



Comptroller General
of the United States

Washington, D.C. 20548

L. Glass

145881

Decision

Matter of: Aluminum Company of America

File: B-246003

Date: February 13, 1992

Thomas P. Barletta, Esq., and Martin D. Schneiderman, Esq., Steptoe & Johnson, for the protester, Michael Friedman for General Aerospace Materials Corporation, and Robert P. Howard for Reynolds Aluminum, interested parties, Robert L. Mercadante, Esq., Defense Logistics Agency, for the agency, Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where invitation for bids specifically provided that the option clause giving the government the unilateral right to extend the terms of the contract for up to 2 additional years at the proposed base-year price, subject to adjustment only as provided by the Economic Price Adjustment clauses (EPA) included in the solicitation, would not become a part of the contract, absent express assent by the bidder, agency properly rejected bid as nonresponsive because bidder failed to show required commitment in its bid.

DECISION

Aluminum Company of America (ALCOA) protests the rejection of its bid under invitation for bids (IFB) No. DLA500-91-B-0099, issued by the Defense Industrial Supply Center for a 1-year requirements contract for 47 items of supply of aluminum sheet and plate. ALCOA's bid was rejected as nonresponsive because the bid did not contain the required commitment to a mandatory option clause contained in the IFB that gave the agency the unilateral right to extend the terms of the contract for up to 2 years at the base-year price subject to adjustments only as provided by the Economic Price Adjustment (EPA) clauses contained in the IFB.

We deny the protest.

The IFB was issued on May 29, 1991, as a partial small business set-aside with an amended bid opening of July 19. The majority of the supplies to be provided were divided into two tentative destinations, representing the government's yearly requirements within the area of the continental United States. The IFB requested offers on 82 contract line items (CLINS). The IFB cover page in block 9, "Additional Information," stated that "[t]his solicitation contains a mandatory option clause. See clause entitled 'option to extend term of contract on page 43 and 44.'" Beginning on page 43 the IFB contained a clause entitled, "Option to Extend Term Of Contract," which provided that the contract may be extended for up to, but not exceeding, 2 years beyond the base contract year. The total duration of the contract, including the base year, was not to exceed 3 years. This clause also provided that during any term of the contract, whether the base contract year or any option year(s), prices would be subject to adjustment in accordance with the clauses of this contract entitled, "EPA Established Prices and EPA Nonproducer."

The clause also provided that offers would be evaluated on the basis of the price(s) submitted for the base contract year only, without regard to the inclusion of the option provision, and that the base price should not include contingencies for increases in costs. Directly following the option terms, the IFB contained the following:

"2. CAUTION NOTICE - ASSENT TO OPTION PROVISION
OFFERORS MUST SUBMIT OFFERS WHICH INCLUDE
THIS OPTION PROVISION, AND MUST INDICATE
THEIR ASSENT TO INCLUSION OF THE CLAUSE
EITHER BY PLACING AN 'X' IN THE BLOCK BELOW,
OR BY INDICATING CLEARLY ELSEWHERE IN THE
OFFER THAT THEY HAVE READ AND UNDERSTAND THE
CLAUSE, AND THAT THEY AGREE TO ITS INCLUSION IN
THE RESULTANT CONTRACT."

The IFB then provided a block adjacent to which was the following:

"OFFEROR HAS READ AND UNDERSTANDS THE FOREGOING
OPTION PROVISION, AND ASSENTS TO ITS INCLUSION IN
ANY CONTRACT RESULTING FROM THIS SOLICITATION AND
OFFER."

The solicitation further provided that failure to indicate assent to the clause above, or elsewhere in the solicitation and offer, would result in rejection of the offer as nonresponsive.

Fifteen bids were received by the bid opening date. ALCOA was the apparent low bidder on all but 30 of the CLINS. Upon review, the bids of ALCOA and four other bidders were rejected as nonresponsive for failure of the bidders to indicate assent to the "Option To Extend Term Of Contract" provision.¹ Award was made to Reynolds Aluminum for 67 CLINS and to General Aerospace Materials Corporation for 14 CLINS. This protest followed.

ALCOA contends that although it did not "check the box" included in the body of the option clause, it otherwise indicated its assent to the clause and therefore complied with the clause. ALCOA maintains that given the clear statement of the mandatory nature of the clause on the face of the solicitation, by signing its bid and including the clause in the bid, ALCOA's bid provided the requisite indication of its intent to accept and be bound by the option provision.

The agency's position is that the intent of the option clause language was for each bidder, "by some affirmative indication," to acknowledge that it had read and understood the terms and conditions of the clause, and to indicate in a clear and positive manner that it agreed to the provisions of the clause as part of its offer and to the inclusion of the clause in any resultant contract. The agency argues that the bidder could provide this affirmative indication by checking the block in the clause provided for such purpose, or by clearly indicating elsewhere in the bid that the offeror had read, understood, and agreed to the provisions of the clause in any resultant contract. The agency states that ALCOA in its bid did not check the block provided in the option clause and did not indicate clearly elsewhere in its bid that it had read and understood the option provision and that it assented to its inclusion in any resultant contract. Consequently, the agency believes that rejection of ALCOA's bid as nonresponsive was proper.

Generally, to be responsive, a bid must be an unequivocal offer to perform without exception the exact thing called for in the solicitation so that acceptance of the bid will bind the contractor to perform in accordance with all the IFB's material terms and conditions. Stay, Inc., B-237073, Dec. 22, 1989, 89-2 CPD ¶ 586, aff'd, 69 Comp. Gen. 296 (1990), 90-1 CPD ¶ 225. Deficiencies or deviations which go to the substance of a bid by affecting, in more than a trivial way, price, quality, quantity, or delivery are

¹Two other bids were found nonresponsive for failing to include an executed Certificate of Procurement Integrity and two bidders refused to extend their offers.

material and require that the bid be rejected, Seaboard Elecs. Co., B-237352, Jan. 26, 1990, 90-1 CPD ¶ 115. Deviations or defects in a bid that change or call into question the legal relationship between the parties that is envisioned by the IFB are also material and justify rejection of the bid as nonresponsive, Mid-East Contractors, Inc., 70 Comp. Gen. 383 (1991), 91-1 CPD ¶ 342; 50 Comp. Gen. 11 (1970); Tennier Indus., Inc., 69 Comp. Gen. 588 (1990), 90-2 CPD ¶ 25.

Here, the option provision gave the agency the unilateral right to extend the terms of the contract for up to 2 additional years subject only to adjustments in accordance with the EPA clauses contained in the solicitation. The provision obligated the bidder to accept the terms and conditions of the base contract year for up to 2 additional years and provided that the prices subject to adjustment during the option terms would be those prices in effect on the last day of the existing contract period. This provision clearly imposed legal obligations on the bidder to which it would not otherwise be bound. Thus, it must be viewed as material.²

In most cases a bid signature is sufficient to bind the bidder to all material IFB provisions. Even in cases where the IFB asks for something more, a bidder's failure to provide it may be waived if it is clear that the bidder otherwise was bound by law or by the signature on the bid to all material IFB provisions. See Tennier Indus., Inc., supra; 53 Comp. Gen. 431 (1973); B-174216, Dec. 27, 1971. In some cases, however, the IFB is structured so that a commitment to certain material requirements can be established only through something more specific than a bid signature; a bidder's failure to provide that commitment

²To the extent ALCOA argues that any deficiency in its bid regarding the clause should be treated as a minor informality because the option provision did not affect price, quantity, quality, or delivery under the contract because it was not a factor in the evaluation, ALCOA's position is without merit. A minor informality or irregularity is one that is merely a matter of form and not of substance. Federal Acquisition Regulation § 14.405 (FAC 90-5). The defect in ALCOA's bid goes to the substance of the government's rights under the contract--the right to exercise an option.

renders the bid nonresponsive. See, e.g., Mid-East Contractors, Inc., supra; McGuire Refrigeration, Inc., B-242754, May 31, 1991, 91-1 CPD ¶ 519; 52 Comp. Gen. 874 (1973); 50 Comp. Gen. 844 (1971); Rossetti Constr. Co., Inc. v. Brennan, 508 F.2d 1039 (7th Cir. 1975); Northeast Constr. Co. v. Romney, 485 F.2d 752 (DC Cir. 1973).

Here, the IFB specifically provided that the option provision would not automatically become a part of any resulting contract--it would become so only upon the express assent of the bidder. That assent was to be provided as part of the bid. We find that ALCOA failed to unequivocally provide that assent and that its bid therefore was properly found nonresponsive.

The IFB clearly required bidders to express specific agreement with the option provision. Bidders could do so by inserting an "X" in the box provided or by clearly indicating agreement elsewhere in the offer. ALCOA did not insert an "X" in the box provided and did not otherwise specifically indicate assent to the clause. Although ALCOA argues that its commitment to be bound to the clause is indicated by the fact that it signed the cover page of the bid, we think the IFB, in requiring a bidder's specific, express assent, imposed a requirement for something more than a bid signature to express that assent. The cover page of the solicitation, which ALCOA signed, notified bidders that the solicitation contained a mandatory option clause and then directed bidders to pages 43 and 44 where the provision was located; we do not see how ALCOA's signing of this page, which contained only a notice of the provision, not the contents, affirmatively showed that ALCOA read, understood, and agreed to be bound by the option terms.


ALCOA states that the rejection of its low bid as nonresponsive will cost the government money. However, in order to maintain the integrity of the competitive bidding system, a nonresponsive bid may not be accepted, even if, as here, the government could save money by accepting the bid. Central States Bridge Co. Inc., B-219559, Aug. 9, 1985, 85-2 CPD ¶ 154; Hanson Indus. Prods., B-218723 et al., May 9, 1985, 85-1 CPD ¶ 521.

Finally, ALCOA argues that the assent provision of the option clause was ambiguous. ALCOA contends that while the option clause permitted bidders to complete the clause either by checking the box in the clause, or by otherwise indicating their assent elsewhere in their bid, the cover page of the solicitation expressly stated that the option to extend the term of the contract was "mandatory." ALCOA maintains that given that express directive, it was reasonable for ALCOA to conclude that submitting a signed

bid, which stated on its cover that the option was mandatory and which included the option clause, was a sufficient indication of assent to the option clause.

We find no ambiguity in the IFB. The solicitation clearly indicated how bidders were to demonstrate their acknowledgment of the option provision. The use of the word "mandatory" meant only that bidders who elected not to assent to the option clause would have their bids rejected--in light of the specific IFB language requiring a specific indication of assent to the clause, it could not reasonably mean that a bidder could manifest assent simply by signing the bid.

The protest is denied.


James F. Hinchman
General Counsel