

7228

Carter
PL-1

DECISION



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

FILE: B-191449 DATE: August 4, 1978
MATTER OF: Bristol Electronics, Inc.

DIGEST:

1. Where protest is against Army interpretation of IFB and consequent bid evaluation, and is filed within 10 days of contract award, protest is timely.
2. Where inconsistencies in IFB are discovered after bid opening, resort to Order of Precedence clause for resolution of conflicts is permissible alternative to cancellation and resolicitation.
3. Under Armed Services Procurement Regulation § 1-905.3(iii), affirmative determination of responsibility was properly made on basis of existing information within agency.
4. Where contracting officer has determined bidder to be responsible, this affirmative (albeit informal) determination will not be questioned by GAO except in circumstances not present here.
5. Submission of low-price or below-cost bid is not basis upon which to challenge award where bid is otherwise acceptable.

Bristol Electronics, Inc. (Bristol), protests the award of contract No. DAAB07-78-C-0110 by the Army Electronics Command (ECOM, since designated CERCOM) to International Pammcorp (Pammcorp) for a specified quantity of radio amplifiers and related items. The invitation for bids (IFB) contained an option provision for the purchase of up to an additional 100-percent of the specified quantity of items.

Bids were publicly opened on January 31, 1978, and on March 8, 1978, award was made to Pammcorp, which did not enter a unit price in SLIN 0001AC for the option quantity in section "E" of the solicitation.

We note at the outset the Army's argument that the protest was untimely filed under our Bid Protest Procedures (4 C.F.R. § 20.2(b)(2) (1977)) because the Army views the protest as one against the propriety of Pamcorp's bid. Since the details of Pamcorp's bid were publicly revealed at the time of bid opening, the Army is of the view that Bristol's protest should have been filed within 10 days of bid opening. We disagree. The protest is not one against the propriety of Pamcorp's bid as such but against the manner in which the Army interpreted the IFB and evaluated bids. These bases were not known until award was made to Pamcorp on March 9, 1978. Since the protest was filed within 10 days of award, the protest is timely. 4 C.F.R. § 20.2(b)(2) (1977). See AIRSEARCH Manufacturing Company of Arizona, B-188369, September 27, 1977, 77-2 CPD 229; Joyce Teletronics Corporation, B-190316, January 11, 1978, 78-1 CPD 24.

Bristol contends, *inter alia*, that Pamcorp's bid was nonresponsive in that the option provision of the bid was left blank; this is alleged to have been a material deviation from the requirements of the IFB and a violation of applicable procurement regulations.

In support of its contention, Bristol cites three subsections of the solicitation, which provide as follows:

"C.83.3 (NOTICE - UNIT PRICES - RANGE QUANTITIES):

Enter unit prices for each specified range for all items for which space has been provided in Section E. DO NOT LEAVE ANY BLANKS. Failure to follow this instruction will render the bid nonresponsive."

"D.32 (EVALUATION OF BIDS/OFFERS):

A bidder/offeror must quote on all items in this solicitation to be eligible for award. All items will be awarded only as a unit. Evaluation of bids/offers will be based, among other factors, upon the total price quoted for all items."

"C.23 (NOTICE - OPTIONS):

This procurement contains an option provision that allows unit prices different than those offered for basic contract quantities. The Government may exercise this option at time of award; because of this, the option quantity and price will be an evaluation factor. See Subsection D.24."

Clearly, these provisions standing alone would make a bid which failed to include option prices nonresponsive. However, subsection D.24 of the IFB (EVALUATION OF OPTIONS), to which the bidder is referred in subsection C.23, states:

"The evaluation of bids will be on the basis of the quantity to be awarded, exclusive of the option quantity. See Subsection J.4.1." (Emphasis added.)

Moreover, subsection J.4.1 of the IFB (OPTION FOR INCREASED QUANTITY), to which the bidder is referred in subsection D.24, provides in pertinent part:

"c. The bidder/offeror may indicate in the space provided below, the unit price(s) for the increased quantities if an option is offered." (Emphasis added.)

The protester denies that there are any inconsistencies between these provisions when they are read "in context" and asks that we enforce those provisions which require that option prices be submitted by all bidders. Specifically, Bristol requests that we direct the Army to (1) set aside the award to Pammcorp; (2) award the contract to Bristol as the next low bidder; (3) cancel the subsequent CERCOM contract awarded under solicitation No. DAAB07-78-B-0281, issued in lieu of an option for identical goods under the subject contract; and (4) include this quantity under the options clause of the newly awarded Bristol contract.

We find Bristol's claim that the solicitation is consistent throughout and all of its provisions should therefore have been given effect in bid evaluation to be without merit. Subsections C.83.3, D.32 and C.23

B-191449

4

of the IFB are mandatory in nature. Bidders are informed that failure to offer option prices will render such bids nonresponsive, and that option prices will be considered in bid evaluation. To the contrary, subsection J.4.1 is permissive in nature, suggesting that the submission of option prices is within the discretion of the bidder. Furthermore, subsection D.24 excludes the option quantity from bid evaluation. We consider these provisions to be patently irreconcilable.

However, the solicitation incorporates an Order of Precedence clause (as mandated by Armed Services Procurement Regulation (ASPR) § 7-2003.41 (1976 ed.)) in subsection C.20.5, which states:

"In the event of an inconsistency between provisions of this solicitation, the inconsistency shall be resolved by giving precedence in the following order: (a) the Schedule (excluding the Specifications); (b) Terms and Conditions of the Solicitation, if any; (c) General Provisions; (d) other provisions of the contract, when attached or incorporated by reference; and (e) the Specifications."

The application of this provision results in precedence being given to subsection J.4.1, since it is found in the Schedule; all inconsistent clauses not found in the Schedule are superseded by it. Since subsection J.4.1 leaves the choice of whether to bid option prices to the bidder, the Army was correct in not considering the option clause in bid evaluation and giving no effect to inconsistent subordinate provisions. See Eltron, Inc., B-189362, November 28, 1977, 77-2 CPD 414, at 4. This case is thus distinguishable from Bristol Electronics, Inc.; E-Systems, Inc., Memcor Division, B-180247, July 11, 1974, 74-2 CPD 23 (cited by Bristol as being applicable here), where we held that offerors were required to quote a price on the option quantity.

Furthermore, the Army reports that 3 of the 6 bidders made no entry in SLIN 0001AC for the option quantity, and none of the 60 bidders solicited sought

clarification as to inconsistencies in the IFB. These additional facts appear to affirm the reasonableness of the Army's use of the Order of Precedence clause in interpreting the solicitation.

Bristol refers to CERCOM solicitation No. DAAB07-78-B-0281, issued on April 7, 1978 (approximately 30 days after award of the instant contract to Pammcorp), for a specified quantity of the same items procured under the subject contract, as evidence that the Army knew at the time of award that it had a requirement for the option quantity. Even assuming such knowledge on the part of the Army, however, option prices could not have been considered in bid evaluation under the solicitation as issued; as stated above, proper application of the Order of Precedence clause precluded any consideration of option prices. Consequently, the Army's only alternative would have been cancellation and resolicitation of the procurement.

The Army reports that, after discovery of the inconsistencies contained in the IFB, it considered cancellation and resolicitation. The contracting officer determined, however, that the actual needs of the Government would be served by award under the solicitation as issued, and that application of the Order of Precedence clause removed any possibility of prejudice to bidders. He therefore chose not to cancel. In view of our policy against cancellation of solicitations after bid opening, we find no basis to challenge the Army's actions. See Hampton Metropolitan Oil Co.; Utility Petroleum, Inc., B-186030, B-186509, December 9, 1976, 76-2 CPD 471, and cases cited.

Bristol further contends that the Army failed to determine the prospective awardee's responsibility in violation of ASPR § 2-407.2 (1976 ed.), which requires such a determination before any award can be made. The contracting officer reports that he made an informal "in-house" check of Pammcorp's responsibility. A memorandum of March 6, 1978, confirms this. Pammcorp was found to be responsible as a result of this informal survey. This method of determining responsibility is in accord with ASPR § 1-905.3(iii) (1976 ed.).

Bristol asserts that, with respect to one bid item (Module A-36), Pammcorp's bid price is lower than the minimum cost for the item itself, excluding labor, overhead and other costs. This is alleged to demonstrate Pammcorp's nonresponsibility, at least with respect to this particular item.

As Bristol recognizes, the question as to whether a bidder can perform at its bid price is one of responsibility. Agnew Tech-Tran, Inc., B-184272, July 14, 1975, 75-2 CPD 32. Where, as here, the contracting officer has determined a bidder to be responsible, that affirmative (albeit informal) determination will not be questioned by this Office unless either fraud or bad faith is alleged on the part of procuring officials, or where the solicitation contains definitive responsibility criteria which have allegedly not been applied. Central Metal Products, Inc., B-181724, July 26, 1974, 74-2 CPD 64. Since this case involves neither of these allegations, we will not question the contracting officer's determination that Pammcorp was a responsible bidder.

Moreover, our Office has consistently held that the submission of a low-price or below-cost bid is not a basis upon which to challenge an award. Futronics Industries, Inc., B-185896, March 10, 1976, 76-1 CPD 169. We have held that the fact that the low bidder might incur a loss in performing the contract at the price shown in its bid does not justify rejecting an otherwise acceptable bid. B-173088, July 27, 1971. Although ASPR § 1-311 (1976 ed.) states that "buying in is not a favored practice," it does not legally proscribe the submission of bids at prices below cost, but merely directs that losses are not to be recouped through increases in the contract price during contract performance, or through "follow-on" contracts at prices high enough to recover losses incurred on the original "buy-in" contract. As a result, we have recognized that an award is not legally precluded where "buying in" is thought to have occurred. Lester B. Knight and Associates, Inc., B-182238, January 16, 1975, 75-1 CPD 25, and cases cited.

For the foregoing reasons, the protest is denied.


Deputy Comptroller General
of the United States