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DECISION



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

[Protest of Bid Rejection as Nonresponsive]

FILE: B-193704.2

DATE: May 29, 1980

MATTER OF: Futura Company *DLGO* 2876

DIGEST:

Where bidder admits that "equal" parts offered as substitutes for brand name parts do not individually comply with specifications but as a whole comply with "intent" of specifications, bid is properly rejected as nonresponsive.

Futura Company (Futura) protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. MSFC-8-99-5 issued by the National Aeronautics and Space Administration (NASA) for modifications to the boiler and burner controls in the main boiler plant at the Michoud Assembly Facility, Louisiana. The bid was rejected because the equipment proposed by Futura failed to meet the IFB specifications. *36*

The protest is denied.

In our decision in Futura Company, B-193704, September 27, 1979, 79-2 CPD 227, we considered a protest by the firm against NASA's rejection of the same bid as nonresponsive because of Futura's indication in the bid that it intended to use Cleveland Controls (Cleveland) parts instead of the Bailey Meter Co. (Bailey) parts named in the specification for panel instruments. The basis for rejection was that Futura had failed to specify the Cleveland parts that would be used and their characteristics.

However, we found that since use of the Bailey equipment was not solicited on a brand name or equal basis, Futura's bid need not be rejected in view of paragraph 9 of the solicitation's General Provisions,

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Standard Form 23-A, entitled "Materials and Workmanship," which allowed the substitution of equipment "which, in the judgment of the Contracting Officer, is equal to that named." We further stated:

" * * * we do not believe that under the present circumstances the fact that Futura did not specify which Cleveland parts will be used and their characteristics necessarily must result in the rejection of the otherwise responsive bid as long as a reasonable effort by the contracting officer would disclose that only one Cleveland model could possibly be used as a substitute for each Bailey part, and that model's features. * * * With respect to the model to be used, although we have recognized that where no model numbers are specified in a bid the bidder in effect may be able to elect to make an otherwise responsive bid nonresponsive, * * * there is no such possibility where the bidder in fact will not be able to choose between a number of units.
* * *

"Thus, if through reasonable effort and based on reasonably available information NASA can confirm [that there is only one possible Cleveland substitute for each Bailey part, and that all substitutes are acceptable] * * *, the bid may be accepted, the solicitation reinstated, and award made thereunder to Futura. In this respect, for information to be 'reasonably available' it does not necessarily have to be in the possession of the activity conducting the procurement; it need only be available to the public prior to bid opening * * *."

To implement our decision, the contracting officer requested that Futura submit for technical review literature concerning the proposed Cleveland equipment. NASA's review of the submissions in response to the

request disclosed that Futura in fact intended to use Bailey equipment for three of the panel instruments, Bristol Co. parts for three, and Cleveland parts for the remainder only. The review showed that in any event the equipment proposed did not meet 13 of the 72 relevant specifications in the IFB. In addition, in NASA's view it was not possible to determine based on the information submitted by Futura or on other data reasonably available to the agency whether 24 other specifications were met. For example, NASA could not determine whether the Cleveland oxygen analyzer would meet the specifications for that item, which, in a report on the protest, NASA asserts is "one of the more important parts of the control system." The agency states:

"* * * the specification * * * called out that the analyzer must be mounted just outside the exhaust stack and that any gas sample removed from the gas stack to the analyzer must be returned to the stack. The purpose of this is to assure that gas samples are not emitted into the boiler room space. The problem we have with the information submitted by Futura, and supplemented by information from outside sources (catalog cuts, etc.) is that we cannot determine if Cleveland's analyzer emits all the sample gasses back into the stack, or if any of the flue gas is emitted into the boiler room spaces."

Finally, the information available indicated that in ordering certain of the Cleveland equipment a choice had to be made among various offered features, and that the acceptability of the equipment would be entirely dependent on the features that Futura as the contractor would choose to select.

In view thereof, NASA again found Futura's bid non-reponsive. It is that finding which forms the basis for the instant protest.

Futura asserts that its bid "was submitted for an entire system" and thus while it may not meet all

enumerated specifications for panel instruments the "system" as a whole would "comply with the intent of the specifications" and thereby fulfill NASA's needs. Futura also contends that NASA should have requested additional information from Futura to clarify problem areas. We find no legal merit to these contentions.

We have consistently held that the determination of the Government's minimum needs is primarily the responsibility of the contracting agency, which is most familiar with the conditions under which the items being procured will be used and thus in the best position to know the Government's needs. Ronald Campbell Company, B-196935, December 19, 1979, 79-2 CPD 424. Similarly, the description of those needs by the establishment of specifications on which to solicit bids also is a function of that agency, not our Office. Therm-Air Mfg. Co., Inc., B-194185 et al., November 20, 1979, 79-2 CPD 365. We will not question an agency's judgment in these respects unless it clearly is shown that it had no reasonable basis. Arista Devices Corp., B-194393, September 5, 1979, 79-2 CPD 177. Thus, the mere belief by a bidder that the item it is offering will meet the Government's needs does not render acceptable a bid that is not responsive to the invitation's specifications. 42 Comp. Gen. 502 (1963).

Moreover, it is inimical to the integrity of the competitive procurement system to consider for award a bid submitted in a manner in which the bidder can control its responsiveness after bid opening and the exposure of competitors' prices. 50 Comp. Gen. 137, 140 (1970); Environmental Conditioners, Inc., B-188633, August 31, 1977, 77-2 CPD 166. A bid must be responsive as submitted, i.e., it must represent an unequivocal offer to perform the exact thing called for in the invitation at a price to which the bidder remains bound for the period specified. Edw. Kocharian & Company, Inc., 58 Comp. Gen. 214, 217 (1979), 79-1 CPD 20.

The basis for our prior position that Futura's bid need not be rejected because of its stated intention to

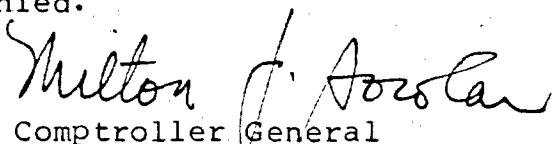
use Cleveland parts instead of Bailey parts was that Futura in reality may not have been able to choose substitutes from a number of Cleveland models or features, some acceptable and some not. Rather, we envisioned that a reasonable investigation by the contracting officer might show that there was only one Cleveland part possible as a substitute for each Bailey part, and that all Cleveland parts would be acceptable. Thus, it was possible that as a practical matter Futura had not retained control over the bid's responsiveness. In this respect, we point out that a bidder's intention to be bound by a bid to properly meet an invitation's specifications is irrelevant if that intention is not apparent from the bid itself. The Entwistle Company, B-192990, February 15, 1979, 79-1 CPD 112.

However, as indicated above NASA's investigation has shown that, contrary to the statement in the bid, Futura in fact did not intend to substitute only Cleveland parts, and that certain parts that would be used simply did not meet, or could not be determined to meet, NASA's needs as delineated in the IFB.

In this connection, as we stated in our earlier decision NASA's investigation in these circumstances had to be limited to an examination of data reasonably available to the public at bid opening to determine the bid's responsiveness. Thus, NASA could not properly contact the firm to otherwise discover or clarify intentions not reflected in the bid or in "reasonably available" data regarding the choice of substitute equipment and features, as suggested by the protester. Fire & Technical Equipment Corp., B-192408, August 4, 1978, 78-2 CPD 91.

Futura has provided no basis to conclude that NASA's investigation was deficient in the above respects, and we note that the firm has not disputed NASA's technical judgment as to whether specifications were met.

The protest is denied.


For the Comptroller General
of the United States