



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

Decision

Matter of: Biehn Construction, Inc.
File: B-244364
Date: September 9, 1991

Carl S. Primavera, Esq., and Peter J. Rescorl, Esq., Mesirov, Gelman, Jaffe, Cramer & Jamieson, for the protester. Anna E. Samuelian, Esq., Rosenthal and Ganister, for Lott Constructors, Inc., an interested party. Lester Edelman, Esq., Department of the Army, for the agency. Linda S. Lebowitz, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is dismissed as untimely where protester knew prior to bid opening of the alleged commercial unavailability of a warranty required by the solicitation, but waited until after award to protest the warranty requirement.
2. Where solicitation required bidders to submit prices for all items, agency properly rejected protester's bid as non-responsive where protester effectively took exception to a warranty requirement of the solicitation by inserting in its bid in the space provided for the item the notation "N/A" rather than a price.
3. Agency's decision not to waive protester's price omission for a warranty requirement of the solicitation was not unreasonable where the warranty was material and was not divisible from the other requirements of the solicitation.

DECISION

Biehn Construction, Inc. protests the rejection of its bid as nonresponsive and the award of a contract to Lott Constructors, Inc. under invitation for bids (IFB) No. DACA31-91-B-0020, issued by the Army Corps of Engineers for the construction of the Strategic Wargaming Facility at the United States Army War College, Carlisle Barracks, Carlisle, Pennsylvania.

We dismiss the protest in part and deny it in part.

The IFB, issued on December 7, 1990, contained a unit price schedule consisting of six base bid items, seven additive items, and four optional items. The IFB required bidders to submit prices for all items, including additive and optional items. Additive item No. 00A1 required a price for providing a "15 year warranty on material and workmanship for Elastomeric Membrane Waterproofing" as described in the specifications. The IFB specifically advised that failure of a bidder to submit prices for all items would result in the rejection of its bid. The IFB provided that a single award of all items would be made to the low, responsive and responsible bidder.

Nine bids were submitted by the amended bid opening date of March 5, 1991. The government estimate for the entire project was \$21,791,069, including \$9,200 for additive item No. 00A1. Biehn submitted the apparent low bid of \$20,812,220. However, for additive item No. 00A1, Biehn inserted in its bid in the space provided the notation "N/A" rather than a price. Because Biehn did not submit a price for additive item No. 00A1, the agency rejected Biehn's bid as nonresponsive.

Lott submitted the second low bid of \$21,399,470. Lott submitted prices for all items, including a price of \$5,000 for additive item No. 00A1.^{1/} On May 31, the agency awarded a contract for all items to Lott as the low, responsive and responsible bidder. On June 6, Biehn filed this protest.

Biehn argues that the agency improperly rejected its bid as nonresponsive. Biehn states that it explained to the agency after bid opening, but prior to award, that the reason it did not submit a price for additive item No. 00A1 was because the warranty was "not available" in the marketplace (hence, the notation "N/A"). Biehn argues that since no firm would be able to provide the warranty because of its commercial unavailability, the agency should have accepted its apparent low bid without considering additive item No. 00A1 and awarded it, not Lott, the contract as the low, responsive and responsible bidder.

As a preliminary matter, Biehn admits, and it is obvious from its bid, that prior to bid opening, it knew of the alleged commercial unavailability of the warranty as required by additive item No. 00A1. Our Bid Protest Regulations require that improprieties in a solicitation which are apparent prior to bid opening must be protested prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991). Here, prior to bid opening, Biehn should have

^{1/} The other firms submitted bids with prices for additive item No. 00A1 ranging from "no bid" and "\$0" to \$98,000.

protested as an alleged defect in the terms of the IFB the agency's inclusion of a requirement for a warranty which it believed to be commercially unavailable. In challenging the rejection of its bid as nonresponsive, Biehn's post-award protest of the inclusion of this warranty requirement as a term of the IFB is untimely. See Pennsylvania Printed Prods. Co., Inc., B-239579, Aug. 29, 1990, 90-2 CPD ¶ 179; KASDT Corp., B-235889, July 19, 1989, 89-2 CPD ¶ 63.

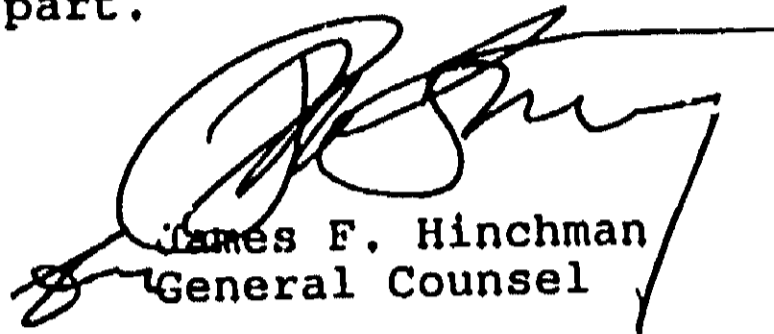
To be responsive, a bid must reflect an unequivocal offer to provide the exact item or service called for in the IFB so that acceptance of the bid will bind the contractor to perform strictly in accordance with the IFB's material terms and conditions. International Pressure Serv., Inc., B-227952, Oct. 5, 1987, 87-2 CPD ¶ 339. Generally, a bid must be rejected as nonresponsive if it is submitted without a price for every item requested by the IFB, since the government's acceptance of the bid would not legally obligate the firm to furnish the unpriced items. Record Press, Inc., B-225517, Mar. 20, 1987, 87-1 CPD ¶ 321. The terms of a warranty are a material part of an IFB, and a bidder's exception to, or qualification of, an IFB's warranty clause renders its bid nonresponsive. General Elec. Co., B-228191, Dec. 14, 1987, 87-2 CPD ¶ 585.

Here, the IFB clearly required bidders to submit prices for all items, including additive and optional items. The IFB specifically advised that failure of a bidder to submit prices for all items would result in the rejection of its bid. By inserting in the space provided the notation "N/A" rather than a price for the warranty requirement of additive item No. 00A1, Biehn effectively took exception to this warranty requirement, in contravention of the terms of the IFB.

While we have recognized that omission of a bid price may be waived where the item for which the price is omitted is divisible from the solicitation's overall requirements, is de minimis as to total cost, and would not affect the competitive standing of bidders, see Custom Envtl. Serv., Inc., B-234774, May 24, 1989, 89-1 CPD ¶ 501, we cannot say that the agency's decision not to waive Biehn's price omission for the warranty requirement of additive item No. 00A1 was unreasonable. The record shows that the agency considers the warranty requirement of additive item No. 00A1 to be material and not divisible from the other requirements of the IFB as the warranty requirement of additive item No. 00A1 is "an integral part of the work, for it assures the integrity of the waterproofing membrane for at least 15 years. The warranty is so essential to the [g]overnment that there is no question that its performance will be enforced." By submitting a price for the warranty requirement of additive item No. 00A1, Lott legally obligated itself to provide all materials and to

perform all labor services associated with this warranty for a full 15-year period. In our view, Lott's commitment to satisfy the warranty requirement of additive item No. 00A1 is material. In contrast, because acceptance of Biehn's bid would not legally obligate Biehn to provide the warranty as required by additive item No. 00A1, the agency properly rejected its bid as nonresponsive.

Accordingly, the protest is dismissed in part and denied in part.



James F. Hinchman
General Counsel