



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

Decision

Matter of: Respiratory & Convalescent Specialties Inc.
File: B-255176
Date: February 14, 1994

Julio Larralde for the protester.
William E. Thomas, Esq., Department of Veterans Affairs, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging award under invitation for bids (IFB) for home oxygen respiratory equipment and services is sustained where IFB failed (1) to identify oxygen cylinder rental charges as a price-related factor to be considered in the evaluation of bids, (2) to advise bidders how the charges would factor into the evaluation, and (3) to provide bidders with the agency's estimate of the number of cylinders to which rental charges would apply.

DECISION

Respiratory & Convalescent Specialties Inc. (RCSI) protests the selection for award of Penn Oxygen Service Inc. under invitation for bids (IFB) No. 562-4-92, issued by the Department of Veterans Affairs (VA) Medical Center, Erie, Pennsylvania, for home oxygen respiratory equipment and services for VA beneficiaries. The protester contends that its bid price was low, but that due to an improper price evaluation, the agency determined that Penn's bid was more advantageous to the government.

We sustain the protest because we find that the solicitation was defective.

The IFB, as amended, requested prices for the monthly rental, and related maintenance services, of various items of respiratory equipment to be furnished to VA beneficiaries in their homes. The solicitation, which sought bids for a base period of 1 year, followed by two 1-year options, set forth estimated quantities under each of eight line items and asked bidders to furnish both unit and extended prices for each item. Line item 2 requested a price for portable

oxygen cylinders for ambulatory patients. Underneath the blank in which bidders were asked to insert their total aggregate price for the eight line items, the IFB provided as follows:

"Note: Cylinders shall be loaned to beneficiaries with no charge for a minimum of thirty (30) days beginning with the date of receipt at their home. Bidder must specify in space provided above, the amount of demurrage charge beyond the free loan period of 30 days."

"It is understood and agreed that if the bidder does not insert charge above, there will not be a charge for demurrage beyond the free loan period."

RCSI and Penn were the only bidders to respond to the IFB. RCSI offered the same monthly price--\$8,697--for the base and option years; its total price for the eight line items over the 3-year period thus totaled \$313,092. In the space above the note instructing bidders to specify their demurrage charge, RCSI inserted the notation "\$3.00/Demurrage/Month on cylinder over 30 days." Penn bid a monthly price of \$8,295 for the base year; \$8,700 for the first option year; and \$9,105 for the second option year. Thus, its bid for the eight line items over the 3-year period totalled \$313,200. Penn did not include a demurrage charge for cylinders retained by recipients more than 30 days.

In evaluating the bid prices, the contracting officer determined that despite RCSI's lower total price on the eight line items, Penn's price was lower overall because it did not include a charge for demurrage. The contracting officer noted that under prior contracts approximately 30 to 40 cylinders per month remained in veterans' homes for more than 30 days; therefore, she calculated that RCSI would charge the VA an additional \$3,280 (30 cylinders/month x 36 months x \$3.00/cylinder) for demurrage over the course of the contract. When this amount was added to RCSI's bid on the eight line items, the total exceeded Penn's total by more than \$3,000.

RCSI argues that it was improper for the agency to consider demurrage charges in evaluating bid prices since the IFB neither identified demurrage as a line item in the bid schedule, nor provided estimates as to the number of cylinders on which demurrage would be charged. The VA contends, in response, that although the IFB did not identify demurrage as a line item, it did identify it as a price-related factor to be considered in the evaluation of bids.

Our review shows that the IFB here did not identify demurrage charges as a price-related factor to be considered in the evaluation of bids; in fact, the IFB gave no guidance to bidders, other than bid price, regarding what price-related factors might be used to evaluate the bids. Moreover, the IFB did not contain other information--such as an estimate of the number of cylinders on which demurrage could be expected to accrue each month, or instructions to enter an extended price for the estimated quantity--which might have placed bidders on notice that the agency intended to consider demurrage charges in evaluating prices.

A solicitation must clearly set forth the basis for bid evaluation so that all bidders may prepare their bids on an equal and well-informed basis. American Cyanamid Co., B-232200.2, June 23, 1989, 89-1 CPD ¶ 593. Specifically, an agency may not evaluate bids on the basis of price-related factors which are not identified in the solicitation. Federal Acquisition Regulation (FAR) §§ 14.201-5(c), 14.201-8;¹ E & T Electronics, Inc., B-238099.2, July 10, 1990, 90-2 CPD ¶ 24.

We disagree with the agency's contention that the IFB's request for such information--i.e., a demurrage charge--was, in and of itself, sufficient to place bidders on notice that the agency intended to use the charge.² Even if the VA were

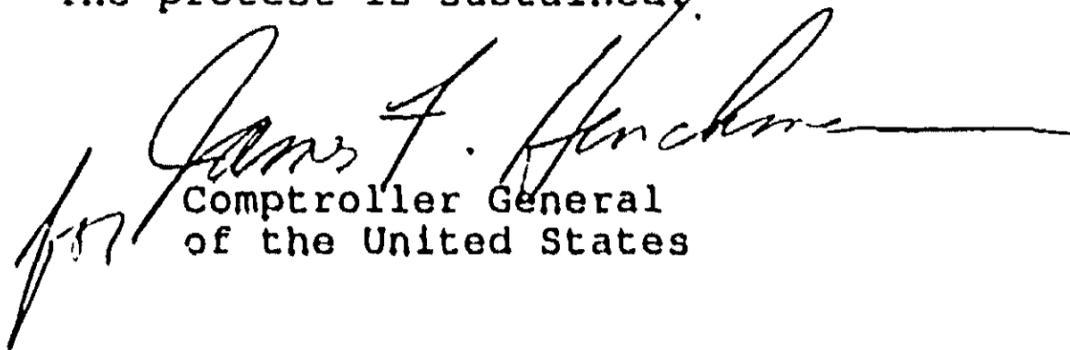
¹FAR § 14.201-8--referenced in FAR § 14.201-5(c)--suggests, for example, that one such factor that should be set forth in a solicitation, when applicable, includes "[f]oreseeable costs or delays to the [g]overnment resulting from such factors as differences in inspection, locations of supplies and transportation." Thus, when differences in transportation costs--for example, freight on board (f.o.b.) charges--to designated points might vary from one bidder to another, the FAR requires that solicitations advise bidders that the difference will be considered in determining the lowest cost to the government. FAR § 14.201-8(a). In our view, the demurrage costs here are analogous to f.o.b. costs, and the role of these costs in an evaluation of a bidder's price should be revealed in the solicitation. See Tek-Lite, Inc., B-230298, Mar. 8, 1988, 88-1 CPD ¶ 241 (agency properly amended IFB to add an additional price-related factor for evaluation of bids).

²We do not think that the mere request to identify the demurrage charge, without information about how the charge would be considered in the evaluation of bid prices, rendered the solicitation patently ambiguous so as to require protest prior to bid opening. See Reflect-A-Life, Inc., B-232108.2, Sept. 29, 1989, 89-2 CPD ¶ 295 (only
(continued...))

correct that bidders should have been on notice that demurrage charges would be considered in the evaluation of their bids. the IFB was nonetheless defective because it failed to furnish bidders with an estimate as to the number of cylinders on which demurrage could be expected to accrue each month. A solicitation for a requirements contract must contain quantity estimates since such information is essential for the preparation of reasonable, intelligent bids, and for the evaluation of the lowest total cost to the government. Air Life, Inc., B-214823, Oct. 30, 1984, 84-2 CPD ¶ 478. Here, since the VA intended to evaluate bids by multiplying the demurrage charge specified by each bidder by the VA's estimate of the number of cylinders that would remain in veterans' homes for longer than 30 days, the IFB should have so informed bidders and furnished them with an estimate of the number of cylinders to which the charges would apply.

We recommend that the VA cancel the IFB and resolicit using an appropriately amended solicitation--i.e., one which (1) identifies demurrage on cylinders retained in beneficiaries' homes for over 30 days as either a separate line item in the bid schedule or as a price-related factor in section M (Evaluation Factors for Award); and (2) provides a monthly estimate as to the number of cylinders to which the charge will apply. We also find that the protester is entitled to the costs of filing and pursuing its protest. 4 C.F.R. § 21.6(e) (1993). In accordance with 4 C.F.R. § 21.6(f), RCSI's certified claim for such costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after receipt of this decision.

The protest is sustained.


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² (...continued)

patent ambiguities need to be protested prior to bid opening). Rather, the IFB did not provide for consideration of demurrage charges in the evaluation of prices, and thus was not ambiguous.