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Golden

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hooven Allison--Request for Reconsideration

File: B-224785.2

Date: March 6, 1987

DIGEST

1. Where it is unclear from record when the protester was advised that its bid had been found nonresponsive, an event which would start the time for filing a protest running, protest filed with the General Accounting Office following denial of an agency-level protest against agency determination that firm's bid was nonresponsive will not be considered untimely for failure to file initial timely protest with agency.

2. Bid for the supply of rope, submitted on the basis of price per pound, rather than price per reel as required by the solicitation, is nonresponsive where bid does not contain precise basis to convert price per pound to price per reel and thus bidder's price per reel cannot be determined from the face of the bid.

3. When a bidder does not bid on the precise quantity, measurement or volume called for in the invitation for bids, the bid must be rejected as nonresponsive unless the intended price for the proper quantity, measurement, or volume can be determined from the face of the bid or the effect or the deficiency on the price of the bid is clearly de minimus and waiver would not be prejudicial to other bidders.

DECISION

Hooven Allison requests reconsideration of our decision in Hooven Allison, B-224785, Oct. 10, 1986, 86-2 C.P.D. ¶ 423, in which we dismissed as untimely Hooven's protest of the General Services Administration's (GSA) rejection of Hooven's bid as nonresponsive under invitation for bids (IFB) No. 7PRT-52878/B5/7SB. Hooven's bid was rejected because the firm bid on the basis of "per pound" of rope instead of "per reel" as required by the IFB Schedule and Hooven's price per reel could not be determined from its bid. Hooven not only

objected to the rejection of its bid but claimed the IFB was ambiguous as to the requirement to bid "per reel."

On reconsideration, we reverse our dismissal of Hooven's protest, consider it on the merits and deny it.

We dismissed Hooven's protest as untimely under our Bid Protest Regulations which require that protests be filed with either the contracting agency or our Office within 10 working days after the basis of the protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1986). Hooven's protest submissions indicated that Hooven's protest to the agency, filed on September 4, 1986, was untimely since it was filed more than 10 working days after August 13, when Hooven first learned that the agency had concluded its bid was nonresponsive and would not be considered for award. See 4 C.F.R. § 21.2(a)(2); AMI Industries, Inc., B-222561, June 5, 1986, 86-1 C.P.D. ¶ 527. Where, as in this case, a protest is first filed with the contracting agency, a subsequent protest to our Office will be considered timely only if the initial protest was timely. 4 C.F.R. § 21.2(a)(3). Since we concluded that Hooven's initial protest to the agency was not timely filed, the subsequent protest to our Office filed on September 25 was also untimely and could not be considered on the merits. AMI Industries, Inc., B-222561, supra. We also noted that the fact that the agency considered the untimely protest on the merits did not alter this result, since our timeliness regulations may not be waived by action or inaction of a procuring activity. Ardrox, Inc., B-221241.2, Apr. 30, 1986, 86-1 C.P.D. ¶ 421.

In its request for reconsideration, Hooven confirms that the contracting officer advised it on August 13 that its bid was nonresponsive and of the basis for her decision. Hooven also admits that GSA discussed with Hooven its right to protest if it disagreed with the decision. Hooven states, however, that when it asked the contracting officer if it would receive a written notice of the agency's position, it was told that it would, but because of a heavy workload, the contracting officer could not state when it would be sent. Hooven states it was never advised at this meeting that the contracting officer's decision was "official" or that under our Bid Protest Regulations, Hooven had 10 working days to file its protest. Hooven asserts that it acted diligently in pursuing a written decision from GSA that its bid was nonresponsive and that GSA never advised it of the filing rules under our Bid Protest Regulations, even though Hooven continued to ask about its options if it disagreed with the decision.

In response to Hooven's request for reconsideration, we requested that GSA provide us with a complete report concerning the circumstances of Hooven's protest and its merits. GSA argues that our dismissal of Hooven's protest as untimely was correct and should be affirmed.

Although we have stated that an oral notification of the basis for protest is sufficient to begin the 10-day period for filing a protest running, and that a protester may not delay filing of protest until receipt of written confirmation of the contracting agency's position, see Koenig Mechanical Contractors Inc., B-217571, Apr. 4, 1985, 85-1 C.P.D. ¶ 389, it is not clear from the record of the August 13 meeting that Hooven understood that the contracting officer had made a final determination that the firm's bid was nonresponsive. Rather, it appears that the protester viewed the meeting as informational and as an opportunity to present the firm's position before a determination of nonresponsiveness was made. In this connection, the contracting officer's memorandum of the meeting states that:

> "[Hooven] wanted to know if our Legal Counsel or Engineering department could override my decision. I told him that I was required to obtain legal concurrence on the determination of non-responsiveness and would be required to obtain legal concurrence of my response to a protest. . . "

It appears from this record that Hooven reasonably may have believed that a final decision to reject its bid had not yet been made and that it had a right to wait for this determination. It is our practice to resolve doubts about timeliness in favor of the protester. Consolidated Bell, Inc., B-220412, Feb. 6, 1986, 86-1 C.P.D. ¶ 136. We shall therefore consider the protest on the merits.

Hooven's bid was rejected because Hooven bid on the basis of per pound of rope, not per reel as required by the IFB Schedule and Hooven's price per reel could not be determined from its bid. Hooven contends that under the IFB the price per pound could be converted to a price per reel and thus its bid was responsive.

Initially, Hooven complains that the IFB was ambiguous. Although Hooven apparently recognizes that the IFB generally called for prices per reel, it maintains that, under prior solicitations, bidding was permitted on a price per pound basis and that the current solicitation failed to highlight the change in unit of measure or otherwise indicate that price per pound was an unacceptable basis for bidding. We disagree with Hooven that the IFB was ambiguous.

The solicitation expressly notified bidders that prices were being solicited on a price per reel basis. The IFB's item description solicits nylon rope on a 600 foot reel. The packing and packaging information similarly states the "rope shall be furnished on a reel." In the IFB Schedule, the unit of rope is indicated as "RL" and a price per unit is requested in the blank immediately to the right of the letters "RL," thus indicating that a price per reel of rope was being solicited.

Also, the record indicates that GSA, by an amendment to the IFB, receipt of which was acknowledged by Hooven, deleted a statement indicating "prices per pound based on net weight," for items 36-52, which apparently had been included in the original IFB through inadvertence. This should further have notified Hooven that GSA was soliciting reels of rope.

Hooven points out item H of paragraph 6.2 of the specification provides that ". . . rope shall be purchased on a price per pound basis. . . ." However, the IFB Schedule, purchase description and amendment all specify the reel as the unit of purchase and, thus, it would have been unreasonable for a bidder to rely on this isolated reference to price per pound. Furthermore, the order of precedence clause applicable to sealed bidding provides that where there is an inconsistency in the solicitation, the Schedule (excluding the specification) takes precedence and here, the Schedule solicits "reels."

Next, Hooven argues that the IFB referred to military specification (Milspec) MIL-R-173430 and amendment No. 1, dated August 9, 1971, which would have permitted GSA to convert Hooven's price per pound to a price per reel. Hooven claims that the weights contained in Table II or Table III of the Milspec provide an accurate basis for conversion. Alternatively, the rope industry has specifications issued by the Cordage Institute which would also permit a basis for conversion of the bid for evaluation. In rejecting Hooven's bid as nonresponsive because it failed to submit prices per reel as required by the IFB Schedule, GSA has also rejected Hooven's contention that the Milspec provides a proper basis to convert Hooven's prices from "per pound" to "per reel."

Responsiveness is determined as of the time of bid opening and involves whether the bid as submitted represents an unequivocal offer to provide the products or services as specified, so that acceptance of it would bind the contractor to meet the government's needs in all significant respects. Johnson Moving & Storage Co., B-221826, Mar. 19, 1986, 86-1 C.P.D. ¶ 273. Any bid that is materially deficient must be

rejected; a defect in a bid is material if it significantly affects price, quality, quantity, or delivery. Johnson Moving & Storage Co., B-221826, supra.

When a bidder does not bid on the precise quantity, measurement, or volume called for in the IFB, the bid must be rejected as nonresponsive unless the intended price for the proper quantity, measurement, or volume can be determined from the face of the bid, Tabco Products, Inc., B-222632, Aug. 27, 1986, 86-2 C.P.D. ¶ 231, or the effect of the deficiency on the price of the bid is clearly de minimus, and waiver would not be prejudicial to other bidders. See, e.g., Leslie & Ellicott Co., 64 Comp. Gen. 279 (1985), 85-1 C.P.D. ¶ 212.

Neither exception applies here. Hooven bid on a per pound basis and thus it is not possible to determine its price per reel from the face of the bid. Although Hooven argues its price per reel could be determined by converting its price per pound by use of the Milspec incorporated into the IFB, we are not persuaded that this is the case. GSA points out that Milspec Table II was not intended for use as a conversion chart. It asserts that Table II of the Milspec for nylon rope, for example, is intended for evaluation of the performance of the finished rope consistent with specified quality assurance provisions. If the rope does not conform to the dimensions for tolerance and hardness, for example, contained in Table II, the rope does not meet the IFB specifications. Table III provides approximate weights, and these weights also are not for conversion purposes.

In any event, even if we were to assume that the Milspec tables or some industry standard could be used for conversion of Hooven's bid, we conclude that Hooven's bid is nonresponsive because its prices per reel cannot be determined with certainty. Hooven's final submission to our Office includes a chart in which Hooven provides the results of converting its bid to prices per reel under Tables II and III of the Milspec and under the industry specification standard and compares these prices with those of the low bidders. Hooven's own chart shows its price per reel changes depending on which conversion factor is used. For example, for items 1-6, the low bid was $163.40 per unit. When Hooven's bid of $1.93 per pound is converted to reel, Hooven's bid is $160.85 per unit using Table II, $165.98 per unit using Table III, and $167.91 per unit using the Cordage Institute specifications. Thus, Hooven is low when evaluated using Table II or Table III, but not when the Cordage Institute specifications are used. In another example, items 36 to 41, Hooven would be low using Table II, but not low under Table III. Thus, even accepting the accuracy of this

information for conversion, which GSA challenges, Hooven's actual price still cannot be determined. Furthermore, we note that after bids had been opened and GSA asked Hooven to verify its price, in writing, on a "reel" basis, Hooven sent a letter to GSA giving a breakdown of its bid in terms of "price per coil." These prices, which in its bid protest calculations Hooven refers to as its "clarified bid," are in every instance lower than those prices at which it arrives through its pounds-to-reel conversion exercise using the Milspec tables and Cordage Institute weights. In our view, Hooven's bid prices cannot be ascertained from its bid. Thus, in view of the uncertainty as to Hooven's price per reel and the fact that under certain scenarios, Hooven clearly displaces the low bidder, the effect of this deficiency in Hooven's bid clearly is not de minimus and may prejudice other bidders.

We deny the protest.

Seymour Efros

for Harry R. Van Cleve
General Counsel