



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: ESS Corporation
File: B-226960
Date: July 20, 1987

DIGEST

Unsolicited identification of manufacturer in bid, unlike offer of a specific type of equipment, does not create ambiguity as to whether bidder is offering to comply completely with the specifications, rendering bid non-responsive. This is information of a general nature and simply represents an offer to meet the specifications with the identified manufacturer.

DECISION

ESS Corporation protests the award of a contract to Plateau Electrical Constructors, Inc., under invitation for bids (IFB) No. 7-SI-30-05660/DS-7708, issued by the Bureau of Reclamation, Department of Interior. The IFB solicited bids for the delivery and installation of three 23-kilovolt, isolated-phase replacement (IPB) bus structures (a bus is a conductor, or group of conductors, serving as a common connection for two or more circuits) and spare parts for the Hoover Power Plant, Boulder Canyon Project, in Arizona and Nevada. ESS primarily contends that award to Plateau was improper because Plateau qualified its bid by specifying an equipment manufacturer, rendering the bid nonresponsive. We deny the protest.

The IFB required the successful contractor to supply and install equipment that met certain technical specifications and drawings; it did not require bidders to identify the manufacturer or model of the equipment they planned to provide or to submit any descriptive literature. At bid opening, held on February 27, 1987, Plateau's alternate bid was low and ESS' bid was second low.^{1/} The cover letter to Plateau's alternate bid stated that "the attached proposal is our alternate bid for your evaluation using [an] isolated-phase bus as manufactured by the Calvert Company."

^{1/} Plateau's base bid was for equipment of a different manufacturer at a higher price than its alternate bid.

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Plateau's alternate bid did not contain any descriptive literature.

After bid opening, the contracting officer requested that the project manager review the four low bids for technical compliance with the specifications. The project manager determined during talks with the president of Calvert that the firm would furnish Plateau with a new IPB under license from an English manufacturer and, based on this knowledge, recommended awarding the contract to Plateau.

As a result of ESS' initial protest to the agency, the contracting officer requested advice as to the propriety of the proposed award to Plateau from the agency's field solicitor. The field solicitor responded on March 25, by "faxogram" with a copy of our decision in Lift Power Inc., B-182604, Jan. 10, 1975, 75-1 CPD ¶ 13. In that decision, we held that a bidder's insertion of an unsolicited model number created an ambiguity as to whether the bidder intended to be bound by the specification, and that award to that bidder would be proper only if published commercial literature publicly available prior to bid opening established compliance with the specifications. On the same day, the contracting officer sent a mailgram to Plateau requesting that the firm provide the agency with published commercial literature, publicly available prior to bid opening, demonstrating that the bus to be furnished by Plateau would meet the specifications. Plateau responded to the agency's request by letter dated March 27, along with a proposal and associated drawings from Calvert for this project, and commercial brochures.

The contracting officer determined from Plateau's literature that its alternate bid met the specifications. The agency awarded a contract to Plateau on June 8, during the pendency of the protest, after making a written finding of urgent and compelling circumstances, as required by the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(c)(2)(A) (Supp. III 1985).

ESS argues that by specifying a manufacturer in its bid, Plateau essentially qualified its bid, rendering it non-responsive, because it was at best ambiguous whether Plateau intended to furnish a bus meeting the specifications, or intended to furnish the Calvert bus whether or not it met the specifications. In this regard, ESS reads Plateau's use of the phrase "for your evaluation" in the bid cover letter as requiring the government to determine if the Calvert equipment was acceptable and as limiting Plateau's liability under any contract. ESS also disputes the agency's contention that the ambiguity was overcome by the commercial literature ESS submitted after bid opening.

Although Interior seems to accept the protester's characterization that by specifying a manufacturer Plateau qualified its bid, rendering it ambiguous and, ultimately, nonresponsive (Interior then argues that the ambiguity was resolved by the commercial literature), we do not share this view. The Federal Acquisition Regulation (FAR) provides generally that a bid must be rejected when the bidder imposes conditions that would modify requirements of the invitation or limit the bidder's liability to the government since, obviously, to allow the bidder to impose such conditions would be prejudicial to other bidders. See FAR, 48 C.F.R. § 14.404-2(d) (1986). The FAR provides more specifically that bids must be rejected when the bidder requires the government to determine whether the bidder's product meets applicable government specifications or limits the rights of the government under any contract clause. See FAR, 48 C.F.R. §§ 14.404-2(5) and (6).

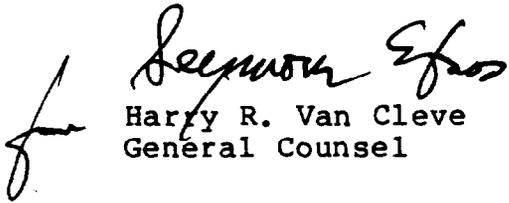
Applying these standards in cases such as Lift Power Inc., B-182604, *supra*, we have held that inclusion in a bid of an unsolicited model number qualifies the bid by suggesting that the bidder intends to furnish that specific model whether or not it meets the specifications. Absent a showing through preexisting commercial literature that the model meets the specifications, the bid is ambiguous and thus nonresponsive since the bid arguably limits the government's right to performance as requested. IMR Systems, Inc., B-222533, Aug. 26, 1986, 86-2 CPD ¶ 224.

We do not believe the situation here is analogous to that in Lift Power, Inc., and other prior decisions involving the inclusion in a bid of an unsolicited model or part number. In our view, Plateau's unsolicited identification of a manufacturer is information of a general nature which in no way rendered the bid ambiguous. Unlike an offer of a specific piece of equipment that may or may not meet the specifications, Plateau's bid simply offered to meet the specifications with the identified manufacturer. Nothing else on the face of the bid took exception to the specifications or indicated that Plateau would furnish a Calvert-built bus not meeting certain IFB requirements. Absent such an exception, even were it shown that Calvert was incapable of manufacturing a satisfactory bar, Plateau's obligation to perform would be clear and its bid therefore would be responsive; the question of Plateau's manufacturer's ability to perform would be a matter of responsibility, to be determined any time up until the time of award. See World Wide Diesel, Inc., B-205599, May 6, 1982, 82-1 CPD ¶ 433.

Furthermore, while Plateau may have used the phrase "for your evaluation" believing its bid needed technical approval, no such approval in fact was required for its bid

to be found responsive. Plateau's different understanding did not make its bid nonresponsive. Again, if Interior had questions as to Plateau's ability to comply with the specifications using Calvert as its manufacturer, these questions were for resolution in considering Plateau's responsibility. (In fact, it appears from the record that Interior met with Plateau and Calvert after bid opening for this very purpose). Because we find that Plateau's bid was responsive, we need not consider the adequacy of its commercial literature.

The protest is denied.


Harry R. Van Cleve
General Counsel