



Decision

Matter of: Mark Dunning Industries, Inc.

File: B-258373

Date: December 7, 1994

Karl Dix, Jr., Esq., and George Papaioanou, Smith, Currie & Hancock, for the protester.
Jesse W. Rigby, Esq., Clark, Partington, Hart, Larry, Bond, Stackhouse & Stone, for Browning-Ferris Industries of Florida, Inc., an interested party.
James A. Sparks, Esq., Diane D. Hayden, Esq., and Paul M. Fisher, Esq., Department of the Navy, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Allegation that contracting agency should have rejected low bid as nonresponsive is denied where on its face, bid takes no exception to the solicitation's material requirements and unequivocally promises to provide the exact services called for in accordance with all material terms and conditions of the solicitation.
2. Submission of below-cost bid is not improper; the government may not properly withhold award merely because a responsive bid is below cost.
3. Protester relied on agency's oral explanation on how to prepare its bid at its own risk, particularly where the solicitation cautioned that all inquiries concerning the solicitation must be submitted to the agency in writing and that responses to such inquiries would be provided to all bidders via an amendment to the solicitation.
4. Whether awardee under invitation for bids for waste disposal services will comply with county ordinance allegedly requiring contractor to enter into a "franchise agreement" with a local government entity is a matter between the contractor and the cognizant state or local authority, not for federal contracting officials to resolve.

DECISION

Mark Dunning Industries, Inc., the incumbent, protests the proposed award of a contract to Browning-Ferris Industries of Florida, Inc., (BFI) under invitation for bids (IFB) No. N65114-93-B-2146, issued by the Department of the Navy for solid waste collection from Naval facilities located in or near Pensacola, Florida. The protester contends that BFI's bid is nonresponsive and materially unbalanced.

We deny the protest.

BACKGROUND

The IFB, issued on August 1, 1994, contemplated the award of a combination fixed-price, indefinite quantity contract for a base year, with up to four 1-year options. Bidders were required to submit unit and extended prices for estimated quantities of the fixed-price, lump-sum portion of the work as follows: "SCHEDULED REFUSE COLLECTION," contract line item number (CLIN) 0001, and "REFUSE DISPOSAL FEE," CLIN 0002, and a subtotal price for those two CLINs. Bidders were also required to submit unit and extended prices for the indefinite quantity work, CLINs 0003 through 0009, a subtotal for those CLINs, and a total price for CLINs 0001 through 0009. Award was to be made to the responsible bidder submitting the lowest total price for CLINs 0001 through 0009.

The agency received five bids by bid opening on August 30, ranging from \$1,060,713 to \$1,276,354. BFI submitted the lowest total price, while Mark Dunning's price of \$1,073,129 was second low. As relevant to this protest, for CLIN 0002 BFI submitted a unit price of \$28/ton, while Mark Dunning bid \$30/ton for that item. On September 1, prior to award, Mark Dunning filed this protest in our Office alleging that the Navy should reject BFI's bid as nonresponsive and materially unbalanced.

PROTESTER'S CONTENTIONS

According to the protester, an ordinance in Escambia County, Florida, where most of the Naval facilities covered by the contract are located, requires that any firm engaged in the business of collecting and disposing of nonresidential wastes in the county enter into a franchise agreement with the county which requires the contractor to use a disposal

facility provided by the county.¹ The protester points to section C.22 of the IFB concerning the disposal or "tipping" fee, CLIN 0002, which provides in pertinent part:

"The disposal fee on this contract will be invoiced separately as indicated in paragraph G.4. The disposal fee will be paid monthly based on the total cumulative tonnage delivered to the landfill each month as shown on the landfill's certified weight tickets multiplied by the unit [price] for [CLIN 0002], . . . Contractors must base their bids [on] the disposal fee that will be in effect on 1 October 1994. Future changes in landfill disposal fees shall be reported to the [c]ontracting officer and adjustments to the disposal fee unit prices will be made in accordance with the [IFB's [e]conomic [p]rice [a]djustment [c]lause. . . ." (Emphasis added.)

According to Mark Dunning, since the local ordinance will require the contractor to enter into a franchise agreement with Escambia County, and since that agreement will require the contractor to use the disposal facility provided by the county, the "landfill" referred to in section C.22 of the IFB must be the Escambia County waste disposal facility. Thus, according to the protester, section C.22 of the IFB required bidders to submit a unit price of \$30/ton for CLIN 0002, since that was the disposal fee in effect on October 1, 1994, at the Escambia County waste disposal facility. Mark Dunning argues that by submitting a unit price of \$28/ton for CLIN 0002, BFI rendered its bid nonresponsive.²

¹The protester has provided a copy of a franchise agreement between Mark Dunning and Escambia County which provides in pertinent part:

"ARTICLE III. TIPPING FEES. All solid waste collected by Collector must be disposed of at a disposal facility designated and/or provided by the County. The contracting parties hereby agree that in consideration for the County providing disposal facilities to the Collector, the Collector shall pay to the County a tipping fee for solid waste delivered to the disposal site. . . ."

²Mark Dunning also argues that based on its experience as the incumbent, the estimated quantity listed in the IFB for CLIN 0002 is defective. Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be filed prior to bid opening.

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DISCUSSION

A responsive bid is one that unequivocally offers to provide the exact thing called for in the IFB, such that acceptance of the bid will bind the contractor in accordance with all of the IFB's material terms and conditions. See Southern California Roofing Co., B-236631, Dec. 26, 1989, 89-2 CPD ¶ 594. Only where a bidder provides information with its bid that reduces, limits, or modifies a material solicitation requirement may the bid be rejected as nonresponsive. See, e.g., Contech Constr. Co., B-241185, Oct. 1, 1990, 90-2 CPD ¶ 264. Here, there is no support in the record for Mark Dunning's assertion that BFI's bid is nonresponsive.

The IFB did not require bidders to bid a predesignated price for CLIN 0002. Nor did the IFB contain any specific requirement for the successful bidder to have a "franchise agreement" or other business license issued by the state of Florida or Escambia County. In addition, the IFB did not require bidders to designate in their bids a particular disposal facility they would be required to use if awarded the contract. The IFB only required bidders to submit fixed unit and extended prices for providing all labor, supervision, tools, materials, equipment, and transportation necessary to dispose of the waste collected from the installations covered by the IFB, which, in their business judgment, would make their bids competitive. Thus, Mark Dunning's contentions notwithstanding, nothing in the IFB required bidders to submit a unit price of \$30/ton for CLIN 0002. The language in section C.22 of the IFB required only that bidders provide a baseline price for CLIN 0002 as of a date certain which the agency could use in considering any future requests by the successful bidder for upward adjustments to the price of CLIN 0002 under the contract's economic price adjustment clause. Indeed, the fact that the IFB provided a blank space for bidders to insert a price for CLIN 0002 belies the protester's assertion that bidders were required to submit a preestablished price for that item. We have examined BFI's bid and find nothing on its face that takes exception to any of the IFB requirements. Since BFI has promised to perform in accordance with the terms of the IFB without exception, BFI's bid is responsive.

Furthermore, even assuming that the IFB contemplated that bidders would "base their bids" on the disposal fee charged by the Escambia County landfill in preparing their bids, and

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⁴ C.F.R. § 31.2(a)(1) (1994). Since Mark Dunning did not raise this allegation prior to bid opening, the issue is untimely and will not be considered.

that the applicable fee was \$30/ton, EFI's price of \$28/ton for CLIN 0002 may properly be viewed as a below-cost bid. The submission of a below-cost bid is not improper. Star Brite Constr. Co., Inc., B-244122, Aug. 20, 1991, 91-2 CPD ¶ 173. Thus, the submission of a unit price for CLIN 0002 lower than the disposal fee in effect at the Escambia County waste disposal facility on October 1, 1994, would not affect the responsiveness of a bid.

The protester argues that at the site visit and during a pre-bid opening conference, a Navy representative orally advised that "bidders were required to dispose of the solid waste refuse at the [Escambia County] landfill and to utilize the County landfill's rate effective October 1, 1994," in preparing their bids. A "NOTICE TO BIDDERS" on the cover page of the IFB warned that all inquiries concerning the IFB "MUST BE SUBMITTED IN WRITING," and that information given to a prospective bidder in response to a written request would be furnished to all bidders by amendment to the IFB. In addition, the IFB incorporated by reference Federal Acquisition Regulation (FAR) § 52.214-6, which requires bidders to request any explanation or interpretation of the IFB in writing and cautions that oral explanations given before the award of a contract will not be binding. Given the IFB's clear instructions and the FAR requirement, Mark Dunning relied on the agency's oral explanation as to how it should prepare its bid at its own risk. See Cuernilargo Elec. Supply, B-240249, Nov. 2, 1990, 91-1 CPD ¶ 68.

The protester's suggestions that BFI does not intend to comply with the local ordinance, or enter into a franchise agreement with the county, or that BFI does not intend to use the disposal facility provided by the county are not for our consideration. Section C.11 of the IFB imposes a general requirement that the contractor "comply with all applicable environmental protection requirements [and] with federal, state and local laws and with the regulations and standards as listed in [the IFB] regarding environmental pollution." Where, as here, a solicitation contains only a general requirement that the contractor comply with applicable laws, the prospective contractor--not federal government officials--is responsible for determining what the state or local requirements may be. See Mid-South Ambulance Corp., B-214078, Jan. 30, 1984, 84-1 CPD ¶ 133.

Although a contracting officer may determine that the absence of an appropriate business license, or, as allegedly required here, a "franchise agreement," renders a

bidder nonresponsible,³ compliance with state or local requirements is generally a matter between the contractor and the issuing authority, and will not be a bar to contract award absent a specific requirement in the solicitation. See Technology Advancement Group, B-238273; B-238358, May 1, 1990, 90-1 CPD ¶ 439. As already explained, the IFB did not contain a specific requirement for bidders to have a "franchise agreement" or other business license to be eligible for award. Moreover, if BFI does not comply with applicable state or local laws and, as a result of enforcement action by the cognizant authority, BFI chooses to not perform the contract or is enjoined from doing so, the contract may be properly terminated for default. See Lewis & Michael, Inc.; Stark Van Lines of Columbus, Inc.-- Recon., B-215134.2; B-215134.3, June 26, 1984, 84-1 CPD ¶ 673.

The protester also argues that BFI's bid is "unbalanced" because it will not result in the lowest overall price.⁴ In this connection, the protester points out that the disposal facility BFI intends to use is owned and operated by a subsidiary of BFI, which currently charges a disposal fee of \$23/ton. Mark Dunning argues that BFI will have the discretion to invoke the contract's economic price adjustment clause to raise its price for CLIN 0002 up to \$2/ton.⁵ If it did so, BFI's total price would increase

³The contracting officer may determine, for example, that enforcement attempts by the cognizant state or local authority are likely, and that there is a reasonable possibility that such enforcement actions could interrupt or delay contract performance. See What-Mac Contractors, Inc., 58 Comp. Gen. 767 (1979), 79-2 CPD ¶ 179. No such circumstances are apparent here.

⁴Since there is no evidence that BFI's bid contains enhanced or overstated prices for some of the items and nominal prices for other items, BFI's bid is neither mathematically nor materially unbalanced. See QMSERV Corp., B-237691, Mar. 13, 1990, 90-1 CPD ¶ 271. In this regard, we understand the protester to be arguing that since BFI will be allowed to recover future increases in disposal fees, its bid will not remain low.

⁵This argument is based on the assumption that the agency will use the \$30/ton disposal fee charged by the Escambia County landfill as a reference point in considering the reasonableness of any requests by BFI for an upward adjustment in the disposal fee. Thus, to illustrate Mark Dunning's concern, immediately after award, BFI's subsidiary could increase the disposal fee it charges BFI
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over the contract periods, rendering the price BFI ultimately charges the government substantially higher than BFI's low bid price.

We think that under the terms of the contemplated contract, there are adequate safeguards against any arbitrary or unreasonable increases in the disposal fee charged the Navy. For instance, the IFB states that adjustments to the disposal fee will be considered provided that any changed fee charged by the disposal facility is not higher than the most favorable fee charged any commercial user, and there is no other disposal facility available at less cost. The IFB's economic price adjustment clause also contains similar restrictions. In view of these provisions, BFI could not arbitrarily or unilaterally increase the disposal fee it charges the Navy as Mark Dunning contends. In any case, whether the agency allows an adjustment to the disposal fee, and the amount of such adjustments, depends entirely on whether BFI complies with the economic price adjustment clause of the contract, which is a matter of contract administration not for review by our Office. See 4 C.F.R. § 21.3(m)(5).

The protest is denied.

/s/Ronald Berger
for Robert P. Murphy
Acting General Counsel

⁵(...continued)
by as much as \$7/ton, raising the disposal fee BFI could then charge the Navy from \$28/ton to \$30/ton.