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DECISION

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

FILE: B-194679 DATE: November 8, 1979

MATTER OF: Dover Elevator Co. CDG01715

[Protest of Bid Rejection as Nonresponsive]

DIGEST:

1. Rejection of bid which did not acknowledge an amendment increasing capacity of elevators to be serviced was proper where change in capacity could have significant effect on price and amendment materially affects the nature (quality) of work required to service elevators.

2. Amendment which does not advise bidders of consequences of failure to acknowledge amendment, as required by Federal Procurement Regulations (FPR), is defective. Protester was not prejudiced, however, because its failure to acknowledge was due to oversight of company employee, who did not show amendment to company officials preparing bid. Failure of amendment to comply with FPR is brought to attention of General Services Administration.

3. GAO construes solicitation requirement that bidder certify that it has serviced elevator "equipment of this type" and IFB specification which describes "type" of equipment in general terms, as not requiring service experience on elevators identical to those in schedule.

Dover Elevator Company (Dover) protests the rejection of its low bid as nonresponsive under invitation for bids (IFB) 79-09-016 issued by the General Services Administration (GSA). In addition, Dover contends that the second low bidder, Continental Elevator Company AGC00017 DLG03304

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(Continental), cannot comply with the solicitation's definitive responsibility criterion. For the following reasons, we deny the protest.

REJECTION OF DOVER'S BID AS NONRESPONSIVE

The IFB requested bids for the award of a full service maintenance contract for 20 elevators in various buildings at the Denver Federal Center. The solicitation required that the contractor provide all labor, supplies, parts and materials to perform the work. The specifications listed the elevators by building number, along with the manufacturer, number of stops, speed, capacity, and type of elevator--hydraulic, gearless traction, geared traction, passenger or freight. However, the IFB, as initially issued, erroneously listed the capacity of 4 elevators as 2,000 pounds instead of 20,000 pounds and the capacity of 1 elevator as 1,000 pounds instead of 4,000 pounds. Addendum 4 of the IFB, which was received by Dover, corrected this error. The protester, however, did not acknowledge receipt of this amendment; consequently, GSA rejected Dover's bid as nonresponsive and made an award to Continental.

Dover argues that its bid is responsive because it inspected the elevators prior to bid submission and based its bid on the actual elevators to be serviced, rather than on the misdescription contained in the IFB as originally issued. Dover asserts that for this and other reasons, its failure to acknowledge the addendum should be waived. We disagree.

The responsiveness of a bid, that is, a bidder's intent to be bound by all the terms and conditions of a solicitation, including amendments thereto, must be determined from the bid itself. 51 Comp. Gen. 352 (1971). Therefore, to be effective, an acknowledgement of an amendment must be submitted prior to bid opening. Ira Gelber Food Services, Incorporated, 55 Comp. Gen. 599, 601 (1975), 75-2 CPD 415. In this connection, a bidder may not cure a bid which is nonresponsive on its face by demonstrating after bid opening that it

was aware of the substance of an amendment. See Spartan Oil Company, Inc., B-185182, February 11, 1976, 76-1 CPD 91. Thus, even if Dover inspected the elevators modified in amendment 4 before bid opening and was aware of the actual capacity of the elevators, it would still have to acknowledge a material amendment pertaining to those elevators. Spartan Oil, supra. Otherwise it would not be legally binding itself to comply with the amendment's requirement. Navaho Corporation, B-192620, January 16, 1979, 79-1 CPD 24. Dover's bid, therefore, may be accepted only if the amendment would have a trivial or negligible effect on price or quality of the work or is not otherwise material. Federal Procurement Regulations (FPR) 1-2.405(d)(2) (1964 ed.); Navaho Corporation, supra.

Dover maintains that the most important factors in estimating the cost of a full service elevator maintenance contract are the number of landings, frequency of use and speed of the elevator. Arguing that these factors were stated correctly in the IFB and that all elevators affected by the amendment were freight elevators with relatively infrequent use and slow speeds, Dover maintains that its "bid was based upon knowledge of the relevant factors for pricing a maintenance contract." Therefore, Dover contends that since addendum 4 did not affect any of these important variables, it could not have had a significant effect on price.

Dover further states that the cost of labor for servicing a large capacity elevator is the same as that for servicing a smaller capacity elevator. The protester then argues that the only factor in amendment 4 affecting price is the increased cost for the larger capacity elevator parts which are not interchangeable with parts required for a smaller capacity elevator. Using its bid price for the elevators affected by amendment 4 as its starting point, Dover estimates that the increased cost of non-interchangeable parts for the large capacity elevators is $51.47.

GSA takes the position that the amendment would have more than a trivial effect on price and quality and is, therefore, material. GSA maintains that a 20,000 pound capacity elevator has larger components which "would cause more problems and would increase the cost of maintenance." However, the agency has not presented any evidence regarding the effect which addendum 4 would have on the cost of performance.

Continental also has submitted its views on this issue. Continental points out that the replacement cost for elevator components of a 20,000 pound capacity elevator will be substantially greater than the replacement costs for components of a much smaller capacity elevator. In addition, Continental takes issue with Dover's assertion that the only increase in cost for a larger capacity elevator is the increased cost of replacement parts. Continental maintains that routine maintenance on a large capacity elevator, especially on elevators as large as the elevators in this case, takes substantially more time, twice as long, than maintenance on a smaller capacity elevator. Continental, therefore, asserts that this fact, necessarily, would have an effect on price.

While Dover primarily was concerned with the number of landings, frequency of use and the speed of the elevators in estimating its bid price, we think it is reasonable that other firms might consider other variables such as elevator capacity in determining the work required and price for a full service maintenance contract. In our view, routine elevator maintenance for an elevator with a 20,000 pound capacity would entail considerably more time than that for an elevator with a 2,000 pound capacity. For example, as Continental points out, it would take substantially more time to service the automated doors of a 20,000 pound capacity freight elevator than the doors of a 2,000 pound freight elevator which are likely to be manually operated. Also, a 20,000 pound freight elevator, in many instances, will have manloaders and forklifts driven on it. An elevator this size is subject to greater abuse which necessarily

will require more maintenance. At the very least, therefore, a bidder could anticipate additional labor time associated with an elevator with a 20,000 pound capacity than that for a 2,000 capacity elevator. We believe, therefore, that the capacity of an elevator, particularly the capacity of one as large as that at issue here, could well have a substantial effect on a bidder's price for maintenance.

Aside from the amendment's effect on price, it would also appear to have a material effect on the quality of work required. That is, since the capacities of the elevators, as amended, are so different (2,000 vs 20,000 pound capacity and 1,000 vs. 4,000 pound capacity), the quality or nature of the work required to service and maintain such elevators would be different. For example, the type of service performed on the doors of a 2,000 pound unit, which are likely to be manually operated, is different from the service performed (balance and adjust seven motors and power equipment) on the power operated bi-parting doors of the 20,000 pound freight elevators at the Denver Center. Therefore, we believe GSA properly rejected Dover's bid as nonresponsive.

Dover argues that amendment 4 was defective because it did not advise bidders of the consequences of their failure to acknowledge the amendment. As Dover correctly points out, FPR 1-2.207(b)(4) requires that an amendment include instructions to bidders for acknowledging receipt and information on the effect of failure to acknowledge or return an amendment. The protester contends, therefore, that this defect "makes the award of a contract to Continental improper."

We disagree. Amendment 4 states that, "telegraphic modification is authorized. Bidder must acknowledge receipt of Addendum no. 4." Dover was not prejudiced by the amendment's failure to state that failure to acknowledge may result in bid rejection because by its own admission "an oversight by a Dover employee * * * caused it to be filed" away without anyone informing the Dover representatives preparing the bid of the amendment's contents. It seems reasonable to conclude

that an amendment to the specifications stating that it must be acknowledged should have been brought to the attention of company officials responsible for preparing the bid, and that Dover's failure to acknowledge the amendment was not a direct result of the defect noted above but rather was more directly the result of its employee's oversight in failing to bring the amendment to the attention of responsible company officials. We note, parenthetically, that Dover acknowledged the first three amendments even though they also did not inform bidders of the effect of failure to acknowledge or return the amendments. Thus, we cannot agree that the defect in the amendment precluded a valid award to Continental. However, we are bringing this deficiency to the attention of the Administrator of General Services.

CONTINENTAL'S RESPONSIBILITY

As its second ground of protest, Dover maintains that the evidence which Continental submitted to the contracting officer did not demonstrate that it could meet the IFB's definitive responsibility criterion. Although GSA asserts that Dover, as a nonresponsive bidder "is not a party in interest to question the responsibility of Continental," we have previously held that a nonresponsive bidder is an interested party under our Bid Protest Procedures. See Arnessen Marine Systems, Inc., B-186691, October 20, 1976, 76-1 CPD 351.

When a solicitation contains a restriction on competition such as a definitive responsibility criterion, a procuring agency must rigidly enforce it because 1) other potential bidders might have participated if they knew the agency wasn't serious about the restrictive requirement and 2) participating bidders might have bid differently if they knew that competition would be increased. Haughton Elevator Division, Reliance Electric Company, 55 Comp. Gen. 1051 (1976), 76-1 CPD 294.

The criterion at issue here states:

"Competence of Bidder - The bidder must furnish a statement certifying that he has

> satisfactorily serviced, on a maintenance basis, elevator equipment of this type * * * Such statement shall include specific locations of similar equipment serviced, the type of service* * *." (Emphasis supplied.)

The protester questions whether Continental has experience with the type of elevators in Building 67. Reiterating that the "Competence of Bidders" clause requires experience on "equipment of this type", Dover contends that none of the elevators listed by Continental to fulfill this requirement is "sufficiently similar" to the elevators in Building 67 which have group supervisory control systems with two-terminal dispatch.

We construe the "Competence of Bidders" clause to mean that a bidder must have maintained elevators of "this type" "similar" to but not identical to the elevators enumerated in the schedule. The schedule does not indicate the specific control systems for the elevators. Rather, the schedule's elevator description indicates the manufacturer and type of elevator in very general terms -- gearless traction, geared traction, passenger, freight etc. This description, when read in conjunction with the "Competence of Bidders" clause, indicates that the clause refers to the specific make and general type of equipment listed; it does not require a bidder to show maintenance experience on elevators with the same control systems as the particular elevators listed. Haughton Elevator Division, supra.

Continental provided the contracting officer with a list of locations where it had serviced elevators of the type specified in the IFB. The contracting officer, together with other agency elevator personnel, determined that these projects encompassed the types of elevators -- hydraulic, gearless traction, etc. located at the Denver Federal Center. Nothing further was required by the IFB.

The protest, therefore, is denied.

For The Comptroller General
of the United States