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DECISION



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

Protest of Bid Rejection as Nonresponsive

FILE: B-198321

DATE: June 20, 1980

MATTER OF: National Oil & Supply
Company, Inc.

DL 604844

DIGEST:

1. Bid was properly rejected when accompanying letter (legally part of bid) requested relief from future unascertainable freight increases beyond those provided for in IFB's price adjustment clause. Protester's argument that language in cover letter was merely precatory at best creates an ambiguity as to bid's responsiveness requiring bid's rejection since acceptance would be prejudicial to other bidders who accepted IFB's terms without reservation.
2. IFB failure to warn that bid would be rejected if accompanied by request for relief from possible future freight rate increases does not preclude bid rejection since regulation reasonably apprises bidders of consequences of taking exception to solicitation provisions.

National Oil & Supply Company, Inc. (National) protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DLA600-80-B-0004 issued by the Defense Logistics Agency (DLA), Defense Fuel Supply Center, (DFSC), Alexandria, Virginia, to meet the requirements of various Federal agencies in a number of states for gasoline, distillate and residual fuels for a one-year period.

DL 601785

DLA reports that National was the sole bidder on a number of line items, and the low bidder on other line items. However, DLA determined National's bid to be nonresponsive for taking exception to the IFB's price and delivery terms.

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The basis for DLA's determination was a cover letter submitted with National's bid which stated:

" * * * Please be advised that National Oil would like to be relieved against freight increases. Due to the unsteady trend of increasing freight rates by the common carriers, we are unable to predict an adequate freight rate. The increases in the surcharge allowed to the common carrier must also be taken into consideration.

"We would wish to escalate our freight rates with verification along with those imposed upon us by carriers."

Because National's bid was conditioned on its right to receive any or all transportation rate increases charged, including ICC tariff rate surcharges, it was determined nonresponsive to DFSC clauses incorporated into the IFB.

Clause L133, "Economic Price Adjustment," provides for a bidder's prices to be adjusted upward or downward only on the basis of changes in a bidder's "reference" prices occurring after the date of bid opening. Under the clause, a bidder is allowed to use its current market price established in the usual or ordinary course of trade or its catalog prices for sales to the general public as an index for price adjustments, and can thus recoup increased costs other than product costs to the extent such other costs are included in a bidder's published price. (Such "established" prices must meet certain criteria set out in L133.)

In addition, DFSC clause H 18 (DAR Clause 7-104.71, "FOB Destination (1969 Apr)") requires that supplies be delivered to the Government's specified destination at the expense of the contractor, and the Government shall not be liable for any transportation charges unless caused by an act or order of the Government in its contractual capacity.

It is DLA's position that since the line items bid by National all require delivery to the using activities, and are consequently "delivered" prices, they must be deemed to include freight or delivery costs; thus, and because adjustments in bid prices are restricted by L133 to changes in a bidder's catalog or published price as defined in the IFB, a bidder cannot recover any increases in freight costs which are in excess of freight cost increases which the bidder may pass along to other customers through increases in its published prices for sales to the general public.

National, through its counsel, argues that its cover letter is not a part of its bid but merely a collateral inquiry whether it might be "relieved of restrictions against freight increases." National urges that words in its cover letter such as "wish," "would" or "like" may not be interpreted as expressing a condition or exception to the terms of the IFB; rather, they are merely the expression of a "desire for."

Alternatively, National submits that since freight charges are included in catalog or posted prices, and since the IFB does not prohibit price escalations in catalog or posted prices, its cover letter has not taken exception to any of the IFB's price or delivery terms.

Finally, National contends that the IFB failed to warn prospective bidders that a bid would be considered nonresponsive if it made "an inquiry concerning freight increases."

Contrary to National's view, we have consistently held that extraneous documents submitted with a bid, including a cover letter, must be considered a part of the bid itself for purposes of determining the bid's responsiveness. See Carco Electronics, B-186747, March 9, 1977, 77-1 CPD 172; New England Engineering Co., Inc., B-184119, September 26, 1975, 75-2 CPD 197.

With regard to the statements appearing in National's cover letter, Defense Acquisition Regulation (DAR) § 2-404.2(d)(i) (1976 ed.) requires the rejection of a bid in which a bidder attempts to limit his liability

to the Government for future changes in conditions such as increased costs. That provision is designed to prevent a bidder from attempting to impose on the Government conditions which would be prejudicial to other bidders who have accepted the solicitation's terms and conditions without reservation. See Chemtech Industries, Inc., B-186652, September 22, 1976, 76-2 CPD 274.

With regard to National's contention that the wording in its cover letter was merely precatory in nature, i.e., the expression of a request rather than taking exception to the terms of the invitation, the meaning of those words must be determined within the context of existing circumstances. Here, we do not find it unreasonable to view National's "request" as something more than a mere wish or desire, for if National's bid were accepted it could be argued that DLA would be legally bound, contrary to the IFB's cited clauses, to absorb unanticipated increases in freight costs above and beyond those which might be included in increases in posted prices. Acceptance would therefore have exposed DLA to future price increases not allowed to other bidders. If, on the other hand, National intended to accept the IFB (including the cited clauses) without reservation, it was incumbent upon National to clearly express such intention. See 45 Comp. Gen. 809 (1966), and discussion therein. In view of the statements included in National's cover letter, we cannot conclude that this is the case.

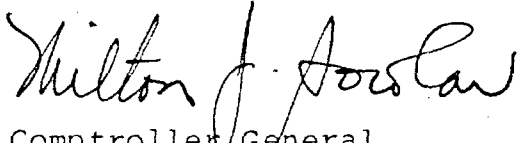
At best, National's bid, including its cover letter, is subject to two possible interpretations, under one of which it would be responsive and under the other non-responsive. We have consistently held that the rejection of such a bid is required and that it would be prejudicial to other bidders to permit the bidder creating the ambiguity to select, after bid opening, the interpretation to be adopted. See M.A. Barr, Inc., B-189142, August 3, 1977, 77-2 CPD 77.

While National correctly notes that the IFB provides for price escalations allowed in catalog or posted

prices, and that these price escalations may include some increases in freight charges, National's cover letter provides no indication that its request for relief from freight increases was limited to those which might be included within adjustments to its catalog or posted prices. If such were the case, there would have been no need for the cover letter since National would have already been protected by Clause L133 of the IFB. Clearly, National's cover letter requests relief from any and all freight increases, including ICC-sanctioned increases by common carriers through surcharges to compensate for increasing costs of motor fuel. As DLA points out, this kind of recoupment was not provided for in the IFB.

Finally, National argues that the IFB failed to warn prospective bidders that a bid would be determined nonresponsive if it made "an inquiry concerning freight increases." However, Standard Form 33-A, incorporated into the invitation, provided that award would be made to that responsible offeror whose offer was "conforming to the solicitation * * *." Paragraph 10(a). Moreover, DAR § 2-404.2(d)(1) specifies that a bid is to be rejected when a bidder attempts to impose conditions which would modify requirements of the IFB or limit his liability to the Government, including those instances in which he attempts to protect himself against future changes in conditions such as increased costs. As DLA points out, it is impossible to enumerate in an invitation every act of omission or commission by a bidder which will render a bid nonresponsive. The provisions we have cited clearly state the general rules which must, of necessity, be applied with regard to the specific facts of each procurement. We therefore reject National's contention.

The protest is denied.


Acting Comptroller General
of the United States