

TINNIBY 12/4/89



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Syllor, Inc. and Ease Chemical
File: B-234723; B-234724
Date: June 6, 1989

DIGEST

1. Agency rejection of bids as nonresponsive because of uncertainty as to the identity of the actual bidder is proper where bids were submitted by an entity that certified itself as both a joint venture and a corporation, used the Data Universal Numbering System (DUNS) number and employer identification number of a corporation, and referred to a joint venture agreement between two corporations.
2. Agency properly waived awardee's failure to provide information as to its status as a manufacturer, its mistake in the Clean Air and Water certification and an erroneous Qualified Products/List test number in its bid because none of these matters affected the bidder's material obligations under the solicitation and thus were not matters of responsiveness.
3. Agency's failure to notify unsuccessful bidder promptly after award is a procedural defect that does not affect the validity of the contract award.

DECISION

Syllor, Inc./Ease Chemical, which according to the protester is a joint venture of Syllor, Inc. and Ease Chemical, protests the rejection of its bids and the award of contracts to any other bidder under invitation for bids (IFB) Nos. DLA400-88-B-3875 (IFB -3875) and DLA400-89-C-0286 (IFB -0286) both issued by the Defense Logistics Agency.

We deny the protest.

On July 12, 1988, the agency issued IFB -3875 for various quantities of lubricating oil. The solicitation provided for multiple awards and contained four line items corresponding to four different delivery locations. Three

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bidders responded by the August 31 opening date. The protester was the low bidder for two of the line items.

IFB -0286 was issued on October 17 for various quantities of tetrachloroethylene. This solicitation also provided for multiple awards and contained four line items. Bid opening was November 16 and seven firms responded. The protester was the low bidder for all four items.

The contracting officer for IFB -3875 made an initial determination of nonresponsibility based on a negative preaward survey conducted on both Syllor and Ease under a prior solicitation. Since the protester certified that it was a small business the agency referred the matter to the Small Business Administration (SBA) for review under its certificate of competency procedures. According to the agency, as a result of inquiries from the SBA about the nature of the relationship between the two firms, it reviewed the protester's bid again. The contracting officer then determined that the bid was ambiguous concerning the bidder's legal status and identity and rejected the bid as nonresponsive.

After being informed that the protester's bid under IFB -3875 was found to be nonresponsive, the contracting officer for IFB -0286 reviewed the protester's bid received under his solicitation. That contracting officer similarly found the protester's bid to be ambiguous as to the bidder's legal status and identity and rejected it, also as nonresponsive.

Syllor/Ease maintains that it is a valid joint venture. The protester argues that the agency relied on the wrong information in making its determination of nonresponsiveness and complains that the agency did not question it on this matter or give it an opportunity to respond.

The record shows that Syllor/Ease completed the "Type of Business Organization" clause in both of its bids by marking both the corporation and joint venture boxes. The agency states and the protester does not dispute that the address, telephone number, Data Universal Numbering Systems (DUNS) code and employer's identification number it provided in both bids is that of Syllor, Inc. Additionally, the protester submitted to the contracting officer before bid opening a "Business Consultant and Teaming Agreement" between Syllor and Ease dated August 23. On its bid for IFB -3875 under its certificate that it was a regular dealer for Walsh-Healey Act purposes, the protester wrote "Please see Joint Venture/Teaming Agreement between Syllor, Inc. and Ease Chemical dtd. 23 Aug. 88." The agency maintains that this agreement does not establish a joint venture between

the two companies because it did not provide for many of the key elements of a valid joint venture such as profit division, joint property interest and management of the business.

To be responsive, a bid must constitute an unequivocal offer to provide without exception exactly what is required at a firm, fixed-price. Sess Construction, Inc., 64 Comp. Gen. 355 (1985), 85-1 CPD ¶ 319. The determination as to whether a bid is responsive must be based solely on the bid documents themselves as they appear at the time of bid opening. Haz-Tad, Inc. et al., B-232025, Nov. 17, 1988, 68 Comp. Gen. _____, 88-2 CPD ¶ 486. Further, an award to an entity other than that named in the bid constitutes an improper substitution of bidders. Id.

Although the protester requests that we rule on the validity of its joint venture, we find it unnecessary to do so because we believe the agency's rejection of the bid as ambiguous was proper. First, we note that throughout both bids the bidder was identified as either "Syllor/Ease Chemical" or "Syllor/Ease." Nevertheless, the bid under IFB -3875 was signed by an individual identified on the bid as the "CEO" of Syllor, Inc., and the other bid was signed by the same individual, but with no title. These irregularities alone would not justify rejection of the bids. See Moore Service, Inc., B-212054, Dec. 6, 1983, 83-2 CPD ¶ 648. What we do find fatal to the bids is the protester's unexplained marking on the bid forms that it was both a corporation and a joint venture and its insertion of the DUNS code and employer identification number (EIN) of Syllor, Inc. First, the bidding entity cannot be both a corporation and a joint venture. Second, the identification of the bidder as a joint venture is inconsistent with the use of one company's DUNS code and EIN. Thus, since Syllor the corporation and Syllor/Ease joint venture are separate legal entities, we believe this contradictory information in the bids made the protester's bids ambiguous. See Future Electric Co., B-212938, Feb. 22, 1984, 84-1 CPD ¶ 216. Because the bidding entity's identity is unclear, acceptance of the bids would not result in a binding commitment by a specific, clearly identified bidder. The bids are therefore nonresponsive. Griffin Construction Co., 55 Comp. Gen. 1254 (1976), 76-2 CPD ¶ 26. Although the protester complains that the agency did not allow it to correct the ambiguity, since responsiveness is determined from the face of the bid at bid opening, post-bid opening explanations are unacceptable and cannot be used to cure a nonresponsive bid. Schlumberger Industries, B-232608, Dec. 27, 1988, 88-2 CPD ¶ 626.

The protester further argues that the agency accepted post bid opening information from the awardee under the solicitation for lubricating oil. The protester states that the awardee used an incorrect Qualified Products List (QPL) test number in its bid, failed to complete the Walsh-Healey certification and marked the wrong box in the Clean Air and Water certification. We think that the agency properly allowed the firm to correct the errors after bid opening.

The information as to the awardee's status as a manufacturer or dealer involves eligibility for award rather than a performance obligation and therefore the failure to furnish it with the bid constitutes a minor informality that does not affect the responsiveness of the bid and instead may be provided after bid opening. The ARO Corp., B-222486, June 25, 1986, 86-2 CPD ¶ 6. Similarly, the Clean Air and Water certification pertains to the bidder's responsibility and is not necessary to decide whether the bid is responsive. Georgetown Air & Hydro Systems, B-222203, Apr. 4, 1986, 86-1 CPD ¶ 328. The awardee's incorrect certification consequently did not require rejection of the bid as nonresponsive because the accuracy of that certification could be verified outside of the bid any time prior to award. See Stellar Industries, Inc., B-218287, May 30, 1985, 85-1 CPD ¶ 616.

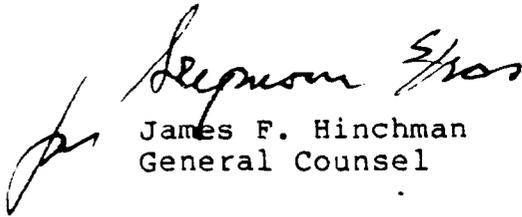
The change in the QPL test number is also not objectionable. Both the original test number and the new number identified compliant QPL items. Except for the promise to provide a product meeting QPL requirements, information pertaining to the firm's QPL eligibility concerns the firm's responsibility--its ability to meet the material terms of the contract--and need not be established until the time of contract award. See Pluribus Products, Inc.-- Reconsideration, B-214924.2, July 11, 1984, 84-2 CPD ¶ 42. Since a prospective contractor need only demonstrate that it can meet the standards for qualification before the date specified for contract award, Federal Acquisition Regulation § 9.202(c); The ARO Corp., B-225727, June 15, 1987, 87-1 CPD ¶ 595, there was nothing improper in the agency's allowing the awardee to change the test number because the bid as originally submitted was responsive. Additionally, we note that the agency allowed the protester to also correct its QPL test number after bid opening.

Further, we find no merit to the protester's complaint that the agency changed the reason for the rejection of its bid from its original statement that the joint venture was nonexistent to its current argument that the bidder's identity and existence could not be determined with certainty from the face of the bids. An agency's actions

do not constitute a waiver of the bidder's error nor estop the government from rejecting the bid where, as here, it is ultimately properly rejected as nonresponsive. Darla Environmental, Inc., B-234560, May 12, 1989, 89-1 CPD ¶ ____.

Finally, Syllor/Ease complains that the agency never notified it that award had been made under IFB -3875. While agencies are required to provide prompt notice of contract awards, we generally view delay in notifying unsuccessful offerors as a procedural defect that does not affect the validity of contract award. Vista Scientific Corp., B-231966.2, Dec. 27, 1988, 88-2 CPD ¶ 625. In any event, since we have found the protester's bid was properly rejected as nonresponsive, it was not harmed by the delay.

The protest is denied.


James F. Hinchman
General Counsel