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DECISION



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

FILE: B-216954 DATE: May 16, 1985

MATTER OF: Ashland Chemical Company

DIGEST:

Award under a deficient solicitation which omitted the payment due date does not justify termination of the awarded contract where the government's needs will be met and there is no evidence in the record that other bidders were prejudiced.

Ashland Chemical Company protests the award of a requirements contract for aircraft fuel to Koch Refining Company by the Department of the Air Force, San Antonio Air Logistics Center, Texas, under invitation for bids (IFB) No. F41608-84-B-0182. Ashland contends that the Air Force should resolicit its requirements because no responsive bids were received under the solicitation and because the Air Force, in any event, failed to obtain adequate competition and reasonable prices. Specifically, Ashland maintains that the Air Force should have rejected Koch's bid, the only one received, as nonresponsive because Koch had inserted the words "net-15 days" in the solicitation's prompt payment discount section, allegedly in contravention of the Prompt Payment Act, 31 U.S.C. §§ 3901-3906 (1982). We deny the protest.

The IFB did not establish a specific payment due date under any resulting contract. The IFB merely incorporated the following clause:

"PAYMENTS (APR 1984)

"The Government shall pay the Contractor, upon the submission of proper invoices or vouchers, the prices stipulated in this contract for supplies delivered and accepted or services rendered and accepted, less any deductions provided in this contract"

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On the front page of its bid, Koch inserted the following in the solicitation's prompt payment discount section:

"No discount for early payment. Payment terms-net 15 days from govt. receipt of invoice."

Under the Prompt Payment Act, supra, which essentially provides that the government must pay interest penalties on overdue contract payments, the required payment due date is that specified in the contract, or, if none is specified, the 30th day after receipt of a proper invoice. According to Ashland, because the solicitation was silent as to any required payment date, the 30-day period of the Prompt Payment Act should be "read into" the solicitation. Alternatively, even if the solicitation is interpreted as remaining silent on payment terms, Ashland argues that the Prompt Payment Act by its terms would establish a 30-day required payment date under the resulting contract. Ashland therefore believes that Koch either deviated from the statutory implied terms of the solicitation or attempted to impose on the government a beneficial additional term which was not contemplated by the agency and which altered the agency's preexisting obligation to make payment on a 30-day basis. We think that Koch's bid was properly accepted by the Air Force.

In order to be responsive, a bid must contain an unequivocal offer to provide the requested items in total conformance with the material terms of the solicitation, and any bid that does not conform is nonresponsive and must be rejected. A material deviation is one that affects the price, quality, quantity or delivery of the goods or services offered. Fluke Trendar Corp., B-196071, Mar. 13, 1980, 80-1 CPD ¶ 196. Ordinarily, a bid which takes exception to a solicitation's express payment terms is nonresponsive and should be rejected. See Buckeye Pacific Corp., B-212183, Aug. 30, 1983, 83-2 CPD ¶ 282 (bid indicating "net-20" under solicitation incorporating a 30-day payment term). This is principally because beneficial terms offered by a bidder that are inconsistent with the solicitation obviously could provide that bidder with a bidding advantage over its competitors. Id. We note here, however, that the Prompt Payment Act does not require a minimum 30-day payment term in the contract. Similarly,

OMB Circular A-125, August 19, 1982, which implements the Prompt Payment Act, only requires that a payment due date be included in a contract. While the government should specify the payment due date in the solicitation to avoid disparate bias, it can be reasonably argued that by remaining silent, the government has tacitly agreed to permit bidders to specify the payment terms as part of their bids. Hence, it can also be reasonably concluded that the 15-day payment due date is included in Koch's contract as a result of the award process consistent with the Prompt Payment Act and the requirements of OMB Circular A-125. We therefore find the bid to be responsive since the Prompt Payment Act does not mandate rejection of the bid.

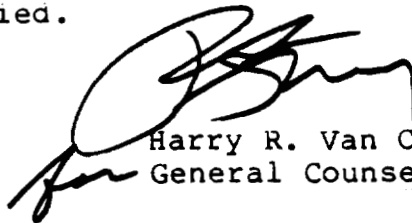
Nonetheless, because this solicitation was silent as to payment terms, the solicitation was deficient. We think it is essential that a solicitation of this type contain a required payment due date so that different bidders will not potentially offer different payment terms. By letter of today, we are so advising the Secretary of the Air Force.

However, the fact that a solicitation is deficient in some ways does not justify cancellation after bid opening, if award under the IFB would meet the government's actual needs and there is no showing of prejudice to other bidders. Richard Hoffman Corp., B-212775.2, Dec. 7, 1983, 83-2 CPD ¶ 656. We think the same principle applies where, as here, a contract has been awarded under a deficient solicitation. Here, the awarded contract will admittedly satisfy the government's actual needs and the agency is agreeable to Koch's payment terms. More importantly, since Koch was the only bidder, we see nothing in the record to support a conclusion that award under the IFB prejudiced other bidders.

Finally, the protester contends that the Air Force did not obtain adequate competition or reasonable prices under this solicitation. We agree that the propriety of a particular procurement generally depends on whether the government obtained adequate competition and reasonable prices. See Space Services International Corporation, B-207888.4, et. al., Dec. 13, 1982, 82-2 CPD ¶ 525. However, adequate competition may still result when only a small number of responsive bids or even one bid is

received, so long as the agency made the required effort to achieve competition. Reliable Elevator Corp., B-191061, Apr. 27, 1978, 78-1 CPD ¶ 330. Here, Koch submitted a responsive bid under the threat of competition (16 potential sources were solicited), the agency considers Koch's price to be reasonable, and there is no evidentiary support in the records to find otherwise.

The protest is denied.



Harry R. Van Cleave
for General Counsel