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DECISION

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

FILE: B-209214 **DATE:** February 28, 1983

MATTER OF: Illinois Constructors Corporation

DIGEST:

A bid that does not contain a specific itemization of the quantity and price of the proposed foreign item, as required by IFB and DAR § 7-2003.65, should not have been rejected as nonresponsive since the bid otherwise provided the necessary information.

Illinois Constructors Corporation (ICC) protests the rejection of its bid as nonresponsive to invitation for bids (IFB) No. DACW25-82-B-0024, issued by the Department of the Army, Corps of Engineers (Corps). The IFB was for construction of a local flood protection project in Winnebago County, Illinois. The Corps is holding award pending the outcome of our decision.

We sustain the protest.

The solicitation contained the following notice concerning the application of the Buy American Act, 41 U.S.C. §§ 10a-d (1976), which is the standard clause to be included in solicitations for construction contracts, Defense Acquisition Regulation (DAR) § 7-2003.65 (1976 ed.):

"13. NOTICE REGARDING BUY AMERICAN ACT (1970 SEP)

"The Buy American Act (41 U.S.C. 10-10d) generally requires that only domestic construction material be used in the performance of this contract. Exception from the Buy American Act shall be permitted only in the case of nonavailability of domestic construction materials. A bid or proposal offering nondomestic construction material will not be accepted until specifically approved by the Government. When a bidder or offeror proposes to furnish nondomestic construction material,

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> his bid or proposal must set forth an itemization of the quantity, unit price, and intended use of each item of such nondomestic construction material. When offering nondomestic construction material pursuant to this paragraph, bids or proposals may also offer, at stated prices, any available comparable domestic construction material, so as to avoid the possibility that failure of a nondomestic construction material to be acceptable under this paragraph will cause rejection of the entire bid."

ICC submitted a bid which provided that approximately 18-percent of the proposed contract price represents foreign content or effort. The firm priced all 43 items in the bidding schedule that required the insertion of a unit price and/or a total estimated amount. However, ICC's bid did not include a statement as to what item or items constituted the 18-percent figure, as required by the above notice. Because of this, the Corps rejected the bid.

We have held that the Buy American Act and the relevant provisions of the DAR incorporated by this IFB provide that domestic construction materials must be used unless the agency determines that domestic materials are unavailable or unreasonably priced. An agency through its own investigation may provide information concerning unavailability or unreasonable prices of domestic items. Key Constructors, Inc., B-205280, B-205280.2, April 8, 1982, 82-1 CPD 328. However, before an agency will be permitted to conduct its own investigation, it must be clear from a bid alone or in conjunction with an alternate bid what amount of the proposed material is foreign and the price of that material. In other words, the bid(s) must be responsive to the terms of the IFB before the agency can supply the information necessary to perform the Buy American Act evaluation. This eliminates the opportunity, after bid opening, to affect either the relative standing of the bid or the status as a domestic bid. See Key Constructors, Inc., supra; 51 Comp. Gen. 814 (1972).

ICC argues that its bid discloses that 100 percent of the foreign content in the bid was in item 3, steel sheet pile, and that this constituted the 18-percent figure ($201,294.18). ICC submits that the difference between the 18-percent figure and the total amount bid for this item ($278,600) represents installation of the steel. The protester admits that its bid did not specifically designate item 3 as an item of foreign origin, and the bid did not contain any information concerning domestic steel availability or prices. Nonetheless, it is ICC's position that its failure to furnish the aforementioned information should not render its bid nonresponsive. ICC believes that the Corps could obtain all and, in fact, had all the necessary information to make the determination of price unreasonableness and waive the Buy American Act.

The Corps contends that ICC's bid is nonresponsive since it did not indicate what percentage of the total amount of steel was foreign. Also, the Corps contends that since there is a high probability that ICC's bid is unbalanced when compared to the Government's estimate, it is a distinct possibility that the line item for steel sheet pile did not necessarily represent the installed cost of the steel or that all of the steel was foreign. Without that factor, no evaluation could be made concerning waiver of the Buy American Act. The Corps argues that without an indication of the percentage of foreign steel, ICC would be able to manipulate its bid after bid opening by submitting information either to obtain or forsake an award. Also, the absence of a specific percentage would render the determination of whether the price of domestic steel was unreasonable useless. In addition, the Corps submits that domestic steel was available from more than one domestic supplier. In light of the multiple sources for domestic steel, the Corps contends that it could not independently determine the price of the domestic steel.

ICC's bid clearly did not include an itemization of the quantity and price of each foreign item proposed as required by paragraph 13, above. However, this does not render ICC's bid nonresponsive. ICC submits, the Corps does not refute, and we are convinced that only item 3 in this IFB contains material that would be obtained from a foreign source. Accordingly, the 18-percent figure of foreign content in ICC's bid price, $201,294.18, can only relate to the steel sheet piling. Since this contract is for construction and because there was no line item for installation, it is reasonable to conclude that the price for item 3 ($278,600) included an amount for installation of the steel. Also, there is nothing in the record to support the Corps' view that part of the price bid for this item could be for domestic steel. Therefore, we do not find that ICC in this instance would be able to manipulate its bid to its advantage.

Having found the ICC bid responsive, there is only one additional factor needed to determine whether the Buy American Act should be waived, that is, if domestic steel is unreasonably priced. As noted above, an agency may provide this type of information through its own investigation. Therefore, we recommend that the Corps now consider ICC's bid and conduct the necessary analysis to determine whether domestic steel is unreasonably priced. The Corps should award the contract to ICC if it is determined that domestic steel is unreasonably priced. This determination is not subject to our legal objection. Key Constructors, Inc., supra; United States Steel Corporation, B-194403, February 11, 1980, 80-1 CPD 118.

The protest is sustained.

for Milton J. Socolar
Comptroller General
of the United States