



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: EDT Construction, Inc., and Northwest Paving & Construction Company, Inc., a joint venture
File: B-240343
Date: November 7, 1990

Thomas W. Hayton, Esq., Ferguson & Burdell, for the protester. Alton E. Woods, Esq., and Justin P. Patterson, Esq., Department of the Interior, for the agency. John Formica, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that bid was nonresponsive because it did not contain required information concerning whether bidder entered into a third party indemnification agreement in order to obtain bonds required by solicitation is denied. The information does not relate to the bidder's obligation to perform in accordance with the material terms and conditions of the solicitation, and therefore can be furnished any time before award.
2. Requirement concerning the submission of information unrelated to the material terms and conditions of the solicitation, and thus unrelated to the bidder's performance obligation, cannot be converted into a matter of responsiveness merely by the terms of the solicitation.

DECISION

EDT Construction, Inc., and Northwest Paving & Construction Company, Inc., a joint venture (EDT), argues that the bid of Tomco Construction, Inc., and Central Washington Asphalt, Inc., a joint venture (Tomco), should be rejected as non-responsive under invitation for bids (IFB) No. R90-6, issued by the Bureau of Indian Affairs (BIA), Department of the Interior, for road construction on the Colville Indian Reservation in Washington.

We deny the protest.

The solicitation was issued as a total set-aside for certified Indian/Alaska Native Economic Enterprises pursuant to the Buy Indian Act, 25 U.S.C. § 47 (1988). Accordingly, the IFB required bidders to certify that they qualified as eligible

Indian economic enterprises, as that term was defined in the solicitation. The solicitation also contained the following clause:

"THIRD PARTY INDEMNIFICATION AGREEMENTS -

The offeror (bidder) shall furnish a copy of any indemnification agreements that it entered into in order to secure the bonds required by the solicitation by the time set for bid opening. If an indemnification agreement was not required in order for the offeror (bidder) to obtain the required bonds, an affidavit to that effect shall be provided by the surety along with the bid bond by the time set for bid opening. Failure to furnish a copy of the required indemnification agreement or the surety's affidavit may cause the bid to be rejected."

The agency explains that the purpose of this clause is to aid it in ascertaining whether a bidder certifying itself as an eligible Indian economic enterprise is actually a "front organization" for an ineligible firm which is using the bidder to improperly take advantage of the contracting opportunities offered Indian entities under the Buy Indian Act. The agency reports that the existence of a third party indemnification agreement entered into by the bidder in order to obtain the bonds required by the solicitation may indicate in certain circumstances that the bidder is in fact acting as a "front organization" for an ineligible firm.

Here the agency received six bids in response to the solicitation, and at bid opening on June 5, Tomco's bid of \$889,923.50 was low, with EDT Construction's bid of \$970,511.49 next. While Tomco certified in its bid that it was an eligible Indian economic enterprise, and provided the required bid bond, it failed to include either a copy of a third party indemnification agreement or an affidavit from its surety stating that an indemnification agreement was not required in order for Tomco to obtain the necessary bonds. After bid opening, the agency informed Tomco of this omission. Later that afternoon, Tomco supplied a statement from its surety stating that it had not required a third party indemnification agreement.

EDT Construction's protest is based on the premise that Tomco's failure to submit the surety affidavit with its bid rendered the bid nonresponsive and that the BIA acted improperly in allowing Tomco to supply the affidavit after bid opening.

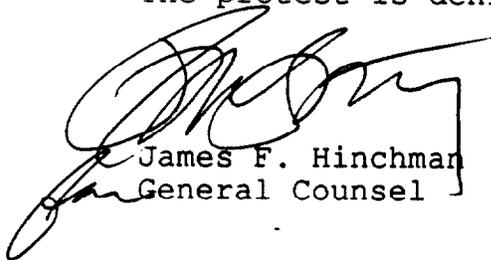
Responsiveness concerns whether a bidder has unequivocally offered to perform in conformity with all material terms and

conditions of a solicitation. See Federal Acquisition Regulation (FAR) § 14.301(a); Sage Assocs. Gen. Contractors, B-235497, Aug. 15, 1989, 89-2 CPD ¶ 141. Generally, a bid with a material omission cannot be corrected after bid opening; such a bid is regarded as nonresponsive and must be rejected. D.M. Wilson Lumber, Inc., B-239136, Apr. 12, 1990, 90-1 CPD ¶ 386, request for reconsideration denied; D.M. Wilson Lumber, Inc.--Recon., B-239136.2, May 18, 1990, 90-1 CPD ¶ 489. However, not all information requested with a bid involves responsiveness; the information may relate to bidder responsibility, that is, the bidder's ability to perform, or simply may be required for the agency's own internal use. This type of information may be furnished up to the time of award. D.M. Wilson Lumber, Inc., B-239136.2, supra.

The information involved here--a third party indemnification agreement or surety's affidavit--is used by BIA internally in connection with set-asides for Indian/Alaska Native Economic Enterprises; it has no bearing on Tomco's obligation to perform. The failure to furnish the information by bid opening, therefore, does not render the bid nonresponsive, and the acceptance by the agency of the information after bid opening is not precluded. Id.

Nevertheless, the protester contends that the IFB's language, stating that the surety's affidavit "shall" be provided by the time set for bid opening or the bid may be rejected, made this requirement a matter of responsiveness. However, a requirement like the one here concerning the submission of information unrelated to the material terms and conditions of the solicitation and, thus, unrelated to the bidder's performance obligation, cannot be converted into a matter of responsiveness merely by the terms of the solicitation. The ARO Corp., B-222486, June 25, 1986, 86-2 CPD ¶ 6.

The protest is denied.



James F. Hinchman
General Counsel