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J. Vachon
7/10/78

DECISION



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

FILE: B-190693 DATE: March 28, 1978
MATTER OF: E-Systems, Inc.

DIGEST:

1. Where bidder in "Guaranteed Maximum Shipping Weights and Dimensions" clause indicates that more than one item will be packed in container, this does not render bid nonresponsive to unit packaging requirement of items being individually packaged where bid took no exception to latter requirement and first noted clause referred to manner of packaging items for transporting.
2. Failure to use "N" in bid schedule as required by IFB and instead using "N/C" for items to be furnished at no cost to Government may be waived as minor informality under ASPR § 2-405 as bidder's intent to furnish items for no charge was clear.
3. Protest that low bidder did not meet definitive responsibility requirements contained in IFB is denied as record before GAO indicates bidder has fulfilled requirements and contracting officer's determination of responsibility was reasonable.
4. Ability of bidder to obtain personnel necessary to performance of contract and whether bidder has financial capacity to absorb loss on contract performance were matters considered by contracting officer in determining bidder's responsibility and will not be reviewed by GAO since definitive responsibility criteria are not involved.
5. Record does not support protester's contention that procuring activity was aware that it planned to delete material requirements of IFB at date

B-190693

of award of contract, thereby entitling contractor to equitable price adjustment while denying bidders right to compete on changed requirement.

6. GAO has no authority under Freedom of Information Act to determine what documents other Government agencies must or must not disclose.

E-Systems, Inc. (ESI), has protested the award of a contract by the United States Army Electronics Command to Bristol Electronics, Inc. (Bristol), under invitation for bids (IFB) No. DAAB07-77-B-0171.

The IFB was for 7,452 each AN/PRC-77 radio sets, 3,505 each RT-841 receiver-transmitters, and supporting data. Bids were opened on October 11, 1977, and award was made to Bristol on November 16, 1977. ESI was the second low bidder.

ESI's first basis of protest is that Bristol's bid was nonresponsive because it failed to comply with the unit packing requirement of the IFB. Bristol's bid, in paragraph B.17, entitled "Guaranteed Maximum Shipping Weights and Dimensions," indicated under the heading "No. of Items per ctr." for item 0001 and item 0002 the numbers 4 and 10, respectively. ESI argues that this does not meet the requirements of paragraph G.4, "Preservation, Packaging and Marking," which states that packaging will be in accordance with Federal Standard 356A (February 26, 1975), wherein it is required that items weighing more than 10 pounds, as here, be individually packaged.

The Army has responded that Bristol's bid was considered responsive because paragraph B.17 of the IFB deals with shipping containers and not unit packaging and that the bid did not take exception to the requirements of Federal Standard 356A.

We agree that Bristol's bid is responsive to the packaging requirement. Paragraph B.17 requires a bidder to indicate how the items will be packaged

B-190693

for transporting to the various delivery destinations so that the Government may evaluate the transportation costs. Bristol's bid, in paragraph B.17, does not contain any indication that it does not intend to comply with the unit packaging requirements of Federal Standard 356A.

Secondly, ESI argues that Bristol's bid failed to include the guaranteed shipping weights and dimensions of the items once they have been palletized. However, there was no requirement in paragraph B.17 or Federal Standard 356A that a bidder had to ship its items on pallets, but these two provisions merely permitted the bidder to palletize if he desired. Accordingly, as Bristol indicated maximum shipping weight per container, it complied with the requirements of paragraph B.17.

Thirdly, paragraph C.83.1 of the IFB advised bidders that, if an item was offered at no charge, "N" should be entered in the bid. On several items, Bristol entered "N/C" in its bid which ESI contends constitutes an ambiguity which renders the bid nonresponsive under the above paragraph.

Our Office has recognized that a bidder's intention to furnish an item at no cost to the Government may be expressed in various ways, such as the insertion in the bid schedule of the symbol "O," 40 Comp. Gen. 321 (1960), or of dashes, Dyneteria, Inc., et al., 54 Comp. Gen. 345 (1974), 74-2 CPD 240. Bristol's use of "N/C" is an equally clear expression of intent to provide an item at no charge. Dyneteria, Inc., et al., B-181470, January 17, 1975, 75-1 CPD 35.

Therefore, Bristol's use of "N/C" rather than the symbol prescribed was waivable under section 2-405 of the Armed Services Procurement Regulation (1976 ed.) as a minor informality and did not render the bid nonresponsive.

Finally, ESI protests the determination that Bristol is a responsible bidder as ESI contends Bristol failed to comply with the definitive responsibility criteria contained in the IFB.

B-190693

Our Office does not review affirmative responsibility determinations unless either fraud is alleged on the part of the procuring officials or the solicitation contains definitive responsibility criteria. Data Test Corporation, 54 Comp. Gen. 715, 724 (1975), 75-1 CPD 138, and Laughton Elevator Division, et al., 55 Comp. Gen. 1051 (1976), 76-1 CPD 294.

Included in the IFB was a provision as follows:

"C.81 SPECIAL STANDARDS OF RESPONSIBILITY

"The below special standards of responsibility are created pursuant to ASPR 1-903.3. Bidders must meet these standards to be considered for award.

"Before a bidder will be awarded a contract, he must show, at least by the time of the pre-award survey,

"1. That the bidder has successfully produced the AN/PRC-77 or, within the last five (5) years, equipment of the same general complexity as the Radio Set AN/PRC-77. The bidder must show that it has manufactured the PRC-77 or other equipment at a monthly rate sustained for six consecutive months, sufficient for the Government to acquire the confidence that the delivery rate in the solicitation and subsequent contract of 600 per month can be attained by the bidder. Equipment other than a PRC-77 will be considered of the same general complexity as a PRC-77 if it:

"a. is an HF, UHF or VHF Radio;
and,

"b. has plug-in modular design using at least 10 modules of which at least four require individual electrical peaking or alignment as part of the manufacturing process; and,

B-190693

"c. uses printed circuit boards in the radio, at least fifteen of which contain some discrete components, such as transistors, diodes, capacitors, resistors; and,

"d. employs phase-lock loop method of frequency synthesis; and,

"e. was produced to meet military or similar standards for electrical, mechanical and environmental requirements."

ESI's arguments relating to Bristol's responsibility center around the requirements in subparagraph C.1.1, supra.

The requirements are the type of definitive or objective responsibility criteria which our Office will review.

ESI states that the specifications for the AN/PRC-77 require compliance with MIL-Q-9858A, a quality control program. Bristol, at the time the preaward survey was conducted, advised the Government that it did not have a quality control program which met the requirements of MIL-Q-9858A, but that if awarded the contract, it would revise its inspection system to comply. ESI argues that since Bristol did not have such a program for its prior production, the radios produced could not be considered "AN/PRC-77" radios because they did not comply with the specifications for the AN/PRC-77.

Our Office has been advised by the contracting officer that MIL-Q-9858A was added to the specifications for the AN/PRC-77 in November 1976. Therefore, the requirement for compliance with MIL-Q-9858A was in effect less than a year prior to the bid opening of the instant IFB and was not required in the prior contracts performed by Bristol.

B-190693

We do not believe that a bidder can be held to the standard ESI attempts to establish that the prior manufactured radios must comply in all respects to the current specifications for the AN/PRC-77, especially since equipment of the same general complexity is an acceptable alternate to prior production of the AN/PRC-77. Under ESI's interpretation, a bidder could be found nonresponsible by having manufactured an AN/PRC-77 from subsequently modified specifications while a bidder who had manufactured equipment of the same general complexity, which complied only with the five criteria quoted above, would be found responsible. Accordingly, we have no objection to the contracting officer's consideration of the prior production of Bristol, notwithstanding the lack of a MIL-Q-9858A program.

ESI also disagrees with the contracting officer's determination that Bristol has demonstrated that it can meet the required delivery rate of 800 items per month.

The contracting officer relied on the following past deliveries of AN/PRC-77 radios under other contracts to determine that Bristol could comply with the delivery schedule:

October 1976	400
November 1976	600
December 1976	700
January 1977	872
February 1977	750
March 1977	729

While ESI argues that the average rate of production was only 675 for the above 6-month period and that other 6-month periods fell far short of this figure, the "Special Standards of Responsibility" did not require past delivery rates of 800 items but only a rate sufficient for the Government to acquire confidence that the 800 delivery rate could be met. Also, the delivery rate only had to be sustained for one 6-month period. Therefore, we find the contracting

B-190693

officer had a reasonable basis for his responsibility determination. In this regard, contrary to ESI's assertion that the above information was not available to the preaward survey team during the conduct of the survey, it was contained in Volume II of the preaward survey data furnished the team.

Because of the above finding, it is unnecessary to discuss Bristol's prior production of the AN/PRC-25 radio for which ESI contends no determination was made that it was of the same general complexity.

ESI further states that Bristol did not comply with the requirement of the IFB that, if a bidder did not plan to acquire the RF switches, a critical component of the AN/PRC-77, from an approved source, the bidder had to submit to the survey team detailed plans for engineering, fabrication and testing of the switches. The contracting officer states that Bristol did discuss this matter with the survey team, Bristol is an approved source for the switches and had already submitted the necessary documentation in connection with its source approval of March 26, 1976. Accordingly, we find the contracting officer had a reasonable basis for his determination regarding the RF switches.

ESI also challenges the ability of Bristol to acquire the necessary employees to perform the contract and whether Bristol has the financial capability to absorb the loss on this contract which ESI argues will occur because of Bristol's low bid. These are matters relating to the contracting officer's affirmative determination of Bristol's responsibility, not covered by the definitive responsibility criteria contained in paragraph C.81 of the IFB and not for consideration by our Office. Data Test Corporation, supra.

ESI states that, based on its best information and belief, the Army is planning to delete the requirement of the IFB that the contractor utilize Special Acceptance Test Equipment (SATE) and such deletion will entitle the contractor to an equitable adjustment in price, which deletion the Army will make of at the time of award.


B-190693

The contracting officer has advised our Office that the Army was not at the time of award and is not now planning to delete the requirement for SATE. The Army is currently studying the possibility of replacing Government-furnished SATE with SATE furnished by the contractor, but no decision on the matter has been reached. Accordingly, we find no evidence that the contracting officer was aware of a change in a material requirement in the IFB which would have required amendment of the IFB to allow all bidders to compete.

Finally, ESI states that the timing of the disposition form dated November 14, 1977, summarizing the preaward survey results, and the date of award to Bristol, November 16, 1977, shows that the contracting officer did not give full consideration to all of the information contained in the survey. The contracting officer advises that the preaward survey was commenced on October 13, 1977, and that, during the month that it took to conduct the survey, he was in contact with various members of the survey team and had knowledge of the results of the survey prior to the November 14, 1977, submission, which was merely an administrative procedure. Based upon our review of the record, we cannot say that the proper procedures for determining a bidder's responsibility were not followed.

Accordingly, the protest of ESI is denied.

Bristol, in its comments on the protest, has challenged the release by the Army to ESI of its preaward survey results under the Freedom of Information Act (FOIA) (5 U.S.C. § 552 (1976)). However, our Office has no authority under FOIA to determine what documents other Government agencies must or must not disclose. Augmentation Incorporated, B-185137, March 16, 1976, 75-1 CPD 179.


Deputy Comptroller General
of the United States