



Comptroller General
of the United States

505.43

Washington, D.C. 20548

Decision

Matter of: Hust Brothers, Inc.

File: B-255363.2

Date: March 14, 1994

Gerald J. Brentnall, Jr., Esq., Law Offices of Frank L. Rowley, for the protester.
James D. Skow, Esq., for Fallen Leaf Enterprises, Inc., an interested party.
Joseph M. Goldstein, Esq., Department of the Air Force, for the agency.
Christine F. Davis, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. An agency was not required to reject an offeror's low-priced proposal as technically unacceptable, even though the proposal lacked price lists for the solicited vehicle parts and the solicitation warned that such an omission would render the proposal "nonresponsive" because the solicitation, in fact, did not premise the evaluation of proposals or the offeror's promise to perform on the information contained in the price lists.
2. The General Accounting Office (GAO) will not consider a protest of an awardee's mistake in proposal claim asserted after contract award, since such claims are for resolution under the Contract Disputes Act and are not encompassed by GAO's bid protest jurisdiction.

DECISION

Hust Brothers, Inc. protests the award of a contract to Fallen Leaf Enterprises, Inc. under request for proposals (RFP) No. F04699-93-R-0060, issued by the Department of the Air Force, for a contractor-operated vehicle parts store at the Sacramento Air Logistics Center, California. Hust argues that Fallen Leaf's offer should have been rejected as unacceptable because it did not include complete price lists to be incorporated into the contract.

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

The RFP, issued on March 19, 1993, contemplated the award of a requirements contract for a 1-year base period with three 1-year options, for the provision of replacement vehicle parts at a contractor-operated parts store. The RFP provided for award to the "responsive," that is, the "technically acceptable," offeror proposing the lowest overall price, inclusive of options.

The RFP price schedule provided, for every line item, a government dollar estimate representing the expected annual requirements for each part. The RFP envisioned that the requested parts generally appear on a price list published by the original equipment manufacturer or a brand name distributor, although there was provision for non-price-listed parts. The RFP, as amended, requested four types of price-listed parts: (1) automobile, truck and bus parts from 4 different original equipment manufacturers; (2) special purposes vehicle parts from 36 different original equipment manufacturers; (3) rebuilt parts; and (4) aftermarket parts. The RFP provided for a separate evaluation of non-price-listed parts.

For each line item of price-listed parts, the offeror was asked to propose a discount from those prices that are listed on the manufacturers' price list(s). The RFP stated that, "any numerical figure (including zero) inserted in the discount block for a brand will be considered an offer for that brand and will indicate the offeror will provide price list coverage for the brand." The RFP further stated that the discounts proposed by the offeror would remain in effect throughout the life of the contract, regardless of whether the manufacturer later revised its price list, whether the parties agreed to a substituted price list, or whether the agency's vehicle or equipment inventory changed. Accordingly, the RFP did not evaluate the offeror's price by reference to any proposed price lists. Rather, the proposed discount for each brand or part was applied to the associated government dollar estimate stated in the RFP for that item to arrive at a total price for price-listed parts.

Although the RFP identified the schedule of special purpose vehicle parts and rebuilt parts as "price-listed parts," the offeror could decline to propose price list coverage for any

¹Since this procurement is negotiated and the concept of "nonresponsiveness" is therefore not strictly applicable, the RFP's references to "responsiveness" simply mean that the offer must be "technically acceptable." See VA Venture; St. Anthony Medical Ctr., Inc., B-222622; B-222622.2, Sept. 12, 1986, 86-2 CPD ¶ 289.

item on these schedules.² The offeror did so by inserting "NPL" in the appropriate discount block, which converted the item to a "non-price-listed" part and meant that the government would ultimately pay the net invoice price for the part. For evaluation purposes, the non-discounted government estimate was considered the proposed price for those parts excluded by the offeror from price list coverage. In addition, the government dollar estimate for these items was transferred to the RFP's designated NPL expense pool, and, as set forth in the RFP, a small, graduated service charge was applied to the gross NPL amount. These calculations yielded the offeror's total evaluated price for non-price-listed parts.

The offeror with the lowest evaluated price overall, including the price-listed and non-price-listed items, would receive the award; the price lists submitted by offerors were not considered in making this determination.

The RFP, at section L-902, stated that the offeror must furnish with its offer a catalog of price lists proposed for use in the resulting contract.³ The RFP further stated at section L-900, and reiterated in the evaluation section, that the failure to furnish the catalog of price lists concurrent with the offer would require the rejection of the offer as "nonresponsive." At the same time, section L-900 went on to state that,

"the Government will require the apparent low offeror to furnish a complete set of price lists proposed for use in the resultant contract within ten (10) work days after the receipt of the request."

Although the resulting contract would incorporate those price lists accompanying the offer or furnished later by the apparent low offeror, the RFP expressly provided for changes in the price lists included in the contract. Such changes included not only manufacturer revisions to the price lists, but also the incorporation of additional price lists into the contract or the substitution of one price list for another; in all cases, however, the associated discounts

²Offerors could not propose to furnish automobile, truck and bus replacement parts or aftermarket parts on a non-price-listed basis.

³Where the RFP requested original manufacturer parts, the offeror was to provide the price list of that manufacturer; where the RFP merely specified a particular part, the offeror could provide any number of price lists covering that part.

offered by the contractor remained firm throughout the contract.

Both Hust and Fallen Leaf submitted initial proposals by the April 26, 1993, receipt date, and the agency conducted discussions with both offerors. During these discussions, Fallen Leaf told the agency that its proposal did not include price lists for all the items for which a discount was proposed. The contracting officer responded that Fallen Leaf could appropriately omit the price lists from its proposal, since, under section L-900, "[t]he apparent low offeror would be the only one asked to provide the price lists to the government" for use in the resulting contract.

On September 15, the agency issued an amendment that effected numerous changes to the RFP.⁴ Based upon the amended solicitation, the agency requested Hust's and Fallen Leaf's best and final offers (BAFO) by September 22. Fallen Leaf's evaluated BAFO price was \$1,118,803.84, as compared to Hust's price of \$1,171,354.52.⁵ The agency declared Fallen Leaf the "low responsive offeror" and awarded it the contract on September 24.

Fallen Leaf's offer omitted each of the original equipment manufacturer's price lists for special vehicles parts from which a discount was proposed (10 price lists in all). This omission, claims the protester, required the rejection of Fallen Leaf's offer as unacceptable under the RFP evaluation section and section L-900.

We reached almost precisely the same issue posed by the protester here in our decision in American Spare Parts, Inc., B-224745, Jan. 2, 1987, 87-1 CPD ¶ 4. The solicitation in that case, an invitation for bids (IFB) for a contractor-operated vehicle parts store, virtually

⁴Among other things, the amendment changed the government estimate for various line items and provided for the evaluation of options.

⁵Fallen Leaf made an apparent clerical mistake in adding the government dollar estimates for the items which it transferred to non-price-list parts. The agency verified this mathematical error with Fallen Leaf on September 23 and corrected it in arriving at the awardee's evaluated price. Contrary to the protester's allegations, the resolution of this apparent clerical mistake was in the nature of a clarification, which, unlike discussions, does not allow a substantive proposal revision or modification and does not obligate the agency to reopen discussions with all offerors. Federal Acquisition Regulation §§ 15.601, 15.607; Sycor Corp., B-231095, July 5, 1988, 88-2 CPD ¶ 9.

mirrored this RFP's requirements regarding the submission of price lists. The protester in American Spare Parts, the apparent low bidder, failed to include with its bid a complete schedule of price lists proposed for use in the resulting contract, and the agency rejected its bid because the IFB conditioned bid responsiveness on the provision of such price lists. We held that the price list requirement was not material, even though so described in the IFB, because the price lists were not to be used in the government's evaluation of the bid and did not affect the bidder's promise to perform as specified. Specifically, the price lists were not used to determine a bidder's evaluated price for the price-listed items; rather, as in this case, the discount promised by the bidder was applied to a stated government dollar estimate to derive the bidder's price. In addition, the bidder's failure to furnish the schedule of price lists did not compromise its promise to perform, which was secured, as in this case, once the bidder inserted a discount for a line item, to be taken from the current price list for the associated part. Thus, we concluded that the agency could not reject the apparent low bid for failing to include a complete schedule of price lists.

In our view, this case is fundamentally the same as American Spare Parts. The schedule of price lists required here was no more relevant to the evaluation of proposals or the offeror's obligation to perform than it was in American Spare Parts. This solicitation likewise disregarded the schedule of price lists in the evaluation of the offeror's price and obligated the offeror to perform at its proposed discount, regardless of any subsequent changes in the price lists. Because the price lists were not material to the proposal evaluation and did not impact on the offeror's obligations under the contract, the RFP gave the agency discretion to defer its request for the price lists until an offeror had been selected, as was done here.⁶ See Tri-Services, Inc., B-245698, Jan. 15, 1992, 92-1 CPD ¶ 75; Essex Electro Eng'rs, Inc., B-232675, Jan. 18, 1989, 89-1 CPD ¶ 44. Under the circumstances, the absence of the price

⁶Here, the Air Force requested Fallen Leaf's omitted price lists after award and received 7 of the 10 price lists within the 10-day time frame spelled out in section L-900. This post-award request did not violate section L-900, since the clause did not specify when the government must request the proposed price lists. While the government thus forfeited its opportunity to consider Fallen Leaf's inability to furnish the three price lists--one of which was commercially unavailable--as a matter of responsibility, the contract expressly provides for substituted or additional price lists, without revision to the associated discounts offered.

lists from the awardee's proposal would not have been a reasonable cause for finding the proposal unacceptable, and we therefore have no basis to object to the award.'

Hust finally questions the efficacy of a mistake in proposal claim made by Fallen Leaf after contract award, where Fallen Leaf requested to reduce some of its proposed discounts and to convert some of the price-listed items to non-price-listed items. Hust asserts that these claims arose from Fallen Leaf's failure to provide proper price lists with its offer. The Air Force has advised that it has not yet ruled on this mistake claim, and that the awardee is billing the Air Force in accordance with its proposed discounts and price lists, without reference to the alleged mistake.

Although the basis for Fallen Leaf's mistake claim is not apparent, we cannot rule on this matter since it is outside of our bid protest jurisdiction. East Bay Auto Supply, Inc., B-223353, June 27, 1986, 86-2 CPD ¶ 15. Mistake in bid claims first alleged after award are claims "relating to" contracts within the meaning of the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (1988). Accordingly, they are for resolution under Contract Disputes Act procedures and are not subject to our bid protest jurisdiction.

The protest is denied in part and dismissed in part.

Robert P. Murphy

Robert P. Murphy
Acting General Counsel

'There is a conflict in the RFP's price list requirements, one which states that such price lists must accompany a proposal as a condition of "responsiveness," the other which states that the price lists can be submitted upon request. However, this solicitation defect was not protested prior to the initial proposal receipt date, see 4 C.F.R. § 21.2(a)(1) (1993), and does not affect our determination that the schedule of price lists was extraneous to the evaluation of proposals under the RFP. Nor is there any suggestion that this defective provision prejudiced Hust.