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DECISION



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

26991

FILE: B-213493

DATE: December 12, 1983

MATTER OF: Alabama Metal Products, Inc.

DIGEST:

A bid which was qualified "all or none" as to three geographic zones on which prices for drawer units were sought, and which was low on only two of the zones, was properly rejected under a solicitation clause which permits the consideration of an "all or none" bid only if it is low with respect to each item upon which an individual award may be made.

Alabama Metal Products, Inc. (AMPCO) has filed suit in the United States Claims Court seeking injunctive and declaratory relief in connection with invitation for bids No. FNPS-S1-1532-A issued by the General Services Administration (GSA). Alabama Metal Products, Inc. v. The United States, Action No. 610-83C. By order dated October 17, 1983, the Claims Court suspended the proceeding and requested our decision on the issues raised by AMPCO.

GSA issued the invitation to secure a Federal Supply Schedule contract for an indefinite quantity of stackable beds and drawer units. AMPCO's bid on the drawer units was designated "all or none" as to the three geographic zones for which prices were sought. The bid was low on two zones, second low on the remaining zone and low overall. GSA rejected the bid, however, because in its view the solicitation permits consideration of an all or none bid only if it is low on each of the three zones. AMPCO essentially contends that the solicitation does not limit the consideration of all or none bids as GSA believes, and asserts that it should be awarded the contract.

We believe the bid properly was rejected.

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The bid schedule set forth in the solicitation divides the requirement into two groups of furniture: Group One--stackable beds, and Group Two--drawer units. Within each group, bidders are required to submit a price for domestic shipment packaging and for overseas shipment packaging, although all goods will be delivered to destinations in the United States. The schedule lists "weight factors" for the stated purpose of evaluating the separate domestic and overseas packaging prices. The solicitation also requests separate prices for delivery in each of three geographic zones within the continental United States. Thus, for the drawer unit group upon which AMPCO bid, the schedule is as follows:

Group 2 - Drawer Units	Weight Factors			Price		
	Zones			Zones		
	<u>1</u>	<u>2</u>	<u>3</u>	<u>1</u>	<u>2</u>	<u>3</u>
a. Domestic Shipment	3	1	2	---	---	---
b. Overseas Shipment	4	1	2	---	---	---

Clause 301N, "Method of Award," describes the following procedure for the evaluation of bids:

"Award will be made in the aggregate by group for each zone. The low aggregate offeror will be determined by multiplying the unit price offered on each item by the weight factor shown, and adding the resultant extensions. In order [to] qualify for an award on a group for a zone, prices must be offered on each item in the group for the zone."

GSA received seven bids on Group Two. Following the application of the weight factors to the domestic and overseas prices, AMPCO was low on Zones 1 and 2, while Joerns Furniture was low on Zone 3:

	<u>Zone 1</u>	<u>Zone 2</u>	<u>Zone 3</u>
AMPCO	\$360.25	\$ 99.84	\$234.84
Joerns Furniture	393.75	112.20	229.00
Baker Manufacturing Co.	374.05	115.75	251.50

AMPCO's bid, however, had an asterisk beside each price and a corresponding notation that, "All pricing predicated on contract for all zones both domestic & overseas shipments."

AMPCO's aggregate price for the three zones is \$694.93, while the total of the low prices excluding AMPCO's prices is \$715.25. GSA, however, rejected AMPCO's all or none bid because AMPCO was not low on Zone 3. GSA premised its rejection on solicitation paragraph 64, "All or None Offers":

"(a) Unless awards in the aggregate are specifically precluded in this solicitation, the Government reserves the right to evaluate offers and make awards on an 'all or none' basis as provided below:

"(b) (Applicable to definite quantity contracts.) An offer submitted on an 'all or none' or similar basis will be evaluated as follows: The lowest acceptable offer exclusive of the 'all or none' offer will be selected with respect to each item (or group of items when the solicitation provides for aggregate awards) and the total cost of all items thus determined shall be compared with the total of the lowest acceptable 'all or none' offer. Award will be made so as to result in the lowest total cost to the Government.

"(c) (Applicable only to requirements and indefinite quantity contracts.) An offer submitted on an 'all or none' or similar basis will not be considered unless the offer is low on each item to which the 'all or

none' offer is made applicable. The term 'each item' as used in this clause refers either to an item that under the terms of this solicitation may be independently awarded, or to a group of items on which an award is to be made in the aggregate."

In GSA's view, paragraph 64(c) applies to this procurement since the contract is for an indefinite quantity of goods. As GSA interprets 64(c), it does not permit the consideration of AMPCO's bid since it is not low on each geographic zone.

(1) Whether paragraph 64(b) or 64(c) applies:

AMPCO contends that GSA has misinterpreted the solicitation, and in particular paragraph 64. AMPCO points out that several decisions by our Office, such as 47 Comp. Gen. 658 (1968); 42 Comp. Gen. 748 (1963); and Steel King Industries, Inc., B-209239, May 5, 1983, 83-1 CPD 473, establish that competitive bidding principles mandate award to an all or none bidder if the award would result in the lowest total price, unless the solicitation proscribes the consideration of such bids. AMPCO argues that the solicitation does not preclude the submission of or limit the consideration of all or none bids because, in its view, paragraph 64(b), which unambiguously permits the consideration of all or none bids, is the operative provision here, not 64(c).

AMPCO reaches the conclusion that paragraph 64(b) controls despite the parenthetical notation that it applies to definite quantity contracts and the similar notation that 64(c) applies to indefinite quantity contracts. In AMPCO's view, paragraph 64(c) is intended to apply only to those indefinite quantity contracts in which it is not possible to determine the low aggregate bidder. Here, since a means for determining the low aggregate price (weight factors) is supplied, AMPCO believes there is no reason to limit the consideration of all or none bids and 64(b) must apply. AMPCO contends that the parenthetical instructions may be disregarded on the basis of clause 301B, a Method of Award clause which was contained in the initial solicitation but was deleted in its entirety prior to bid opening and replaced by clause 301N, which is quoted above. Clause 301B stated that:

"The Government intends to make awards on an item-by-item basis. However, if an 'all or none' or similar type offer is received, offers on the items to which the 'all or none' offer applies will be evaluated and award made in accordance with Para.(b) of Clause 64, 'All or None Offers' of this solicitation."

Even though this clause was eventually deleted from the solicitation, AMPCO asserts that the designation of 64(b) as controlling demonstrates that 64(b) and 64(c) are not self-effectuating based upon whether the solicitation is for a definite or indefinite quantity contract; rather, one or the other provision must be called into play by other provisions in the solicitation. Since the new Method of Award clause (301N) does not mention 64(b) or 64(c), argues AMPCO, bidders must look to other more implicit direction in the solicitation to determine which clause applies.

In this regard, AMPCO finds an indication that 64(b) rather than 64(c) applies in the fact that the new Method of Award clause calls for an aggregate group award, combining domestic and overseas packaging prices, a practice which, in AMPCO's view, is consistent with 64(b) and inconsistent with 64(c).

AMPCO also believes that the weight factors set forth in the price schedule indicate that 64(b) applies. Although the weight factors are included for the stated purpose of evaluating the mandatorily aggregated domestic/overseas shipment prices, AMPCO points out that the weights could also be used to evaluate any bid aggregated with respect to the zones.

We reject AMPCO's interpretation of the solicitation. We regard the instructions parenthetically set forth in 64(b) and (c) as precise and unambiguous: 64(b) applies to definite quantity contracts and 64(c) applies to indefinite quantity contracts. AMPCO's interpretation that 64(c) applies only to those indefinite quantity procurements in which it is not possible to determine the low aggregate bidder is contrary to the clear, unqualified language of that paragraph. We see no basis to read the solicitation provision other than as it is written.

Further, we reject AMPCO's argument that the paragraphs are not self-effectuating. The initial Method of Award clause which designated 64(b) as controlling might have created an inconsistency had it remained in the invitation. The GSA Federal Supply Service Clause Manual, however, indicates that clause 301N is to be used only in solicitations for definite quantity contracts. Recognizing this error, GSA deleted the clause, and removed the inconsistency. At the time the clause was deleted, it became a nullity with respect to this procurement so that AMPCO's assertion that the initial inclusion of the clause established that the parenthetical instructions were not self-effectuating simply is not tenable. Again, we believe the clear language of clause 64 should be given effect.

Although AMPCO has referred to provisions which in its view implicitly call 64(b) into play, in view of our finding that the paragraphs are self-effectuating, those provisions lose their significance. In any event, we point out that, contrary to AMPCO's assertion, the award scheme set forth in clause 301N (aggregate award by group) is consistent with paragraph 64(c) which explicitly countenances the aggregate award of groups of items. Also, the inclusion of weight factors which could be used for aggregation across zones but were not so intended does not establish, as AMPCO's arguments in this regard seem to imply, that the factors must be used for that purpose.

In view of the above, 64(c) must be viewed as the operative provision with regard to all or none bids.

(2) Whether paragraph 64(c) mandates the rejection of AMPCO's bid:

The question remains whether under paragraph 64(c), the rejection of AMPCO's all or none bid was proper. AMPCO argues that 64(c) only limits the consideration of those bids that are qualified as to items (e.g., overseas or domestic packaging) or groups of items. AMPCO's qualification does not relate to items or groups of items, but rather to geographic zones. Thus, argues AMPCO, the consideration of its bid is not limited by 64(c).

We disagree. Paragraph 64(c) permits the consideration of an all or none bid only if it is low with respect to each item. "Item," in this context, refers to any requirement that may be independently awarded. As noted, the Method of Award clause provides that for every group there will be an independent award for each of the three zones. The only sensible interpretation of paragraph 64(c) is that it requires bids qualified as all or none with respect to zones to be low on each zone in order to be considered for award.

The reason paragraph 64(c) limits the consideration of all or none bids in requirements or indefinite quantity procurements is that in such procurements there is no assurance that the low aggregate bid will actually represent the lowest cost to the government. If ordering patterns differ from the prior years' experience upon which weight factors or estimates are based, an apparently low aggregate bid may well result in a higher total cost than the next-low combination of individual bids. Since a discrete award is contemplated for each zone and the distribution of eventual orders across zones may vary from the ratios established by the weight factors, there is no assurance that AMPCO's bid will actually represent the lowest cost to the government. Thus, to interpret the paragraph as AMPCO urges and permit award to AMPCO would contravene the purpose of the paragraph and create an undue risk of award to a bidder that will not actually provide the best price to the government.

(3) Whether the solicitation is fatally defective:

AMPCO suggests that if its bid, which in its view represents the lowest cost to the government, cannot be considered for award, the solicitation is fatally defective. First, AMPCO asserts that interpreting the solicitation as precluding the consideration of its bid would render the solicitation defective under our decision in Martin & Turner Supply Company, 54 Comp. Gen. 395 (1974), 74-2 CPD 267. In Martin & Turner we examined an all or none provision similar to 64(c) and concluded that, in the absence of circumstances reasonably establishing that the interest of the government would be served by prohibiting the submission of bids on an all or none or combination basis, such a prohibition unduly restricts competition and is contrary to the purpose of the statutes governing public procurement.

Second, AMPCO asserts that if the weight factors are sufficiently reliable to be used to aggregate and compare the individual prices for domestic and overseas packaging, then the weight factors should also be sufficiently reliable to be used to aggregate and compare individual prices for the zones and select a low bidder on that basis. AMPCO believes that GSA's failure to use the weight factors for the latter purpose manifests a doubt on the part of GSA as to their reliability and that the invitation therefore is defective and should be canceled.

These arguments are without merit.

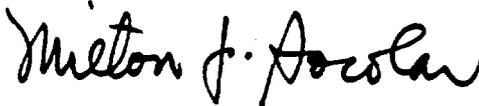
We point out that in Martin & Turner, the solicitation was for definite quantities of goods, and in such procurements there rarely are compelling reasons to restrict all or none offers. We have on several occasions, however, explicitly approved of restrictions on all or none bids in the context of indefinite quantity contracts. See 47 Comp. Gen. 682 (1968); B-156224, April 21, 1965. In an indefinite quantity contract, the government is not obligated to purchase quantities in accordance with the estimates (or weight factors) contained in the solicitation, and if actual orders deviate from the estimates, the government may pay more to the all or none bidder than it would have if award had been made on an item by item basis. There is nothing illegal in the government's protecting itself against such uncertainty, even though there is the risk that doing so may increase the overall cost of the contract.

Thus, we believe that in the context of indefinite quantity procurements contracting activities have the discretion to permit the consideration of all or none offers without restriction, if doing so is in the government's best interest, or to limit all or none bids in a particular case on the basis that there is always some uncertainty as to whether the low evaluated all or none bid will be the actual low bid. Moreover, we see nothing wrong with permitting certain types of all or none offers while restricting others in the same solicitation, as the government's best interests dictate.

In this case, by requiring all or none bids to be low on each item, GSA decided to limit the consideration of most types of all or none bids because of the uncertainty generally inherent in using weights to evaluate bids, not, as AMPCO suggests, because these particular

weights are unreliable. At the same time, GSA determined that the mandatory aggregation of packaging prices, despite the existence of the same uncertainty, was in the government's best interest because aggregation of packaging prices was required to assure the awardee of sufficient quantities to offer the government reasonable prices and to obtain adequate competition for overseas items. We do not believe GSA's determination that using the weights with respect to the packaging prices is in the government's best interest commits it to determine that the use of weights with regard to the prices for the zones is also in the government's best interest. Under the circumstances, we do not find the solicitation defective so that award under it would be illegal.

In conclusion, we find that paragraph 64(c) appropriately prohibits the consideration of AMPCO's all or none bid since it was not low on each of the three zones. Therefore, GSA's rejection of the bid was proper.

for 
Comptroller General
of the United States