



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Metric Systems Corporation

**File:** B-256343; B-256343.2

**Date:** June 10, 1994

E. Bruce White Wolf, Esq., for the protester.  
Danielle M. Conway, Esq., Department of the Army, for the agency.  
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

In a two-step sealed bid procurement, the protester's exception, in a cover letter submitted with its bid, to the solicitation's indemnification requirements changed the legal relationship between the parties as envisioned by the solicitation and rendered the protester's bid nonresponsive.

### DECISION

Metric Systems Corporation protests the rejection of its bid and the award of a subcontract to Ionics, Incorporated by Bechtel National, Inc. under invitation for bids (IFB) No. 19987-149-C1A-R for blast doors and gates, pursuant to Bechtel's prime contract with the U.S. Army Corps of Engineers for the acquisition of equipment for the Chemical Stockpile Disposal Program.<sup>1</sup> Metric protests that it is entitled to award as the low-priced, responsive bidder and that the Corps failed to notify it promptly of the rejection of its bid.

We deny the protest.

<sup>1</sup>The Chemical Stockpile Disposal Program is a congressionally mandated plan to provide for the design, construction, and operation of facilities to dispose of obsolete chemical warfare agents and munitions. Bechtel is designated as the Corps's agent in making these equipment acquisitions. See Parsons Precision Prods., Inc., B-249940, Dec. 22, 1992, 92-2 CPD ¶ 431.

The IFB contemplated the award of a fixed-price contract with an economic price adjustment clause for a base requirement of 6 doors and 8 gates and options for an additional 24 doors and 32 gates. Bidders were informed that the procurement would be conducted in accordance with the two-step sealed bid procurement procedures set forth in Federal Acquisition Regulation (FAR) Subpart 14.5. Under step one of a two-step sealed bid procurement, bidders submit technical proposals. In step two, bidders, whose first step proposals were found technically acceptable, submit formal bids based upon their technical proposals, using forms provided by the agency.

Bidders were informed that bid prices would be evaluated by adding the bidder's total option prices to its price for the base requirement. The IFB provided that award would be made to the responsible bidder whose bid, conforming to the IFB, was the most advantageous to the government, considering only price and price-related factors included in the IFB.

In pertinent part, the IFB contained the following "Indemnity" clause:

"Seller hereby releases and shall indemnify, defend and hold harmless Buyer (Bechtel) . . . of all the foregoing from and against and all suits, actions, legal or administrative proceedings, claims, demands, damages, liabilities, interest, attorney's fees, costs or expenses of whatsoever kind or nature, including those arising out of injury to or death of Seller's employees, whether arising before or after completion of the work hereunder and in any manner directly or indirectly caused, occasioned, or contributed to in whole or in part, or claimed to be caused, occasioned or contributed to in whole or in part, by reason of any act, omission, fault or negligence whether active or passive of Seller, its subcontractors or of anyone acting under its direction or control or on its behalf in connection with or incidental to the performance of this contract.

"Seller's aforesaid release, indemnity and hold harmless obligations, or portions or applications thereof, shall apply even in the event of the fault or negligence, whether active or passive, or strict liability of the parties released, indemnified or held harmless to the fullest extent permitted by law, but in no event shall they apply to liability caused by the willful misconduct or sole negligence of the party released, indemnified or held harmless.

"This Purchase Contract does not include the FAR clause § 52.250-1, "INDEMNIFICATION UNDER PUBLIC LAW 85-804 APR 84." The Seller, in accordance with FAR § 50.403, may submit a written request for inclusion of said clause after contract award. If the Seller makes this application to Bechtel National, Inc., the request will be reviewed as promptly as possible through U.S. Army Corps of Engineers channels. . . . Bechtel National, Inc. will make reasonable efforts to support Seller's valid applications." [Emphasis added.]

Bechtel received 13 step-one proposals and found that 7 proposals, including those of Metric and Ionics, were within the competitive range. Discussions were conducted with the 7 competitive range bidders, and proposal revisions received. Bids were ultimately requested from 6 bidders, including Metric and Ionics, all of whose proposals had been found acceptable. Metric submitted the apparent low bid of \$2,026,356, while Ionic's bid of \$2,447,105 was second low.

Metric's bid included a cover letter that, in part, stated that the IFB's "Indemnity" clause was:

"somewhat vague and requires clarification. To the extent that Metric is required to indemnify Bechtel for Metric's negligence, we are willing to accept the provision. However, other sections of the clause are unclear (see line 4 "from and against all"). Metric needs clarification regarding whether Bechtel intends for Metric to indemnify Bechtel from the consequences of Bechtel's negligence or strict liability. We are certain that we can negotiate a mutually satisfactory clause upon proper clarification of this provision." [Emphasis added.]

Bechtel rejected Metric's bid as nonresponsive because the cover letter took exception to the IFB's indemnification clause.<sup>2</sup> On July 22, 1993, Bechtel requested the Corps's consent to award a subcontract to Ionics, as the low, responsive and responsible bidder. Award was subsequently

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<sup>2</sup>Metric's bid was also determined to be nonresponsive because Metric, contrary to the IFB, priced the option quantities using the economic price adjustment clause, and Metric did not separately price each contract subline item but provided total prices and indicated that the subline items were "not separately priced." Because, as described below, we find that Metric's bid was nonresponsive to the IFB's indemnity requirement, we do not address Metric's protest of these other matters.

made to Ionics, and on January 28, 1994, Bechtel notified Metric that its bid was rejected. This protest followed.

All bidders must compete for sealed bid contracts on a common basis. No individual bidder can reserve rights or immunities that are not extended to all bidders by the conditions and specifications advertised in the IFB. Parsons Precision Prods., Inc., supra; Bishop Contractors, Inc., B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555. Therefore, to be responsive, a bid must contain an unequivocal offer to provide the required items or services in total conformance with the material terms of the solicitation, and any bid which imposes conditions that would modify the material requirements of the solicitation must be rejected as nonresponsive. Id. A material deviation is one which affects, in more than a trivial way, the price, quality, or quantity of goods or services offered, or which changes or calls into question the legal relationship between the parties that is envisioned by the IFB. Aluminum Co. of Am., 71 Comp. Gen. 245 (1992), 92-1 CPD ¶ 184. A bid which is nonresponsive on its face may not be converted into a responsive bid by post-bid-opening clarifications or corrections. Propper Mfg. Co., Inc., B-245366, Dec. 30, 1991, 92-1 CPD ¶ 14; Buckeye Pacific Corp., B-212183, Aug. 30, 1983, 83-2 CPD ¶ 282.

Here, the IFB's indemnification clause required subcontractors to indemnify and hold Bechtel harmless from any suit, action, claim, or liability arising, directly or indirectly, from "any act, omission, fault or negligence" of the subcontractor or of anyone acting under the subcontractor's control or direction or on the subcontractor's behalf. The clause further provided that the subcontractor's indemnity obligations would apply even in the event of Bechtel's own negligence or strict liability, unless the liability was caused by Bechtel's sole negligence or willful misconduct.

Metric's bid cover letter informed Bechtel that Metric only agreed to indemnify Bechtel for Metric's negligence. The letter then stated that Metric did not understand the remainder of the indemnity clause but that Metric was "certain that we can negotiate a mutually satisfactory clause upon proper clarification of this provision."

It is apparent that Metric, in its cover letter, merely agreed to indemnify Bechtel for Metric's individual negligence and only in the absence of Bechtel's negligence or strict liability, rather than unequivocally promising to indemnify Bechtel from any action or liability, arising from acts or omissions of negligence or otherwise and agreeing that this indemnity would apply even if Bechtel was contributorily or comparatively negligent or was subject to

strict liability. Metric's attempt to limit its potential liability to Bechtel changed, or at least called into question, the legal relationship of the parties envisioned by the IFB. Allowing Metric to reserve to itself the right to renegotiate this legal obligation would be prejudicial to the other bidders who bound themselves under the IFB's indemnity provisions. See Bishop Contractors, Inc., supra; Hewlett-Packard Co., B-216530, Feb. 13, 1985, 85-1 CPD ¶ 93.

Metric argues that it did not take exception to the IFB indemnity provision but only requested clarification and/or negotiations. In this regard, Metric contends that since it signed the bid, it was bound to strictly comply with all material terms and conditions of the solicitation, regardless of the language in the cover letter. We disagree. Whether a bid is responsive is determined from all the bid documents, including any cover letters or extraneous documents, at bid opening. See The Ramirez Co. and Zenon Constr. Corp., B-233204, Jan. 27, 1989, 89-1 CPD ¶ 91. Here, as indicated above, Metric's bid expressly took exception to certain portions of the IFB's indemnity requirements.

Metric also argues that the IFB indemnification provisions are not material because Bechtel is itself indemnified for unusually hazardous risks by the government under FAR § 52.250-1, "Indemnification Under Public Law 85-804," which was included in Bechtel's prime contract.<sup>3</sup> However, a deviation to an IFB provision that has the effect of changing the legal relationship between the parties is material and cannot be waived, even if the impact on price may be trivial. See Parsons Precision Prods., Inc., supra; Versailles Maint. Contractors, Inc., B-203324, Oct. 19, 1981, 81-2 CPD ¶ 314. Here, the IFB contemplated a relationship in which the subcontractor would indemnify Bechtel who was acting as the government's agent in the acquisition of the blast doors and gates. Metric's exception to the IFB indemnity provision if accepted would

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<sup>3</sup>Metric suggests that the IFB's indemnification provision is "so overly broad, overreaching and unconscionable as to be unenforceable and not in the public's interest." This challenge to the indemnification provision (which seemingly is an acknowledgment of the material nature of this provision) is an untimely protest of an apparent alleged solicitation impropriety. Our Bid Protest Regulations require protests of apparent solicitation improprieties to be filed prior to bid opening or the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1994). Metric's post-award objection of this requirement is untimely and will not be considered by our Office.

fundamentally change the nature of this relationship. While it is true that the government has chosen to indemnify Bechtel to the extent that Bechtel is not otherwise insured or indemnified, this does not mean that Bechtel, as the government's agent, could or should waive indemnity coverage (and thus unilaterally increase the government's potential liability) without the government's assent, which has not been given.<sup>4</sup> In any case, as noted above, the other bidders assumed this legal liability when they submitted their bids.

Metric also protests that the Corps failed to promptly notify it of the rejection of its bid. This objection, which is merely procedural in nature, provides no valid basis to challenge the validity of the agency's award decision or decision that Metric's bid was nonresponsive. See Pauli & Griffin, B-234191, May 17, 1989, 89-1 CPD ¶ 473.

The protest is denied.

*Ronald Berger*

for Robert P. Murphy  
Acting General Counsel

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<sup>4</sup>In this regard, the IFB informed bidders that extension of the indemnity provisions of FAR § 52.250-1 to the subcontractor would be within the agency's discretion.