejected as nonresponsive. The George Sollitt Construction Company, supra.

Furthermore, the responsiveness of a bid must be determined from the bid itself, and is not affected by past actions of the agency. Engineering Design & Development, B-185332, February 11, 1976, 76-1 CPD 92. Thus, Goodyear's contentions about prior contracts are not relevant to the acceptability of this particular bid. International Salt Company, B-200128, January 7, 1981, 81-1 CPD 142.

In light of the above, we assume that if TSARCOM has issued an FET exemption certificate to Goodrich, the contract price, which includes FET, will be adjusted downward accordingly.

The protest is denied.

Nonetheless, it is not clear to us why TSARCOM requires bidders to include FET in bids to supply items for which an exemption certificate presumably will be issued pursuant to DAR § 11-202. The result of TSARCOM's approach is that once the exemption certificate is issued, the contract price must be reduced by the amount of the tax. In this respect, it also is not clear whether the amount of the tax, and thus the price reduction, would be the same no matter which bid is accepted (assuming there is a tax-included bid that does not specify the amount of FET). If the price reduction would vary with each bidder, a competition based on bids that include unstated allowances for FET may not disclose the bid that actually will cost the Government the least. By separate letter, we are bringing our concerns to the attention of the Secretary of the Army.

for 
Comptroller General
of the United States