

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-185605

DATE: July 1, 1976

MATTER OF: Acorn Building Components, Inc.

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DIGEST:

1. Discrepancy between requirements of solicitation is not "minor inconsistency" where requirements read together could reasonably lead prospective bidders to different conclusions regarding materials to be submitted with bids. Moreover, prospective bidders should not be expected to resort to technical legal construction of terms of solicitation to determine bid submission requirements.
2. Bid price submission instructions are deficient which would reasonably lead bidders to assume that "deductive alternative" bid could be expressed as total alternative bid price or as deduction from base bid.
3. Where solicitation stated that award would be made on base bid, if budgeted funds were available, award on alternative basis would be improper absent agency determination that such funds are not available.
4. Requirement that bidders supply information having no bearing on bid evaluation is improper, and agency is advised that such requirements should be avoided.
5. Requirement that bidder submit test reports by a laboratory approved by a trade association and that the products supplied bear the quality seal of that trade association - available only to association members - is unduly restrictive. Product specifications published by a trade association may be used, but bidders must be permitted to independently demonstrate that their products meet those specifications.
6. Allegation that prospective awardee will not supply conforming product, which is based on protester's prior experience with supplying manufacturer, is not for consideration where bid does not indicate that offer is nonconforming and acceptance of offer will result in binding obligation to supply conforming goods. Moreover, this Office no longer reviews protests against affirmative determinations of responsibility.

7. In view of deficiencies in solicitation and evaluation of bids, GAO recommends to agency that IFB be canceled and procurement readvertised.

Acorn Building Components, Inc. (Acorn), objects to award to any firm other than to itself under solicitation DC 1-1, Specification 1-75-6 issued by the National Capital Housing Authority (NCHA) for replacement windows and window guards for use in the Fort Dupont Dwelling Project. Base and alternate bids were solicited, based upon use of thermal, or non-thermal glass, respectively. In regard to both base and alternative bids, Acorn was the third lowest of four bidders. Visor Builders, Inc. (Visor), submitted the low bids and the second low bids were submitted by Detroit Window Products (Detroit).

Initially, Acorn challenged Visor's bid on four grounds and Detroit's bid, on seven. NCHA has since found Detroit's bid to be nonresponsive, rendering moot Acorn's protest in that respect. Further, in response to the NCHA report to our Office, Acorn withdrew one of its four objections to Visor's bid, and limited a second to Visor's base bid only. NCHA has determined that award should be made to Visor on its alternate bid.

While in the circumstances we might focus simply on the remaining three of Acorn's 11 original objections, we believe the cumulative effect of the errors disclosed on this record to be such as to require resolicitation. Accordingly, to assist NCHA in any resolicitation, we comment briefly on the following issues:

1. Acorn has contended that the Specifications required that bidders submit with their bids detailed shop drawings. It is admitted that Visor submitted with its bid only typical window drawings rather than detailed "shop" or "installation" drawings.

Section III of the Specifications requires that:

"A. The contractor shall submit a complete set of window replacement drawings for approval, showing details and methods of installation. The manufacturer's products to be used in this project shall be described prior to installation.

"B. Shop drawings for window guards shall be submitted for approval only where designs and installation procedures differ from NCHA drawings and specifications.

"C. Window parts catalogue shall be submitted with bid to NCHA, detailing the complete description of manufacturer's replacement parts and prices."

In addition, Section XVIII provided:

"XVIII. SUBMISSIONS

"Check the following required items submitted with bid:

"A. Window shop drawings (base bid)

"B. Window shop drawings (alternate bid)

"C. Test Reports

"D. Replacement parts catalogue

"E. Window guards drawings (Not required if NCHA design accepted)"

The agency states that despite a "minor inconsistency" between the quoted portions of the specifications, the agency's intent was that detailed "shop" drawings need be furnished only by the contractor after award. In support of its position, the agency points to the use of the word "contractor" in section III. A. and asserts that since drawings were supplied with the solicitation, there was no need for bidders to submit drawings with their bids.

We believe the solicitation was confusing as to what was to be submitted with the bids. Bidders should not be required to track the use of "contractor" and "bidder" in the solicitation in order to discern what is to be submitted with the bid. Furthermore, those terms are not used consistently throughout the IFB: section I. E. states, for example, "The contractor shall bid on the work specified * * *". We also note that the drawings accompanying the IFB were "typical" and not "shop" drawings. This circumstance, together with section XVIII of the IFB, could reasonably lead bidders to conclude that detailed shop drawings were required to be submitted with the bid.

2. A similar lack of clarity as to what was required of the bidder appeared elsewhere in the procurement documents. For example, although the bid form refers to a "deductive alternated" bid, the bidding instructions failed to clearly state how the alternate bid was to be submitted. As a result, in NCHA's words:

"Use of the term 'Deductive Alternated' bid obviously caused confusion. Two of the bidders submitted total lump sums in the space provided; one submitted a figure preceded by a minus sign * * *; one (Visor) submitted the amount to be deducted from the base bid without the explanatory minus sign."

Taken ex facie, the three low bidders submitted the following alternate bids:

Visor Builders, Inc.	\$ 12,122.00
Detroit Window Products	\$110,549.00
Acorn Building Components	\$126,675.46

Assuming that NCHA actually evaluated the alternate bids in determining that the Visor alternate bid was low,¹ NCHA did so by accepting the figures shown on the face of those bids, and without applying those figures as a deduction. In this respect, NCHA initially advised us that it believed that the \$12,122 figure submitted by Visor represented Visor's intended alternate bid.

In view of the discrepancy between Visor's alternate bid and the other alternate bids, we requested NCHA to confirm Visor's bid. We were then advised that Visor stated it had intended to submit a total alternate bid of \$84,671 - that figure being the difference between the Visor base bid of \$96,793 and its "deductive alternated" bid of \$12,122. The \$84,671 figure is supported by Visor's detailed price breakdown submitted with its bid but apparently not referred to by NCHA until our Office questioned whether \$12,122 represented Visor's total alternate bid.

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In the report furnished by NCHA, the contracting officer states that the three low bidders submitted bids as follows:

Visor Builders, Inc.	\$ 96,793.00
Detroit Window Products	\$125,991.00
Acorn Building Components	\$143,713.07

The record discloses that the above figures were submitted as base, not alternate, bids. Since NCHA advises that it intends to award this contract on the Visor alternate bid, NCHA's submission of the above raises doubt regarding even this aspect of NCHA's bid evaluation.

The agency's willingness to accept without verification an alternate bid approximately one-tenth of those of the next two bidders when a detailed price breakdown accompanying the bid revealed the bidder's true intention casts doubt upon the care with which bids were evaluated. We also note that the agency's failure to submit with its report to our Office complete copies of the bids submitted, including the detailed price breakdowns, extended the time required for our resolution of this protest.

3. Moreover, NCHA's decision to award this contract on the alternate bid basis is questionable.² In this regard, NCHA advises that:

"One purpose satisfied by the solicitation of a base bid and an alternate bid from each bidder was the opportunity to find out how much of a saving could be realized by using non-thermal window frames with single glazed window panes.

"* * * [NCHA] has determined that Visor is the lowest responsible bidder and that it should be awarded the contract on the basis of its alternate bid."

The bid form stated that:

"If at the time this contract is to be awarded, the lowest base bid submitted by a responsible bidder does not exceed the budgeted funds for this work, the contract will be awarded on the base bid only. If such bid exceeds the budgeted funds, the LHA may reject all bids or may award the contract on the base bid combined with the deductible alternate."
(Emphasis added.)

The solicitation conveys a value judgment that the insulated glass windows (the base bid) are more desirable than single glazed windows (the alternate bid) and that the insulated glass windows would be purchased if enough funds were available. The sole circumstance given in the IFB under which the single glazed windows would be purchased was where adequate funds were not available for the preferred item. NCHA's consideration of cost savings thus appears

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In addition to the issue discussed in the text, such a determination was plainly improper if, as appears likely, it was based on what NCHA evidently assumed was a \$12,122 Visor alternate bid.

extraneous, absent a determination that budgeted funds were not available. Insofar as we are advised, no such determination has been made. Cf. Sterling Engineering and Construction Co. 55 Comp. Gen. 443, 75-2 CPD 293 (1975).

4. As we have indicated above, the IFB specifications required bids to be accompanied by the bidder's window parts catalogue "detailing the complete description of manufacturer's replacement parts and prices." Acorn contended that Visor's bid should be rejected as nonresponsive because the information which it submitted was inadequate. The agency's position is that Visor was "in substantial compliance" with the specification requirement. Acorn elected not to pursue this part of its protest because in its view the deficiency was less serious than others.

Our concern lies not with the extent to which Visor may have complied with the parts catalogue requirement, but with the existence of the requirement itself. The agency states that the purpose of the requirement was "to give the agency's technical representative information relating to the number of parts that conceivably might need replacement, and the unit price of these items."

[Citation
added
August 25,
1976]-----

The solicitation envisaged that award would be made to the lowest responsible responsive bidder, on its base or alternative bid. Technical and price evaluation of replacement parts formed no part of the basis for award. Cf. Western Waterproofing Co., Inc., B-183155, May 20, 1975, 75-1 CPD 306. Whatever the usefulness of this information, requiring bidders to submit it with their bids creates opportunities for bidders to be determined to be nonresponsive on grounds having no relationship to any evaluation criteria. Cf. e.g., facts in Electronics Associates, Inc., B-184412, February 10, 1976, 76-1 CPD 83. The replacement parts data requirements should not be imposed in any resolicitation unless the evaluation criteria are modified so that the number and cost of parts is made a proper factor for consideration.

5. Section X.A of the specifications of the instant IFB provided:

"Certified test reports no more than 3 years old from an independent laboratory, recognized and approved by the Architectural Aluminum Manufacturers Association, Inc. shall be submitted with the bid. Windows specified must meet or exceed the values as set forth in AAMA specifications and shall bear the quality certified seal of the Architectural Aluminum Manufacturers Association, Inc. (AAMA), as a DH-A2-HP or HS-B2-HP window."

Acorn alleged that Detroit is not a member of the Architectural Aluminum Manufacturers Association (AAMA), a trade association, and therefore its windows cannot bear an AAMA Quality Certification seal. Since Detroit's bid was found to be nonresponsive on other grounds, this issue became moot. However, we believe it requires comment.

Although NCHA states that it did not intend to require AAMA membership, it has not denied Acorn's assertion that in order to use the AAMA label, a manufacturer must be a member of that Association. Although we have generally voiced no objection to a requirement stating that a subject matter of a procurement conform with a set of standards adopted by a nationally recognized organization in the field, or to a requirement for independent laboratory certification that such standards are met, we have held that a requirement that articles offered or supplied to the Government bear a specific label showing approval by a particular testing laboratory is unduly restrictive, and improper. Cf. 33 Comp. Gen. 573 (1954); Western Waterproofing Co., supra; Arctic Marine, Inc., B-182321, May 14, 1975, 75-1 CPD 311. The specifications are unduly restrictive to the extent that they require the testing laboratory or the bidder to be approved by or members of the AAMA. Product specifications published by the AAMA may be used provided bidders are permitted to independently establish that their items meet those specifications.

6. Acorn also questioned whether Detroit met the solicitation's 5-year experience requirement with regard to thermal barrier windows. Although this issue became moot with the rejection of Detroit's bid, we note for the future guidance of the agency that definitive standards of responsibility such as this cannot be waived. Haughton Elevator Division, Reliance Electric Company, B-184865, May 3, 1976, 76-1 CPD _____.

7. Finally, Acorn has argued that Visor does not intend to supply extruded aluminum frames as required in the specifications. Acorn states:

"* * * Acorn has competed a great number of times on large government projects against the particular window manufacturer wh[ich] Visor intends to use. It is a matter of record that this manufacturer does not, and will not use an extruded aluminum screen frame section. It has been that manufacturer's policy to use roll-formed (less expensive and less durable) sections. Acorn contends that that manufacturer has not, to this date, manufactured a screen with an extruded frame section and based upon that knowledge Acorn contends that they are not

complying with the specifications. If that manufacturer were to supply an extruded aluminum screen frame as specified, Acorn would defer to their compliance with the specification."

Since Visor's bid does not indicate that it is offering anything other than extruded aluminum frames, acceptance of its offer, if otherwise responsive, will result in an obligation on its part to supply those frames. Compliance with that obligation is a matter of contract administration having no effect on the validity of the award. Moreover, this Office no longer reviews protests against affirmative determinations of responsibility, absent allegations of fraud or unless the solicitation includes definitive responsibility criteria which it is claimed were not applied. Central Metal Products, Inc., 54 Comp. Gen. 66, 74-2 CPD 64 (1974).

The instant solicitation contained data submission requirements which were at times unclear and inappropriate. Bidders were confused as to whether alternate bids were to be submitted as a total or as an amount to be deducted from the base bid. The agency's proposed award appears to be based on the evaluation of an alternate bid as \$12,122 when a price breakdown submitted with the bid shows the correct amount to be \$84,671. Moreover, the record does not show that the agency has determined that funds available would not support an award of the low base bid even though that is the sole criterion given in the IFB for not awarding on the base bid. Finally, the specifications are unduly restrictive in that they require the bidder to belong to a trade association and that his products be tested by a laboratory approved by that association.

As explained at the outset, we believe the cumulative effect of the errors disclosed is such as to require cancellation of the subject solicitation, and resolicitation. Accordingly, Acorn's protest is sustained. By separate letter of today we are calling the deficiencies discussed to the attention of the Mayor of the District of Columbia. In addition to recommending cancellation and resolicitation, we are requesting that steps be taken to prevent a recurrence of such deficiencies in future NCHA procurements.

Since our decision contains a recommendation for corrective action, we have furnished a copy to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency to the Committees on Government

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Operations and Appropriations concerning the action taken with respect to our recommendation.

A handwritten signature in black ink, appearing to read 'R. K. ...', is written over the printed name.
Deputy Comptroller General
of the United States