



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: The Bruce Corporation

File: B-231171

Date: June 24, 1988

DIGEST

Where invitation for bid requires that bid prices include all applicable taxes, a bid which provides "Tax Not Included" without specifying the class and amount of tax excluded is nonresponsive.

DECISION

The Bruce Corporation protests the proposed rejection of its low bid as nonresponsive under invitation for bids (IFB) No. 8201-3K15-88, issued by the Department of Agriculture for construction of the Animal Health Systems Research Center, Clay Center, Nebraska. The agency considers Bruce' bid nonresponsive because it included a statement in Section B, "Tax Not Included," whereas the IFB required that the bid price include all applicable federal, state and local taxes (Section B included a schedule of items with provisions for submission of prices.) Bruce contends that its bid referred only to the exclusion of the Nebraska sales tax which the federal government is exempt for paying.^{1/}

We deny the protest.

The IFB incorporated by reference Federal Acquisition Regulation (FAR) § 52.229-3 (FAC 84-5), which provides:

"The contract prices includes all applicable Federal, State, and local taxes and duties."

^{1/} In its initial protest, Bruce represented to our Office that its bid only included the notation, "no sales taxes included." However, Bruce's bid in fact excluded all taxes without distinction.

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Bids were opened on April 6, 1988 and Bruce was the low bidder. However, Gilbert Corporation of Delaware, Inc., the second low bidder, objected to award to Bruce stating that Bruce had qualified its bid since its price excluded taxes. The contracting officer agrees and considers Bruce's bid nonresponsive, thus making Gilbert the low bidder.

Unless otherwise specified in the IFB, the inclusion of the standard tax clause constitutes notice to all bidders that bids will be evaluated on a tax-included basis. The George Sollitt Construction Co., B-190743, Sept. 25, 1978, 78-2 CPD ¶ 224. The submission of a bid on a tax-excluded basis is viewed as evidence of the bidder's belief, absent definite information to the contrary, that taxes may be assessed, and of his unwillingness to assume payment of such taxes at his bid price. NASCO Products Co., B-192116, Nov. 27, 1978, 78-2 CPD ¶ 364. Nevertheless, the bid still may be considered if the class and amount of the tax are specified elsewhere in the bid, because such information permits all bids to be evaluated on an equal basis. J & W Welding and Fabrication, B-209430, Jan. 25, 1983, 83-1 CPD ¶ 92. Absent such information the bid cannot be evaluated on an equal basis with other bids, and must be considered nonresponsive. Trail Equipment Co., B-206975, Apr. 20, 1982, 82-1 CPD ¶ 366.

As stated above, Bruce contends that the statement in its bid, "Tax Not Included," refers only to one class of tax, i.e., the Nebraska sales tax and that in substance it meant that there is no Nebraska sales tax applicable to materials incorporated into the project. Bruce notes that the Nebraska sales tax was the only class of tax ever discussed or questioned prior to bid opening and the exclusion was in fact understood by the government to relate only to the sales tax as demonstrated by the government's own "Abstract of Offers-Construction," dated April 6, 1988. This document, prepared by the government in the ordinary course of business, states as to the bid of Bruce, "does not include sales tax." Consequently, Bruce contends that the type of tax excluded is identified and can be easily quantified and compared with the other bids.

We do not agree. A bidder's intention as to the basis for its bid must be determined solely from the bidding documents. A bidder may not be afforded an opportunity after bid opening to explain or clarify its bid so as to make it responsive. A bidder's intention must be determined from the bid and material available at bid opening. Photographic Analysis Co., Inc., B-223787, Dec. 1, 1986, 86-2 CPD ¶ 619. Bruce's bid merely states, "Tax Not Included," which could be interpreted to mean that all taxes that may be applicable to this project are excluded, including, for example, Social

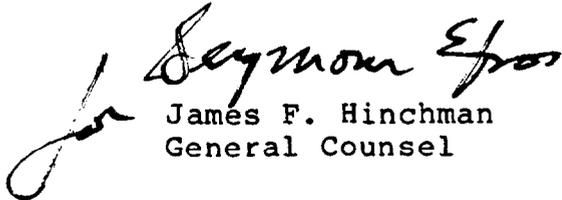
Security, Workman Compensation, and Unemployment. Further, despite Bruce's assertions to the contrary, the fact remains that nowhere in Bruce's bid does Bruce define the amount or class of tax to be excluded. Since there is no clear indication in the bid of the class of tax to be excluded, the bid at a minimum is ambiguous as to what taxes are in fact excluded, and therefore the bid cannot be evaluated on an equal basis with the other bids. In short, by submitting a bid on a tax excluded basis in response to an IFB that contained the standard tax clause, without specifically identifying the class and amount of tax that has been excluded, Bruce effectively prevented a comparison of its bid with those of its competitors. Bruce's bid therefore must be rejected as nonresponsive. See Cornelius Architectural Products, B-224140, Oct. 29, 1986, 86-2 CPD ¶ 492.

Bruce next argues that the IFB was confusing and ambiguous because the bidders did not know whether to bid the project as a project which would be sales tax exempt. Bruce further contends that the procuring agency added to the confusion by not clarifying the IFB when it had ample opportunity to do so. To the extent that Bruce believed that the solicitation was ambiguous, Bruce was required to protest before bid opening any alleged improprieties in the solicitation which were apparent prior to bid opening. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1988). Bruce did not do so. In any event, the FAR generally requires that all solicitations for fixed-price contracts performed in the United States contain a clause requiring the bidder or offeror to include all applicable federal, state, and local taxes and duties. FAR § 29.401-3 (FAC 84-5). Since contractors generally are more familiar with the application of state and local taxes than the contracting officer, this clause places the burden on the bidder to ascertain if any taxes are applicable and to include the amount of such taxes in its price. NASCO Products Co.--Reconsideration, B-192116, Feb. 16, 1979, 79-1 CPD ¶ 116. The instant solicitation clearly provides that prices should include all applicable Federal, State and local taxes. We therefore find that the solicitation was not ambiguous. Rather, it was incumbent on Bruce to determine what taxes were applicable and should be included in its price.^{2/}

^{2/} We further do not find persuasive Bruce's argument that the solicitation was ambiguous because 3 of the 5 bidders submitted bids that did not include sales tax. We simply note that the second low bidder, Gilbert, submitted a responsive bid and the two other bidders apparently excluded sales taxes only so that these bids may also have been responsive if the class and amount of the tax were specified.

Finally, Bruce argues that the government would save money by accepting its bid. Although rejection of Bruce's bid may result in additional cost to the government in this procurement, we have consistently held that a nonresponsive bid may not be accepted even though it would result in savings to the government, since acceptance of such a bid would compromise the integrity of the competitive bidding system. Industrial Structures, Inc., 64 Comp. Gen. 768 (1985), 85-2 CPD ¶ 165.

The protest is denied.



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General Counsel