



Comptroller General
of the United States

Washington, D.C. 20548

Maeder

Decision

Matter of: E & T Electronics, Inc.

File: B-238099.2

Date: July 10, 1990

Laurie A. Eller and Edward P. Young, for the protester.
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of the decision.

DIGEST

1. The submission of a below cost or low-profit offer is not illegal and provides no basis for challenging the award of a firm, fixed-priced contract to a responsible contractor.
2. A bidder's ability to meet its contractual obligations at the price offered is a matter of the firm's responsibility for the contracting agency to determine before award, and the General Accounting Office will not review an affirmative determination in that respect except in limited circumstances.
3. Contracting agency may consider cost-related factors other than bid price to determine the low evaluated bid only where such factors are clearly delineated in the solicitation.
4. Protest issues based on alleged improprieties in a solicitation that are apparent prior to bid opening must be filed prior to that date.
5. Failure to promptly notify protester of award to another bidder does not affect the validity of an otherwise properly awarded contract.

DECISION

E & T Electronics, Inc. protests the award of a contract to Western Instrument Lab, issued by the Federal Aviation

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Administration (FAA), Alaskan Region, under invitation for bids (IFB) No. DTFA04-89-B-20013. E & T has raised a number of objections to the award, most of which concern whether the contracting agency improperly evaluated the bids and the costs associated with the procurement.

We deny the protest.

The IFB, a small business set-aside, was issued on November 6, 1989, and contemplated the award of a contract for the calibration of, and repairs to, an estimated 1800 pieces of electronic test equipment in the Alaskan Region on a yearly basis. "Incidental repair" was defined as the replacement of inexpensive (less than \$10) contractor-supplied parts (e.g., fuses, knobs, lamps, screws, equipment feet or bumpers) needed to return an instrument to operational condition, tightening of mounting screws and installation of expendable items. Where government-furnished parts are installed, the \$10 limit would not apply. Labor required for incidental repairs would be considered part of the calibration process.

Costs associated with more extensive repairs, defined as minor and major repairs necessary to bring an operable instrument to within specification, were to be authorized by the Regional Test Equipment Coordinator (RTEC) and performed by the contractor only after RTEC approval. Minor repair is defined in the IFB as repair costing not more than 30 percent of the acquisition cost of the equipment. Major repair is defined as repair costing more than 30 percent but less than 50 percent of the cost of the equipment.

The solicitation advised that the FAA field offices would ship the test equipment to the contractor's Fixed Calibration Facility (FCF) and/or the contractor could use a Mobile Calibration Facility (MCF), that could travel to some of the Alaskan facilities to provide limited on-site test equipment calibration. The contractor could use either or both calibration facilities to accomplish the calibration of the test equipment. Shipping costs for test equipment sent to the contractor's FCF would be borne by the government; return shipments from the contractor to the FAA would be paid for by the contractor. Three equipment lists and a location identifier list were included in the solicitation to assist bidders.

The IFB required bidders to provide a calibration price for each of 235 types of equipment, each of which was listed in a separate line item, specifically identified by manufacturer and model number, and for which estimated quantities were given. The IFB also required bidders, at item

number 236, to provide an hourly rate for minor and major repairs that may be performed on the equipment to be calibrated. This item was listed as a "contingency item" which would only be performed when ordered by the RTEC or the Contracting Officer Representative (COR). At item 237, bidders were to indicate the premium, as a percentage to be added to the base rate, that they would charge for priority servicing. Due to the uncertainty as to the requirements for both repairs and priority servicing, no estimated quantities for these tasks were set forth in the solicitation, and prices were evaluated by totaling the bidders' extended prices for servicing the 235 line items of equipment.

Although five bids were received in response to the solicitation, two of the bidders were found to be large businesses and their bids were not considered for award. Since Western's bid of \$119,583 was \$79,112 lower than the bid of E & T, the second low bidder, award was made to Western on January 8, 1990. E & T's unit prices varied depending on the type of equipment to be calibrated; in contrast, Western bid a flat rate of \$103 per unit. As for the "contingent" repair labor rates, E & T's bid of \$60.00 an hour for minor repairs and \$65.00 an hour for major repairs was less than Western's bid of \$75.00 an hour for both minor and major repair work. On the other hand, E & T's surcharge of 50 percent for priority servicing was more than Western's surcharge of 15 percent for priority servicing.^{1/} Western indicated in its bid that it would perform the work at its California facility and would not use a mobile facility in Alaska. E & T indicated that it would perform the work in its Anchorage facility. E & T was the prior contractor for these services under a 1989 Blanket Purchase Agreement (BPA).

After learning of the award to Western, E & T first protested to the agency on February 9 and, when that protest was denied, protested to our Office on February 27. As we indicated above, E & T is the prior contractor for these services and is located in Anchorage as is the contracting agency. E & T has raised numerous protest issues, most of which center around whether the FAA properly evaluated price

^{1/} At the end of the pricing schedule, immediately beneath the contingency and priority service items, E & T inserted:

"NOTE: An additional two (2) percent discount is offered for repair and calibration services performed on [equipment based in Anchorage where E & T is located]."

and price-related factors in determining which bid was most advantageous to the government. In particular, E & T is of the view that there were cost advantages to using an in-state contractor which the FAA improperly failed to consider.

First, in its initial protest letter, E & T complains that Western's flat rate price of \$103 to calibrate each instrument is suspect because this price is substantially lower than published industry prices and does not reflect Western's own published prices. E & T asserts that Western cannot perform the work for the price bid. It suggests that Western was able to bid as it did because its shipping costs were to be subsidized in some manner, and speculates that Western and the FAA's Alaskan or Western Region have agreed to an improper return shipping arrangement (e.g., the FAA would provide government franked mailing labels to Western); that Western will request and be granted additional funds to complete the work; or that the contractor will roll over the return shipping costs into repair costs.

In response, the FAA maintains that, since Western's bid took no exceptions to the solicitation requirements and was otherwise responsive on its face, and since the firm was determined to be responsible, the award was proper. The agency states that this is a fixed-price contract and the contractor is and will be required to perform the work at the bid price.

The submitting of a below-cost or a low-profit offer, as E & T seems to allege Western has done here, is not illegal and provides no basis for challenging the award of a firm, fixed-priced contract to a responsible contractor since it is the offeror's loss and not the government's if the cost of performance exceeds the contract price. Crux Computer Corp., B-234143, May 3, 1989, 89-1 CPD ¶ 422.

To the extent that E & T asserts that Western cannot perform at its offered price, E & T is challenging the FAA's determination that Western is a responsible contractor. Our Office will not review an affirmative determination of responsibility, which is largely a business judgment, unless there is a showing of possible fraud or bad faith on the agency's part or that definitive responsibility criteria in the solicitation were not met. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(5) (1990); Space Communications Co., 66 Comp. Gen. 2 (1986), 86-2 CPD ¶ 377. E & T does not contend that the IFB contained definitive responsibility criteria and, although E & T speculates about improper mailing arrangements between Western and the FAA, the record

contains no indication of any such fraud or bad faith by the agency.

E & T next argues that the FAA should have considered certain price-related factors, specifically: (1) the approximately \$31,000 cost to the government for shipping equipment to be calibrated from FAA sites within Alaska to the contractor's California location; (2) unspecified cost savings associated with a local contractor who could pick up and deliver equipment at no charge; and (3) the 2 percent discount E & T offered for repair and servicing on Anchorage-based equipment. E & T also notes that Western quoted a higher hourly labor rate for major and minor repairs and that these costs were not evaluated even though they were required by the solicitation. Finally, E & T alleges that the FAA did not consider that some equipment must be calibrated and/or repaired by the manufacturer, which entails higher costs which the contractor must pass on to the FAA.

In response to the first issue, the FAA notes that the solicitation explicitly stated that the government would bear the costs of shipping its equipment to the contractor. The agency reports that it did not provide for the evaluation of the costs of shipping equipment to the contractor because in the solicitation it offered the contractor the option of using a mobile facility and therefore evaluation of such costs was impossible because the agency could not determine the location of the contractor's facility. In view thereof, we do not think it is unreasonable for the FAA to decide not to evaluate the cost of shipping its equipment to the contractor.

The agency says it could not consider the 2 percent discount E & T offered for repair/calibration service on Anchorage-based equipment because the agency could not determine the number of instruments that would qualify for this discount. E & T disputes this, arguing that the agency knew the location of each piece of equipment. We note, however, that apart from the uncertainty as to which pieces of equipment were Anchorage-based, i.e., local to E & T, and would therefore be eligible for the discount E & T offered, this approach has administrative difficulties in that it puts the burden on the FAA to identify which of the 1800 pieces of equipment were Anchorage-based and to apply the discount to each of them as they are serviced and invoiced. If the protester could identify the pieces of equipment that were local and presumably less expensive for it to service, it could have taken this into account when pricing its bid. In any event, even E & T estimates the minimum value of the

discount to be only about \$1,753 and this amount does not affect the bid standing.

Likewise, the agency argues that, based on the experience E & T says it had on the prior year's contract, Western's cost for contingency repairs would be approximately \$6,000 higher than E & T's, but would not change the bid standings. We note that the agency claimed not to have included contingency repairs in the evaluation because it had no estimated quantities for this task. However, we believe that since the equipment covered by this solicitation has been serviced in the past, the agency should have a record of the repair requirements and should be able to produce realistic estimates of the repairs that may be needed. All that we require concerning the accuracy of estimates is that they be a reasonably accurate representation of the anticipated needs, although there is no requirement that they be absolutely correct. Dynalectron Corp., 65 Comp. Gen. 92 (1985), 85-2 CPD ¶ 634, aff'd on reconsideration, 65 Comp. Gen. 558 (1986), 86-1 CPD ¶ 452. In our view, since these repairs were included as part of the contract, the cost of the repairs should have been evaluated. However, here, because the difference in bids is about \$79,000 and the costs E & T suggests should have been evaluated are approximately \$39,000, Western's bid would remain low bid even if bids were evaluated in this way.

Finally, in response to all of these allegations, the agency reports that none of these costs were evaluated because these factors were not included in the solicitation and therefore could not be legally considered. We agree.

The Competition in Contracting Act of 1984 (CICA) requires agencies to evaluate sealed bids based solely on the factors specified in the solicitation and to award a contract to the responsible source whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and other price-related factors included in the solicitation. 41 U.S.C. § 253b(a) and (c) (1988). A clause to this effect was included in Section L of the solicitation. Although the government may consider cost-related factors other than bid price to determine the low evaluated bid (and therefore the bid most advantageous to the government), fair competition dictates that the government include such other factors in the solicitation before they can be considered. Stewart & Stevenson Servs., Inc., B-215899, Aug. 13, 1984, 84-2 CPD ¶ 173. Here, the solicitation did not provide for the evaluation of the type of costs the protester argues the agency should have considered. Therefore, the agency could not have legally

considered these factors in connection with its bid evaluation.

To the extent that the protester argues that price-related factors should have been included as evaluation factors, the protest concerns an IFB defect and is untimely. Our Bid Protest Regulations require a bidder to complain about a defect in a solicitation prior to bid opening. See 4 C.F.R. § 21.2(a)(1); T&A Painting, Inc., B-236847, Sept. 12, 1989, 89-2 CPD ¶ 231. The IFB clearly set forth the factors for evaluation. Thus, if E & T believed these factors were inappropriate, it was required to protest before bid opening. Since E & T did not file its protest until after learning it had not received the award, this ground of protest is untimely and not for consideration. DH Indus., B-232963, Jan. 25, 1989, 89-1 CPD ¶ 80.2/

In this connection, E & T alleged in its comments on the agency's position that the agency had not included Section M in E & T's copy of the solicitation, so E & T did not know what would or would not be considered in the evaluation of bids. At this time, E & T also complained that the agency failed to structure the solicitation so as to favor a local Alaskan business by splitting the requirements or otherwise accounting for the higher cost of operating in Alaska. The agency argues, and we concur, that E & T's protest on these issues is untimely, since, as noted above, protests based on improprieties in a solicitation which are apparent prior to bid opening must be filed before bid opening. Seals Servs., Inc., B-235523, June 20, 1989, 89-1 CPD ¶ 581.

As to E & T's failure to receive a copy of Section M, the FAA admits that Section M was inadvertently omitted from the solicitations when they were mailed to prospective bidders. However, the agency reports that E & T contacted the contracting officer about the missing section and that the contracting officer read the section over the telephone to an E & T representative. The agency also says that a copy of the section was made available but was never picked up by the protester. Apart from advising bidders that progress payments would not be permitted, Section M did not list any substantive evaluation criteria in addition to those already

2/ The same conclusion applies to E & T's argument that the solicitation did not specifically address those instances in which a piece of equipment could only be calibrated by its manufacturer. E & T states it was aware of which items had to be returned to the manufacturer for calibration and factored those costs into its bid price.

listed in Section L of the solicitation which E & T acknowledges receiving. Therefore, the protester was or should have been aware of the evaluation criteria.

Regarding the structure of the procurement, the agency says that it had a duty to structure the procurement to reflect the needs of the FAA and not to favor any bidder or group of bidders except as specifically authorized in the applicable statutes and regulations. We note that there are no regulations favoring Alaskan businesses and, in view of CICA, 41 U.S.C. § 253(a)(1)(A) (1988), which makes full and open competition the standard for conducting government procurements, the FAA could not legally limit or otherwise structure the procurement to favor local contractors.

E & T also complains that the contracting officer did not notify unsuccessful bidders of the award to Western until after E & T filed its protest with the contracting officer, more than one month after award. Contracting officers are to "notify unsuccessful bidders promptly that their bids were not accepted." FAR § 14.408-1(a)(1). Although the FAA admits that, because of the press of business, notification was not prompt, it argues that E & T was not prejudiced since it filed a timely protest notwithstanding the late notification.

The press of business is not a valid excuse for waiting more than one month to notify offerors of the award. CICA provides that an agency shall suspend contract performance when it receives notice of a protest from our Office within 10 days of the date of contract award, 31 U.S.C. § 3553(d) (1988), and a delayed agency notification defeats the statutory stay of performance provisions. In this case, however, because the protest is denied, the protester was not prejudiced. Failure on the agency's part to provide timely notification to E & T was a procedural matter and does not affect the validity of a contract which was otherwise properly awarded. DH Indus., B-232963, supra.

Finally, E & T raises the issue of a Blanket Purchase Agreement (BPA) that it believed the FAA had awarded to it on April 13, 1990, to provide the contingency repairs and priority servicing called for in this solicitation. The BPA was canceled on May 8. The FAA explained in its cancellation letter that the BPA had been issued erroneously because of a clerical error: due to a similarity in names the BPA was inadvertently issued to E & T but should have been issued to the E. J. Company. The protester suggests that there was no "clerical error" but that it is being penalized for filing a protest and that the agency will preclude E & T from awards in future procurements.

The agency has submitted documentation that substantiates the clerical error. Indeed, in the documents provided it is clear that in February 1990, the agency decided to reissue 15 of the prior year's BPAs, one of which was to be reissued to the E.J. Company. According to the agency, this BPA was reissued incorrectly to E & T. Unfortunately, this error was not discovered until the contracting officer read a reference to a BPA issued to E & T in the comments from E & T concerning its protest. Once discovered, the contracting officer canceled E & T's reinstated BPA. It is clear that the tasks covered in E & T's purported BPA would duplicate the tasks Western was already obligated to do under its contract. Since the agency would not contract twice for the same services, common sense supports the agency's contention that the BPA issued to E & T was a mistake. We find no evidence in the record, beyond E & T's allegation, that the FAA is "penalizing" E & T for protesting to our Office or that the FAA intends to automatically preclude awards to E & T in future procurements.

Accordingly, the protest is denied.



fr James F. Hinchman
General Counsel