

Zelkowitz



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: George E. Failing Company

File: B-233207

Date: February 24, 1989

DIGEST

1. Protest that awardee's bid is nonresponsive is denied where the protester does not show that the agency's determination that the awardee's offered product meets the requirements of the solicitation is wrong.
2. Where contracting officer determined prospective awardee was responsible based on a positive preaward survey finding the firm to have adequate financial resources and an adequate production capability to manufacture the required product, and there is no showing that the determination was made in bad faith, there is no basis to object to the agency's affirmative determination of responsibility.
3. Contracting agency properly allowed correction of firm's bid, which resulted in displacement of other competitors as the low bidder, where the firm's intended bid price is clearly evidenced in the firm's entire bid, including documents furnished with descriptive literature.

DECISION

George E. Failing Company protests the Department of the Army's award of a contract for commercial well drilling equipment to NITCO, Drilling Products Division, under invitation for bids (IFB) No. DAAK01-88-B-0184. Failing principally contends that NITCO's bid should have been rejected as nonresponsive for failure to comply with material terms of the solicitation. Additionally, Failing challenges the Army's affirmative determination of NITCO's responsibility to perform according to the terms and conditions of the solicitation, and also questions the Army's allowing NITCO to correct an alleged mistake in its bid.

We deny the protest.

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The IFB specified that the required well-drilling equipment was to be mounted on a type I, class B, diesel engine driven, six-wheel-drive, commercial truck chassis, conforming to federal specification KKK-T-2111. The solicitation included a standard descriptive literature clause which required bidders to furnish documentation with their bids to establish their proposed equipment's compliance with the stated technical specifications, and also required the successful contractor to subject its offered product to first article testing.

The Army initially found NITCO's to be the fourth low responsive bid of the seven received. Shortly after bid opening, however, NITCO claimed a mistake in its bid price. The Army found this claim to be supported by a bid price breakdown NITCO submitted with its descriptive literature, and therefore allowed the correction, resulting in NITCO's becoming the low bidder in line for award. This protest followed.

Failing contends that the truck proposed by NITCO, a Ford FT-900, is overloaded and cannot possibly meet the requirements set forth in the purchase description and the referenced federal specification. Specifically, Failing maintains that the front axle capacity of the vehicle is not sufficient to bear the cumulative weight of the drilling equipment to be installed on the truck. Failing also asserts that the specified gross combined weight rate for this truck (65,000 pounds) will be exceeded as a result of the vast weight of the drilling equipment.

As Failing correctly notes, to be responsive a bid must comply with all material terms of the solicitation. Federal Acquisition Regulation (FAR) § 14.301(a). A bid that fails to conform to the essential requirements of the IFB, as determined at the time of bid opening from all materials submitted with the bid, must be rejected as nonresponsive. FAR § 14.404-2; see Southwest Mobile Systems Corp., B-223940, Aug. 21, 1986, 86-2 CPD ¶ 213.

Here, while Failing frames its challenge to the size and capacity of NITCO's proposed vehicle in terms of responsiveness, Failing does not allege, nor does the record otherwise indicate, that NITCO took exception in its bid to any of the solicitation's terms and conditions. In this regard, the solicitation simply required that the offered truck chassis comply with federal specification KKK-T-2111; this specification does not impose a 65,000 pound gross combination weight requirement, or any other load bearing requirements. Moreover, based on the descriptive literature furnished by NITCO, discussions with NITCO and Ford Motor

Company engineers, and its employees' knowledge of available drilling equipment, the Army specifically determined that the Ford FT-900 model truck proposed by NITCO would comply with the IPB's requirements. Failing disagrees, but has not clearly shown that the Army is wrong. Accordingly, we see no basis for concluding that NITCO's bid was nonresponsive.

Failing also questions NITCO's responsibility as a vendor to supply the required drilling equipment. Specifically, Failing contends that NITCO has only been in business a relatively short period of time, has few employees and a sparse credit history, has never manufactured a drilling rig that meets the specifications of this IPB, and has not been approved by applicable trade associations. Failing concludes that the agency's affirmative determination of responsibility was unjustified.

Whether NITCO is a responsible prospective contractor is a determination within the business judgment of the contracting agency. Prior to award, an agency is required to make an affirmative determination of the prospective awardee's responsibility, FAR § 9.103(b), which we will not question absent a showing of fraud or bad faith. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(5) (1988). To make this showing, the protester has a heavy burden of proof, as contracting officials are presumed to act in good faith. Keyes Fibre Co., B-225509, Apr. 7, 1987, 87-1 CPD ¶ 383.

We find no showing of bad faith here. The record shows that the affirmative determination of NITCO's responsibility was made on the basis of a preaward survey that found NITCO to have adequate financial resources and an adequate production capability to manufacture the required drilling equipment. While the survey did disclose that NITCO has limited experience in the manufacture of the equipment, the Army reports that NITCO indeed has assembled well-drilling equipment for more than 2 years, and that its product line includes a drilling rig quite similar to the one required here. We thus find no basis to object to the affirmative determination of NITCO's responsibility.

Failing finally contends that the Army improperly allowed NITCO to correct a mistake in its bid after bid opening which resulted in NITCO's displacing several other responsive firms in becoming the low bidder. The Army initially calculated NITCO's total bid price to be \$2,337,250, which it computed by totaling the bid schedule prices for each of the solicitation's line items. During a discussion with

agency personnel shortly after bid opening, however, NITCO noted that this sum did not represent its intended bid; NITCO explained that the price it quoted for line item 0001 (production quantity) erroneously included prices for line items 0002 through 0004, and that its intended price was actually \$2,127,250. The Army found this lower price, which was the low price bid, to be supported by a detailed bid price breakdown, which NITCO included with its descriptive literature, and therefore concluded that correction should be permitted.


Failing argues that NITCO should have been bound by the higher total price computed from its bid schedule, under which NITCO would have been only fourth low. Failing believes that NITCO should not have been permitted to revise this price downward, thereby displacing the other bidders, by reference to the price breakdown included with its bid package.

Under FAR § 14.404-3(a), an agency may permit a bidder to correct an alleged mistake where clear and convincing evidence establishes both the existence of the mistake and the bid actually intended. Where such a correction would result in displacing one or more lower bids, however, the correction is permissible only if the existence of the mistake and the bid actually intended are ascertainable substantially from the invitation and the bid itself, including all documents comprising the bid package. Eagle Electric, B-228500, Feb. 5, 1988, 88-1 CPD ¶ 116; see Clear Maintenance Corp., B-207607, Aug. 23, 1982, 82-2 CPD ¶ 167 (bid bond may be considered in ascertaining intended bid price).

We think the Army's consideration of NITCO's entire bid package, including the price breakdown, to ascertain NITCO's intended bid price was proper under the above standard. Reference to the price breakdown clearly shows that NITCO, in completing the bid schedule, included prices for solicitation line items 0002 through 0004 twice. This occurred when NITCO transferred its prices from the price breakdown; although the breakdown total included items 0002 through 0004, NITCO inadvertently inserted this total on the schedule as its item 0001 price, and then also inserted the separate prices for items 0002 through 0004. Thus, when all items were added to arrive at the total bid price, the total

shown on the schedule included the prices for items 0002 through 0004 twice. We conclude that NITCO's bid, read as a whole, clearly indicated that NITCO intended to bid the lower price, and that correction therefore was proper.

The protest is denied.

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General Counsel