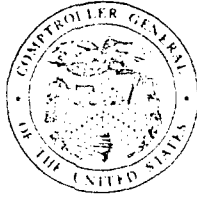


DECISION



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

51036

FILE: B-183791

DATE: September 23, 1975

MATTER OF: W. A. Apple Manufacturing, Inc.

97430

DIGEST:

1. Failure of low bidder to formally acknowledge amendment to invitation for bids which, among other things, made material change in specifications may be waived as minor informality where bid clearly indicated compliance with only material change called for by amendment.
2. Bid which did not state minimum bid acceptance period was properly accepted despite provision in solicitation establishing minimum bid acceptance period of 60 days and cautioning bidders to enter specified period in space provided on SF 33, page 1 of solicitation, since provision on page 1 cross-referenced other provision and provided for 60-day bid acceptance period unless different period was specified by bidder in blank space provided on bid form and no such period was inserted by bidder. ASPR § 2-201(a) Sec. C(xviii), effective October 1, 1975, contains new requirements which will avoid possible confusion in future solicitations.
3. Bidder's protest against responsiveness of low bid which inserted approximate weight and dimensions under guaranteed maximum shipping weight and dimensions clause on basis that insertion of approximate figures rendered evaluation of bid impossible is denied since results of GAO transportation rate technician review has determined that even when using unlikely high figures for transportation low bid remains low by significant amount.

This matter concerns the protest of W. A. Apple Manufacturing, Inc. (Apple), against any award of a contract to Waterfront Rope and Canvas Corp. (Waterfront) under invitation for bids (IFB) No. DAAJ01-75-B-0443 (PlB), issued by the United States Army Aviation Systems Command, St. Louis, Missouri.

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The subject IFB was issued with two amendments for 5,800 each, cargo bags, for bids on a f.o.b. origin basis to be evaluated to the appropriate destinations by adding all transportation costs. Bidders were requested to state the guaranteed maximum shipping weights and dimensions of the offered supplies as well as the type of container (e.g. fiber, wood) to be used for packing. Amendment 0001 shortened the period for bid submission. Amendment 0002 (1) extended the bid opening date; (2) changed the packing requirement from a cardboard to a wood container; and (3) increased the Government-estimated unit weight of the item for evaluation purposes in the event the bidder failed to state its guaranteed maximum shipping weights to 74.15 pounds from 49.7 pounds. The contracting officer reports that, by changing from cardboard to wood, the cost of each container (including three units) was increased \$5.38 for a total additional cost of \$10,404.92.

Bids were opened and Waterfront submitted the low bid. After evaluating transportation cost factors, Waterfront remained the low bidder.

Apple contends that Waterfront's bid is nonresponsive for failure to acknowledge receipt of amendment 0002 or to indicate a specific bid acceptance period. With respect to amendment 0002, Apple states that, assuming neither Waterfront nor its firm had stated guaranteed weights, Waterfront's bid would have been evaluated on 49.7 pounds while Apple's bid would have been evaluated on 74.15 pounds. Apple contends this would have been grossly unfair since the transportation costs for delivery of a 49.7 pound item are considerably less than a 74.15 pound item.

Further, Apple contends the bid should be rejected as nonresponsive because Waterfront inserted "200 lbs., APPROX." as its guaranteed maximum shipping weight which would make it impossible for the Government to (1) accurately evaluate total costs for the contract or arrive at a fixed overall price for the bid; and (2) establish a standard for contract price reduction in the event the stated weight is exceeded pursuant to the terms of the resulting contract.

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For the reasons stated below we believe the Waterfront bid is responsive.

With respect to the failure of Waterfront to acknowledge receipt of amendment 0002, the Waterfront bid--in stating that the type of shipping container would be "wood" and the shipping character would be "wood box w/ lid"--clearly indicated compliance with the only material change called for by the amendment. Therefore, the failure to formally acknowledge receipt of the amendment in this regard is of no consequence and may be waived. The failure to acknowledge a bid opening date extension has been held by our Office to be a minor informality or irregularity also subject to waiver. Finally, since Apple inserted a guaranteed weight (171 pounds) and Waterfront inserted a weight, albeit "APPROX.," no Government evaluation based on the estimated weight increase in the amendment was made eliminating any of the unfairness which Apple alleged would occur from the failure to acknowledge receipt of the amendment. In any case, the Waterfront bid clearly indicated receipt of the amendment because it reflected a salient change embodied by the amendment, a wood shipping container. We have held that such a circumstance constitutes constructive acknowledgment of receipt of an amendment binding a bidder to the terms thereof. See Inscom Electronics Corporation, 53 Comp. Gen. 569 (1974), 74-1 CPD 56; and section 2-405 of the Armed Services Procurement Regulation (1974 ed.).

We do not agree with Apple's second contention that Waterfront's failure to enter an acceptance period rendered its bid nonresponsive. The invitation contained Standard Form 33 (November 1969), entitled "Solicitation Offer and Award." The "Offer" portion of that form provides as follows:

"In compliance with the above, the undersigned offers and agrees, if this offer is accepted within _____ calendar days (60 calendar days unless a different period is inserted by the offeror) from the date for receipt of offers specified above, to furnish any or all items upon which prices are offered, at the price set opposite each item, delivered at the designated point(s), within the time specified in the Schedule. See para. 32, page 13."

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Paragraph 32 stated as follows:

"C. 32 Bids - Acceptance Period (1960 Apr.).
Bids offering less than 60 days for acceptance by the Government from the date set for opening of bids will be considered non-responsive and will be rejected.

ASPR 2-201(a) Sec. C (xviii)

CAUTION: Bidders are cautioned that the period specified above must be entered in the appropriate space under offer on the 'Solicitation, Offer and Award' Form (Standard Form 33)."

The bid acceptance provision in SF 33, on page 1 of the invitation, standing alone, is self executing and requires no insertion by a bidder in the blank space on the bid form to indicate the bidder's acceptance of the 60-day period. In this case, where the minimum bid acceptance period did not exceed 60 days, it was not necessary to caution bidders to insert a 60-day acceptance period on SF 33, in view of the provisions of SF 33. Nevertheless, we do not believe there is any significant doubt that a bidder, who leaves blank the space provided for an acceptance period in SF 33, intends to offer the 60-day acceptance period otherwise specified in the provision. It is evident that the sole purpose of paragraph 32 is to establish a minimum acceptance period of 60 days and that a bidder reading that paragraph together with SF 33 reasonably could conclude that an insertion on the bid form was not necessary if the bidder intended to offer a bid acceptance period of 60 days. Based on this reasoning, we denied a similar protest involving a failure to insert a bid acceptance period in an invitation containing almost identical provisions relating to the bid acceptance period. See Intercontinental Manufacturing Company, Incorporated, B-180784, June 4, 1974, 74-1 CPD 300.

In that decision, we commented that language such as was used here in paragraph C32 cautioning bidders to insert a bid acceptance period on SF 33 to be responsive is appropriate where, unlike here, the minimum bid acceptance period exceeds 60 days. There, to avoid possible confusion in future solicitations establishing

minimum bid acceptance periods of 60 days, we recommended that appropriate language be included to apprise bidders that an insertion in the appropriate space on SF 33 is required only if the bidder intends to offer other than a 60-day bid acceptance period. We note that ASPR § 2-201(a) Sec. C(xviii), effective October 1, 1975, contains new requirements which will avoid the possible confusion discussed above.

The subject IFB, Section D.4, Evaluation - F.O.B. Origin, provides that for the purpose of evaluating bids, transportation cost will be added to the bid price in determining the overall cost of the supplies to the Government. In addition, the IFB contained a "Guaranteed Maximum Shipping Weights and Dimensions" clause which acts as a safeguard against liability for additional transportation charges not included in a bid as offered.

Clause B.15 provides as follows:

"Each bid (or proposal) will be evaluated to the destination specified by adding to the f.o.b. origin price all transportation costs to said destination. The guaranteed maximum shipping weights and dimensions of the supplies are required for determination of transportation costs. The bidder (or offeror) is requested to state as part of his offer the weights and dimensions. If separate containers are to be banded and/or skidded into a single shipping unit, details must be described. If delivered supplies exceed the guaranteed maximum shipping weights or dimensions, the contract price shall be reduced by an amount equal to the difference between the transportation costs that should have been used for bid (or proposal) evaluation purposes based on correct shipping data."

Our Office has stated that the purpose of the guaranteed maximum shipping weight clause is twofold: (1) to enable the Government to accurately ascertain its total costs for a proposed contract; and (2) to establish contract price reduction in the event the shipping weight is exceeded. Further, we have recognized that "In order to meet competition a bidder may guarantee a weight which is less than actual rather than reduce the price for the item itself." See Drexel Contract Furniture, B-175514, June 29, 1972, and cases cited therein. As the contracting agency points out in a

report to our Office on the protest, we have recognized that shipping weights guaranteed by bidders are no more than estimates. See B-153323, May 2, 1964.

The record discloses that Waterfront's transportation costs were evaluated by the contracting activity using 200 pounds as the weight of each container and the size of each container being 28 by 12 by 12 inches which resulted in a total evaluated transportation cost of \$20,832. We observe here that Waterfront, under the heading of the clause designated size of container inserted the notation "(APPROX)" after the given dimensions. Apple's total evaluated transportation costs amounted to \$18,450. Using these transportation figures for purposes of evaluation, the record discloses that Waterfront remains the low bidder by approximately \$69,000.

In a decision involving a clause similar to that in the instant IFB, we discussed the propriety of an award to a low bidder who failed to insert either guaranteed maximum weights or dimensions in the face of an admonition in the IFB that bids failing to state the weights or dimensions would be rejected.

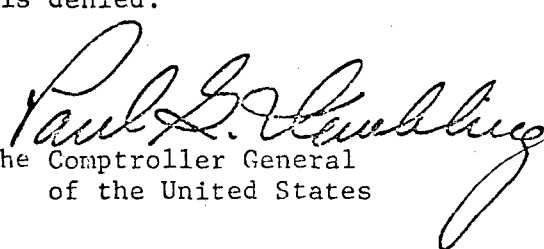
"In the present case there is no question as to the bidder's undertaking to meet all requirements of the specifications, including delivery, or as to the price to be paid to it therefor. The only question is as to the determination of whether the bid 'conforms to the invitation and will be the most advantageous to the United States, price and other factors considered,' so as to entitle the bidder to award under the provisions of 10 U.S.C. § 2305(c). Since the shipping weight and dimensions are material only to the determination of the Government's ultimate costs, and their omission therefore actually affects only the determination of whether the bid will be the most advantageous to the United States, we do not believe that the omission should be regarded as making the bid nonconforming within the meaning of the statutory language unless it clearly precludes the making of that determination with certainty. * * *" 48 Comp. Gen. 357, 360, 361 (1968), and cases cited therein.

In that decision, we concluded--considering an agency determination of the possible transportation costs based on maximum weight and

dimensional limitations in the specifications that the low bidder would still be low--that the low bid need not be rejected. We have also held in a similar situation that where a low bidder failed to include a guaranteed maximum shipping weight as required by the IFB, the bid was properly considered for award where the facts indicated that there was no real likelihood that the low bid would exceed the second low bid. See 49 Comp. Gen. 496 (1970).

Applying the above principles to this case, we conclude that the Waterfront bid may be accepted for award. In this regard, GAO transportation rate technicians estimate that if, for example, the actual weight of each box containing cargo bags to be shipped by Waterfront was doubled to 400 pounds, the total freight charges would be increased by slightly more than \$10,000. Also, if the cube (dimensions) of each box were increased nearly five fold, the shipping costs for Waterfront would not change from that evaluated by the agency. The agency transportation cost evaluation personnel determined from the bids that each vendor would make 12 shipments to each destination. If, however, for some unknown reason, Waterfront had to make twice as many shipments as before with the same weight per box, the charges would double for an increase of slightly over \$21,000. Even if Waterfront's freight rates were to amount to the unlikely high figures used herein, Waterfront's bid would remain the low responsive bid by a significant amount. Clearly, the unlikely high figures used are well beyond any reasonable interpretation of the approximate weights and dimensions inserted by Waterfront in its bid. Moreover, these considerations make inconsequential the fact that the Government may not be able to recoup transportation costs if the actual weight inserted by Waterfront is exceeded.

Accordingly, the protest is denied.


For the Comptroller General
of the United States