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1978

DECISION



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

FILE: B-190220

DATE: March 21, 1978

MATTER OF: Keuffel & Esser Company

DIGEST:

1. Where protest is against manner in which waiver of data provisions is applied and not against fact that provision was applicable to instant procurement, timeliness of protest is determined from time protester learned of alleged misapplication. Since basis for protest did not exist prior to bid opening and since protest was filed within 10 working days after protester learned of such basis, protest is timely.
2. Where protester presents no evidence that differences in pertinent specifications for prior and instant procurement go to technical requirements, contracting activity's determination to waive data requirement for bidder/incumbent contractor on basis that data submitted under prior contract constituted "same data" under instant procurement will not be questioned.
3. Protester's contends that \$18,000 in prices bid by incumbent contractor on contested three data items indicates differences in form of data required are so great as to preclude acceptance of data submitted under prior contract as "same data" for instant procurement (thereby permitting waiver of data requirement). Contention is without merit in view of protester's bid of \$30,500 for same items and inasmuch as incumbent offered to update previously submitted data properly determined "same data" at no cost to Government in accordance with solicitation terms.

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The Keuffel & Esser Company (Keuffel) protests the award of contract No. DAAK01-77-C-5896 for short distance surveying and measuring instruments and technical data and assistance to Cubic Western Data (Cubic) by the United States Army Troop Support and Aviation Materiel Readiness Command. Keuffel submitted the total low bid price of \$802,500, whereas Cubic, the incumbent contractor, submitted a total bid price of \$815,000. Because it was provided in paragraph B-7 (Prior Submission of Data) of the invitation's General Instructions that a contractor who had submitted under a previous contract the same technical data as was required here could inform the Government of this and of his amenability to having the requirement for any such items priced under the instant invitation waived (Cubic advised in its bid that it had submitted the same data for data item Nos. A001-A010 under contract No. DAAK01-76-C-5060) and because it was provided in paragraph D-2 (Data Evaluation) that the Government could waive the data requirements under such circumstances, the contracting activity waived the data requirement for Cubic on data item Nos. A002 and A006-A008. This waiver brought the Cubic evaluated bid price to \$795,000. Since Keuffel could not avail itself of the waiver provisions, its evaluated bid price remained at \$802,500, and award was made to Cubic.

Keuffel protests that the data submitted by Cubic under its prior contract for the data items equivalent to the present item Nos. A006-A008 were not sufficient to meet the technical requirements of the instant invitation. It is noted that in the instant procurement these three items are governed by specification DI-M-6153, dated April 30, 1971, and Attachment "A," dated June 8, 1977, whereas under the prior Cubic contract specification DI-M-1502, dated December 15, 1969, was referenced along with an Addendum, dated February 19, 1975, for the equivalent of the present item No. A006 and along with Attachment "A," dated April 10, 1975, for the present item Nos. A007 and A008. The protester further presumes that the use here of the newer data specifications shows that the older specifications do not meet the current needs of the Government. Consequently, it is believed by Keuffel that the data submitted under the prior contract would not constitute

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the "same data" for the items in question as is required under paragraph D-7 of the instant invitation and that the waiver of the data requirement was improper.

Keuffel thus asserts that the waiver permitted the improper evaluation of bids on two different bases--one basis for Keuffel and another less demanding one for Cubic. This may be seen, Keuffel argues, in the fact that Cubic submitted prices totaling \$18,000 as the costs of complying with the data requirements of these three items. Keuffel also feels that these prices indicate the insufficiency of the data previously submitted by Cubic vis-a-vis the present Government requirements. Keuffel, therefore, concludes that had the same evaluation basis been applied to Cubic as to Keuffel, especially in view of the \$18,000 prices bid and the \$7,500 difference between the two evaluated bid prices, Keuffel might have truly submitted the low evaluated bid price. Thus, the protester maintains that the lack of a common basis of bid evaluations rendered the invitation defective, and as such no award should have been made under it.

As regards the argument of the contracting activity that the data previously submitted by Cubic and that required here are the same in substance and vary only in the form of submission and that the data requirement was thus properly waivable, the protester notes that the Government is very concerned with the form in which it receives its data. Again, the fact that Cubic bid \$18,000 on the three items involved, it is contended, indicates the magnitude of the effect that mere form may have. Under the circumstances, Keuffel submits that a reasonable bidder, aware of the change in question, would assume that the particular data items changed would not be subject to waiver and the remainder would be. If it is the Government's position that the form of the data is irrelevant for purposes of the waiver, then it would seem to Keuffel that the bidders should have been so informed in the invitation.

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Before presenting the position of the contracting activity on the merits of this case, it is necessary to consider the activity's contention that the protest was untimely filed. The reasoning behind this contention is that the protest is based upon an alleged deficiency in the evaluation criteria and, consequently, that the protest should have been filed prior to bid opening. We must disagree with this position. The protest is based upon the contention that the evaluation criteria were misapplied by the activity either by following those criteria incorrectly or by giving them a meaning which a reasonable man would not. In summation, the protest is not against the incorporation of the criteria into the invitation or about the manner in which the criteria were written but rather against the actions of the contracting activity in applying the criteria. The protester would not know of the existence of a protest basis until the criteria were applied and the award decision had been made known. The contracting activity does not allege that Keuffel knew that an award would be made to Cubic prior to the actual award date of September 20, 1977. Since the protest was filed with our Office on September 26, less than 10 working days after the first occasion upon which a basis for the protest might have become known, we believe the protest to have been timely filed.

Regarding the merits of the protest, it is the position of the contracting activity that the technical data submitted by Cubic under its former contract is the same as that required under the instant invitation and that the only possible difference between what Cubic previously furnished and the data that must be furnished under the invitation is simply a difference in the form in which the data is set out. In this respect the activity notes that in paragraphs 7-104.9(n)(1)(a) and 1-201.35 of the Armed Services Procurement Regulation (ASPR) (1976 ed.) data is defined to mean "recorded information, regardless of form or characteristics." It is further noted that contrary to the protester's allegation, item No. A005 of the prior contract of Cubic was governed (as the result of an amendment) by specification DI-M-6153, dated April 30, 1971, and a June 15, 1975, dated Addendum.

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Although Keuffel argues that the differences in the specifications cited on each item in the Cubic contract and in the instant invitation make the data required different, it does not cite any areas to show what makes the technical requirements, as apart from the form in which the data is submitted, vary. Since we have repeatedly held that determinations as to whether or not data requirements may be waived are basically matters within the discretion of the contracting activity and will not be questioned by our Office unless a determination is shown to be arbitrary or capricious, in the absence of such a showing on this issue by Keuffel we must accept the technical determination made on this matter by the contracting activity. Boston Pneumatics, Inc., B-188275, June 9, 1977, 77-1 CPD 416.

While we note that the activity does admit that there are differences in form involved in the data required and that submitted under the prior Cubic contract, we do not feel that the Cubic bid of \$18,000 for these items indicates the magnitude of the change in form, especially in view of the protester's bid of \$30,500 for these same items. Also we note that in paragraph B-8 (Updating Data) of the invitation Contract Form and Representations, Certifications, and Other Statements of Offeror, bidders were offered the opportunity, if they had submitted similar data under a previously awarded Government contract, to offer prices for updating each data item. For all data items (with the exception of item Nos. A001-A002, the costs for which were included in the end item) Cubic submitted prices of "No Charge" for updating its previously submitted data. It would appear from the cost of updating this data that the costs occasioned by the change in specifications were so small as to be negligible and that the determination by the Government that the data previously submitted by Cubic was the "same" for the purposes of this procurement was essentially correct and that the determination in no way worked to the detriment of Keuffel.

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Accordingly, the protest is denied.

R. F. Keller
Acting Comptroller General
of the United States