

DECISION

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

FILE: B-186793

DATE: August 9, 1976

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MATTER OF: Exide Power Systems Division of ESB, Incorporated

DIGEST:

1. Allegation that second step IFB of two-step, formally advertised procurement did not require submission of bid bond and rejection of protester's bid for failure to submit bond was improper, is without merit as first step RFP required bid bond and second step IFB was based on offerors' acceptable technical proposals and Government specifications under first step. Also, protest that second step contained no specification is denied for same reason.
2. Protest that bid bonds indicating bonds were for 20 percent of bid amount with no indication of what constituted bid amount (unit bid, first year bid or total bid price) is denied as amendment to solicitation stated bonds were to be 20 percent of total first year requirement.
3. Protest alleging that receipt of only one responsive bid under second step of two-step, formally advertised procurement did not constitute adequate price competition and, therefore, cost and pricing data must be requested is denied as ASPR § 3-807.3 only requires cost and pricing data in negotiated procurement and where more than one acceptable technical proposal is received, two-step procurement is not considered negotiation. In instant case, three acceptable proposals were received.

Exide Power Systems Division of ESB, Incorporated (Exide), has protested the rejection of its bid under invitation for bids (IFB) No. N62477-76-C-0119, the second step of a two-step, formally advertised procurement issued by the Naval Facilities Engineering Command. Exide's bid was rejected as nonresponsive because of Exide's failure to submit a bid bond with the bid.

Exide's protest was initially based on the allegation that there was no requirement in the IFB for the submission of a bid bond. Exide now concedes that the step-one RFP, issued prior to the step two IFB, contained the following requirement for a bid bond in paragraph 15.2 of section I, General Paragraphs:

"15.2 BID BOND: Each bidder shall submit with his bid, a bid bond, U.S. Standard Form 24, or a certified check payable to the Treasurer of United States, in the sum of 20 percent of the largest amount for which the award can be made. Failure to submit a bond on time will be cause for rejection of the bid."

By amendment 0001 to the RFP, the above paragraph was altered by the deletion "of the largest amount for which the award can be made," and "of the total first year requirements" was substituted.

Exide argues that the above requirement was never incorporated in the second step IFB and, therefore, no requirement for the submission of a bid bond existed. Exide's position is based on the following language contained in the Standard Form (SF) 33 which was the first page of the second step IFB:

"All offers are subject to the following:

- "1. The attached Solicitation Instructions and Conditions, SF 33-A.
- "2. The General Provisions, which is attached or incorporated herein by reference.
- "3. The Schedule included below and/or attached hereto.
- "4. Such other provisions, representations, certifications, and specifications as are attached or incorporated herein by reference. (Attachments are listed in the Schedule.)"

As the IFB consisted of the SF 33 and a bidding schedule of 9 pages and nothing further was incorporated by reference, Exide states that, based on the above-quoted portion of the SF 33, the requirement for a bid bond was not incorporated by reference into nor attached to the second step.

Exide cites two decisions of our Office to support its position, Grunley-Walsh Construction Company, Inc., B-181593, October 24, 1974, 74-2 CPD 228, and Science Management Corporation (Decision Studies Group), B-181281, July 3, 1974, 74-2 CPD 6. Both of these cases held that where a provision is not incorporated by reference or attached to an IFB, the failure of a bidder to comply with such a provision is not a proper basis to determine the bid nonresponsive. However, the cited decisions involved IFB's which were not the second step of a two-step, formally advertised procurement. We believe this distinction to be crucial and, therefore, find the above cases to be inapplicable to the instant protest and not controlling.

In the present procurement as in other two-step, formally advertised procurements, only bidders whose first step technical proposals are accepted by the Government are eligible to compete in the second step IFB. The only purpose of the second step is price competition. The method of procurement to be employed was explained as follows in the step-one RFP:

"3. METHOD OF PROCUREMENT - TWO STEP FORMAL

ADVERTISING: This procurement will be accomplished in two steps, pursuant to ASPR, Section II, Part 5, as follows:

"STEP ONE: Technical proposals submitted as the result of this invitation will be reviewed for compliance with minimum requirements. Proposals which meet minimum requirements will be evaluated in accordance with the criteria set forth herein. Offerers are advised that due to required delivery schedules, the Government may request additional information regarding those proposals classified under ASPR 2-503-1 (e) (ii) only if sufficient proposals are not received in category (i). **PRICES OR PRICING INFORMATION SHALL NOT BE INCLUDED IN ANY SUBMITTAL.**

"STEP TWO: An Invitation for Bids (IFB) will be issued to only those offerers whose technical proposals were classified as acceptable under the review procedures in step one. **Bids MUST BE BASED ON BOTH THE BIDDER'S OWN TECHNICAL PROPOSAL APPROVED BY THE GOVERNMENT UNDER STEP ONE AND THE SPECIFICATIONS PROVIDED.**" (Emphasis in original.)

The second step IFB contained the following "Note" to bidders:

"THIS INVITATION FOR BIDS IS ISSUED PURSUANT TO TWO-STEP, FORMALLY ADVERTISED PROCEDURES, CITED IN SECTION II, PART 5 OF THE ARMED SERVICES PROCUREMENT REGULATIONS. BIDS WILL BE ACCEPTED AND CONSIDERED ONLY FROM THOSE FIRMS WHO HAVE SUBMITTED ACCEPTABLE TECHNICAL PROPOSALS PURSUANT TO THE FIRST STEP OF SUCH PROCEDURES, AS INITIATED BY THE REQUEST FOR TECHNICAL PROPOSALS ISSUED ON 22 JANUARY 1976."

The import of the above-quoted provisions from the first and second step documents is to the effect that bids under step two must be based upon the bidder's technical proposal approved under step one and the Government's specifications included therein. We believe these provisions effectively incorporated the specifications under step one, including the bid bond requirement, which was part of the General Paragraphs of the specifications. Therefore, we find there was a requirement for the submission of a bid bond and the failure of Exide to submit the required bond was a proper basis to find the bid nonresponsive. In this connection, we note that the other two bidders submitted bid bonds as required. However, to avoid the possibility of a recurrence of this problem in the future, we are recommending to the Navy that applicable provisions in step one specifically be carried forward to step two.

Exide also argues that its failure to submit a bid bond was the result of oral advice from an employee of the procurement activity 5 hours prior to bid opening that a bid bond was not necessary and that the contracting officer overheard this conversation and said nothing to change the belief of Exide that a bond was not required. We do not believe this argument changes the above result. Both the RFP and subsequent IFB stated that the contracting officer was the individual to be contacted with regard to further information concerning the solicitation.

While Exide also protests that the resulting contract will not include any of the Government specifications contained in the RFP and therefore the Government cannot be certain what it will obtain from the contractor, in view of the previous discussion, it is unnecessary to further consider this point.

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Exide states that if a bid bond was required, then the other bidders are nonresponsive because their bid bonds only indicated that it was for 20 percent of the bid amount without containing an actual dollar figure or stating what the bid amount was to be (i.e., per unit bid, first year bid, total bid). We believe that amendment 0001 clarified this problem by stating that the bid bond was to be 20 percent "of the total first year requirement" and the protest on this point is also denied.

Finally, Exide contends that the award cannot be made to Teledyne Inet, the second low bidder, because only the bid of Teledyne was responsive and there was inadequate price competition which requires the submission of cost and pricing data.

Under Armed Services Procurement Regulation (ASPR) § 2-503.1(h) (1975 ed.), a two-step, formally advertised procurement is considered negotiation only when step one results in no acceptable technical proposal or only one acceptable technical proposal. In other cases, the contract is considered as having been competitively let. Cost and pricing data is only required for negotiated procurements in certain circumstances (ASPR § 3-807.3 (1975 ed.)). As this procurement, under the regulations, is considered formally advertised because of the receipt of three technically acceptable proposals in the first step, there is no requirement for the submission of cost and pricing data.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States