



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hicklin GM Power Company

File: B-222538

Date: August 5, 1986

DIGEST

1. The intent of the term "commercial product" used in a clause in a government solicitation requiring the delivery of a "standard commercial product" is the use that appears in the Federal Acquisition Regulation. A product is not a "commercial product" when its only use is for a military application.
2. The agency's waiver of a commercial product clause, after bid opening, is proper where the IFB required a product which is only used by the government to test military vehicles and the clause was included in the IFB by mistake.
3. A bid which, on its face, takes no exception to the IFB's requirements is responsive, since it is an unqualified promise to do the exact thing called for in the solicitation.

DECISION

Hicklin GM Power Company (Hicklin) protests the award of a contract to Aidco, Inc., under invitation for bids (IFB) No. M00027-85-B-0048, issued by the Marine Corps (Corps). The procurement is for the acquisition of automatic transmission test stands. Hicklin complains that the award to Aidco is improper because Aidco's bid was nonresponsive to the commercial product requirement set forth in the IFB. Hicklin urges that it was the only bidder whose bid met the requirement and, therefore, that the Corps had no legitimate basis to waive the requirement. Accordingly, Hicklin asserts that it is entitled to the award as the sole responsive bidder.

We deny the protest.

BACKGROUND

The IFB was issued on September 3, 1985, with an amended bid opening date of October 10. The IFB sought bids for eight automatic transmission test stands plus one first article unit for testing, related technical data, optional repair parts, and four optional test stands. The test stands are needed by the Corps to test automatic transmissions in both wheeled

and tracked vehicles. Accordingly, the IFB required the test stands to have the special capability to test cross-drive transmissions found only in tanks and other military tracked vehicles.

At issue in the case, the IFB contained the following clause:

"STANDARD COMMERCIAL PRODUCT. The machine shall be a standard commercial product which has been advertised and produced by brand names and make or model number or other appropriate nomenclature, by which such product has been offered for sale to the public, 12 months prior to the date of the Invitation for Bid/Request for Proposal. The bidder shall submit the proof, of this offering a commercial product, with his bid. The Contracting Officer will determine the acceptability of this proof. Failure of the bidder to furnish proof of his offering a standard commercial product shall be cause for rejection of his bid."

Bids were received from Aidco, ACL-FILCO Corp., and Hicklin, lowest to highest in price, respectively. Upon evaluation, the Corps determined that no bidder had complied with the commercial product requirement of the IFB. Neither Aidco nor ACL-FILCO submitted with its bid any evidence of the commercial availability of its product. With regard to Hicklin's offered test stand, the Corps obtained a report from the appropriate Defense Contract Administration Services Management Area which indicated that Hicklin had never sold its product to the commercial market.

Although the Corps determined that all three bids were nonresponsive to the commercial product requirement, the Corps decided that it would be inappropriate to cancel the IFB and resolicit, because bids had already been exposed and an immediate resolicitation under essentially the same terms (absent the commercial product requirement) would result in an auction situation among the bidders. The Corps determined it would be in the government's best interests simply to waive the requirement so as to allow an award to be made. In the Corps' view, a waiver would not prejudice any bidder because none could possibly meet the requirement, since cross-drive transmissions are only used in tracked military vehicles. Therefore, the Corps waived the requirement and reevaluated the responsiveness of the submitted bids. Upon receipt of a favorable preaward survey, the Corps awarded the contract to Aidco as the low bidder. Hicklin then protested the award to this Office.

PROTESTER'S POSITION

Although Hicklin agrees that cross-drive transmissions are employed exclusively by the military, it disputes the Corps' determination that test stands with cross-drive testing capability cannot be deemed to be commercially available products. Hicklin contends that the Corps has

misinterpreted the commercial product clause of the IFB as requiring that the offered products have a history of actual prior sales to the public, rather than as requiring only that the products have been previously offered for sale on a commercial basis. Hicklin asserts that its product brochures, which it submitted with its bid, clearly show that the firm has offered for sale to the general public an automatic transmission test stand with the capability to test cross-drive transmissions since the beginning of 1983. Although Hicklin acknowledges that it has sold its test stand only to the Department of the Army so far, the firm urges that this fact fails to establish that its test stand is not a commercial product within the meaning of the specific IFB clause. Hicklin points out that it recently offered to sell its product to a commercial entity in Europe and to a domestic original equipment manufacturer, although neither offer resulted in a sales contract. Thus, Hicklin contends that the Corps' blanket waiver of the requirement was improper since Hicklin had submitted a responsive bid.

ANALYSIS

From our reading of the specific IFB clause, we conclude that Hicklin's bid was not responsive to the IFB's commercial product provision.

The Federal Acquisition Regulation (FAR), §§ 11.001 (FAC 84-5, Apr. 1, 1985) defines a "commercial product" as a product sold or traded to the general public in the course of normal business operations at prices based on established catalog or market prices. FAR, §§ 15.804-3(c) defines (1) "established catalog prices" as requiring, among other things, a record of current or last sales prices to a "significant number of buyers constituting the general public;" and (2) "commercial items" as "supplies or services regularly used for other than Government purposes and sold or traded to the general public in the course of normal business operations."

While it is true that the solicitation clause does not literally require actual sales (the product need only have been "offered for sale to the public"), we believe that the only reasonable approach to discerning the meaning and intent of the phrase "commercial product" is the use that appears throughout the FAR. Of significance, we believe, is the consistent use of the term "commercial product" in conjunction with "the public" or "the general public." Under the FAR, the "public" or "general public" has a meaning that is clearly "other than" the government. We do not think that a product may be deemed to be a standard commercial product when its only use is for the government, e.g., a military application. Nor do we find that the protester's equipment is a "commercial product" within the meaning of the clause, merely because it is fully developed and has been offered for sale to a European source and a domestic manufacturer. Commercial product clauses are not intended to be used in solicitations for military products.

As a general rule, when an IFB requires a commercial product, the contracting agency must determine that the low bid is responsive to that requirement before it can make award to the low bidder. See Coast Iron & Machine Works, Inc., 57 Comp. Gen. 478 (1978), 78-1 CPD ¶ 394; Davey Compressor Co., B-203781.2, May 10, 1982, 82-1 CPD ¶ 444. Any waiver of that requirement is improper. Id. However, since all 3 bids were nonresponsive to the commercial product requirement we conclude that the Corps' waiver of the commercial product requirement and award to Aidco were proper under the circumstances.

Hicklin also alleges that Aidco's offered test stand does not conform to the IFB's requirements in several areas, and, hence, should be rejected as nonresponsive. For example, Hicklin urges that Aidco's machine is designed with an integral power unit, rather than with a remote power unit as called for in the specifications. Moreover, Hicklin contends that the hydrostatic pump utilized in Aidco's machine is operable at only half the RPM rate required by the solicitation, and that the machine's overall construction is not heavy duty as mandated by the specifications.

To be responsive, a bid must represent an unequivocal offer to perform the exact thing called for in the solicitation such that acceptance of the bid will bind the contractor in accordance with the solicitation's material terms and conditions. Spectrum Communications, B-220805, Jan. 15, 1986, 86-1 CPD ¶ 49. Thus, a bid must be rejected if it indicates that the product offered will not comply with the specifications. Id.; Jarrett S. Blankenship Co., B-213294 et al., Apr. 2, 1984, 84-1 CPD ¶ 370. However, we have examined the bid as submitted by Aidco, and we must agree with the Marine Corps that, on the face of the bid--there being no requirement for the submission of descriptive product literature to establish conformity with the specifications--Aidco did not qualify its offer in any respect, that is, that it was an unqualified promise to do the exact thing called for in the solicitation. Therefore, the bid was responsive. IMPESA International, Inc., B-221903, June 2, 1986, 86-1 CPD ¶ 506; J.D. Bertolini Industries, Ltd., B-219791, Aug. 19, 1985, 85-2 CPD ¶ 193. Whether Aidco will ultimately meet its commitment to fulfill the IFB's requirements is a matter of contract administration within the ambit of the agency, not this Office. See AT&T Technology Systems, B-220052, Jan. 17, 1986, 86-1 CPD ¶ 57. Moreover, as we believe the Marine Corps correctly points out, the requirement for first article delivery and testing adequately protects the government's interest because the Marine Corps will determine at that time whether Aidco's offered test stand is acceptable, and, if not, will proceed to terminate Aidco's contract and resolicit the requirement at the firm's expense. To the extent Hicklin contends that Aidco's significantly lower bid price is evidence of the firm's lack of capability to furnish an acceptable test stand, it is well-settled that a protester has no legal basis to object to the submission or acceptance of a competitor's below-cost bid if that is the case here, as the low bidder's ability to perform the contract at its bid price is a matter of responsibility for the agency to

determine before contract award. K&P Inc., B-219608, Aug. 1, 1985, 85-2 CPD ¶ 121. By awarding Aidco the contract, the Marine Corps has, by regulation, determined Aidco to be responsible. FAR, § 9.105-2(a)(1); see also Ameriko Maintenance Co., B-216247, Sept. 12, 1984, 84-2 CPD ¶ 287.

The protest is denied.

for 
Harry R. Van Cleve
General Counsel