

P. Williams



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

Decision

Matter of: Luther Construction Company Inc.
File B-241719
Date: January 28, 1991

Jonathan W. Hewes, Esq., Rodey, Dickason, Sloan, Akin & Robb, for the protester.
Alton E. Woods, Esq., Department of the Interior, for the agency.
Paula A. Williams, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly rejected protester's bid as nonresponsive on the basis of agency's concern that the firm would not comply with retention of work clause in the invitation for bids. This clause imposes a performance requirement which the protester agreed to in its bid; thus, the agency's concern related to the bidder's responsibility, not the responsiveness of the bid, and since the protester is a small business, the matter must be referred to the Small Business Administration under the certificate of competency procedures.

DECISION

Luther Construction Company Inc. protests the rejection of its low bid as nonresponsive under invitation for bids (IFB) No. BIA-0150-90-14, issued by the Bureau of Indian Affairs (BIA), Department of the Interior, for roof construction and repair/replacement at the Southwestern Indian Polytechnic Institute in Albuquerque, New Mexico. BIA rejected Luther's bid because information furnished by the firm after bid opening raised doubt as to its intent to comply with the retention of work clause in the solicitation. Luther contends that its bid was improperly rejected as nonresponsive because the bid took no exception to any of the IFB's requirements.

We sustain the protest.

The IFB, issued on July 10, 1990, incorporated the Performance of Work by the Contractor clause, Federal Acquisition Regulation (FAR) § 52.236-1, as required by FAR § 36.501(b). This clause essentially requires the successful contractor to perform at least 20 percent of the total contract work with its own labor forces.

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Bid opening was August 9 and seven firms responded. Luther was the low bidder. As requested by the contracting officer after bid opening, Luther furnished information concerning how it intended to meet the requirement that the successful contractor perform 20 percent or more of the work. Based on a technical review of Luther's submittal, the contracting officer concluded that the percentage of work that would be performed by Luther was less than that required by the solicitation. By letter dated September 21, the contracting officer advised the protester that its bid was rejected as nonresponsive based on the technical review of Luther's submittal. Award was made to the second low bidder the same day. After its agency-level protest of this action was denied, Luther filed this protest with our Office.

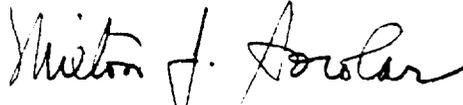
Luther challenges the rejection of its bid on several bases. First, the protester maintains that its bid conforms to all essential requirements of the IFB and, on its face, is responsive. Therefore, Luther argues, the contracting officer's preaward review to determine what percentage of the work Luther would accomplish with its own labor forces was improper since such a review properly should be performed at the end of contract performance utilizing the contractor's actual costs. The protester insists that the information it furnished the contracting officer demonstrates that its retained work exceeds that required by the solicitation. Finally, Luther complains that the agency did not inform it that a technical analysis of the information would be conducted, nor give it an opportunity to participate in the review or methodology to be used and that the technical analysis that was performed was inaccurate.

We agree with the protester that its bid was improperly rejected as nonresponsive. To be responsive, a bid must constitute an unequivocal offer to provide without exception exactly what is required. See The ARO Corp., B-222486, June 25, 1986, 86-2 CPD ¶ 6. 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. See, e.g., Gardner Zemke Co., B-238334, Apr. 5, 1990, 90-1 CPD ¶ 372. Here, by signing and submitting the bid documents without taking any exceptions therein, Luther offered to perform the work in conformity with all material terms and conditions of the solicitation, including the retention of work requirement. Thus, Luther's bid was responsive on its face, and should not have been rejected as nonresponsive. Sage Assocs. General Contractors, Inc., B-235497, Aug. 15, 1989, 89-2 CPD ¶ 141.

The retention of work clause in the IFB is a contract performance requirement which simply sets forth how the work is to be accomplished after award. C. Iber & Sons, Inc., B-208365.2, Apr. 20, 1983, 83-1 CPD ¶ 424. Consequently, how a bidder intends to meet this obligation if awarded the contract relates to bidder responsibility, which is determined as of the time of award, rather than to bid responsiveness. Id. at 4. Thus, we view the contracting officer's finding that Luther will not comply with the retention of work clause to be an element of responsibility and the subsequent rejection of its bid to be, in effect, a nonresponsibility determination. Since Luther certified itself to be a small business concern, the agency is required to refer its determination to the Small Business Administration (SBA) for review under its certificate of competency (COC) procedures. See 15 U.S.C. § 637(b)(7)(A) (1988); J. Johnson Enter., B-234245, May 18, 1989, 89-1 CPD ¶ 478.

Although award has been made, the agency has not yet issued a notice to proceed. Accordingly, we recommend that BIA refer the issue of Luther's responsibility to the SBA for review. If the SBA issues a COC for Luther, the awarded contract should be terminated and award made to Luther, if otherwise appropriate. In any event, since BIA failed to follow the statutory COC procedures, Luther is entitled to recover the costs of filing and pursuing its protest. 4 C.F.R. § 21.6(e) (1990). Luther's claim for such costs should be submitted directly to the agency.

The protest is sustained.

for 
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