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DECISION

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

[Protests Alleging That Awardees Bids Were Nonresponsive]

FILE: B-198608, B-198624, B-198703

DATE: December 24, 1980

MATTER OF: R. H. Pines Corporation; TI Steel Tubes (USA) Inc.

DIGEST:

Where IFB is ambiguous whether bidders should include import duty in bid price with result that bidders do not compete on equal basis, affecting procurement's outcome, proper course is to reject all bids and resolicit using corrected IFB.

R. H. Pines Corporation (Pines) and T.I. Steel Tubes (USA) Inc. (TI) have each filed protests concerning different solicitations issued by the Defense Construction Supply Center (DCSC), Defense Logistics Agency (DLA), inviting bids to supply steel boiler tubes. Pines protests the award to any other bidder under IFB No.'s DLA700-80-B-1031 and -1034; TI protests award under IFB No. DLA700-80-B-0737. In each case the contracting officer proposed Tioga Pipe Supply Company, Inc. (Tioga) receive the contract.

Both protesters contend that telegraphic bids submitted by Tioga are ambiguous and thus nonresponsive. Except for the offered price, Tioga's telegraphic bids contained the following statement:

> "This offer is * * * based on supplying a domestic product manufactured by a small business concern. Source of hollows - Bentler Works, West Germany, duty amount $.1004 per foot."

The crux of the protests is that Tioga's bids did not clearly state whether or not their offered prices included the stated import duty. This is significant because the IFB's provided that offers of items produced or manufactured in certain countries, including West Germany, would

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be evaluated without duty since duty free entry certificates would be issued for such items. Tioga's bids would be low only if they were interpreted to include the duty specified in its telegrams and the duty was deducted from the bid prices.

The protesters contend that the IFB's did not require Tioga to list any duty or include duty in its bid prices, and argue that Tioga's statement of duty in its telegraphic bids raises a question whether or not Tioga included duty in its bid prices. Tioga states that it interpreted the IFB's as requiring Tioga to list the duty ordinarily payable and to include it in the bid prices. While the contracting officer agrees with Tioga's interpretation, DLA does not. DLA concedes that the solicitations' provisions might not have precisely instructed Tioga whether or not to include duty in its bids, but maintains that Tioga is responsible for the difficulties in interpreting its telegraphic bids because the bids did not clearly indicate whether or not the prices included duty. Therefore, DLA believes Tioga's bids should be rejected.

The pertinent solicitation provisions included the following:

Notice of Potential Foreign Source Competition:

"(a) Offers for the procurement may be solicited from sources in the * * * Federal Republic of Germany [West Germany] * * *. Also United States' offerors may offer end items to be manufactured in these countries. It has been determined by the Secretary of Defense that the restrictions of [Buy American Act, 41 U.S.C. §10a] shall not apply to items of Defense equipment described in this solicitation when produced or manufactured by sources in the above countries. * * *

* * * * *

"(c) Duty Free Entry.

"1. DAR (Defense Acquisition Regulation) 7-104.31(a) Duty-Free Entry for Certain Specified Items * * * [is]

> incorporated by reference and will be applicable to awards for items to be produced or manufactured by sources in [West Germany] * * *."

DAR § 7-104.31(a)(DAC 76-18, March 1979) provides that:

> "Except as otherwise approved by the Contracting Officer, no amount is or will be included in the contract price on account of duty with respect to those supplies that are specifically identified in the Schedule as supplies to be accorded duty-free entry."

The solicitation also contained the following "Percent Foreign Content Clause", DAR § 7-2003.81 (DAC 76-17, September 1978), and DCSC's explanatory notes to the clause:

> "Approximately ____ percent of the proposed contract price represents foreign content or effort.
>
> NOTES:
>
> "1. When the above certification is completed indicating foreign content, * * * Provision D14 * * * must be completed. * * *
>
> "2. Many countries have Memoranda of Understanding (MOU(s)) with the United States under which the Buy American Act is waived for purposes of evaluation of award. This fact, however does not abrogate the above requirements. An offer based on furnishing supplies or components from such countries nevertheless represents a 'foreign' content or effort. * * *
>
> "3. When telegraphic offers are submitted, such offers must include the information required by * * * Provision D14, and identify any foreign material to be used or supplied, together with the name and address of the foreign plant." (Emphasis added.)

Provision D14, contained in DCSC's Master Solicitation, provided:

"a. Offerors offering other than domestic source end products, as defined in [DAR] § 7-104.3 [which defines domestic source end products to be those foreign end products as to which the Secretary has waived the Buy American Act] * * *, must include in the price offered all applicable import duty and, for evaluation purposes, furnish the [amount of duty per item].

* * * * *

"c. The Government reserves the right to award on a duty-free basis by reducing the unit price offered by the amount of the duty. If award on a duty free basis is made, * * *. [DAR] § 7-104.31(a) is incorportated herein by reference and made a part hereof."

The United States has a Memorandum of Understanding (MOU) with West Germany in which both countries agree not to apply the price differentials of their respective "Buy National" laws or regulations in the evaluation of certain defense items produced or manufactured in the other country. In accordance with the MOU and pursuant to the Secretary's authority to waive the Buy American Act, the Secretary issued a Determination and Finding dated May 31, 1979, exempting certain West German source defense items, including those required here, from the Act. Hence, the Notice of Potential Foreign Source Competition informed bidders that the Secretary had determined that the Buy American Act shall not apply to items from certain MOU countries including West Germany.

The protesters apparently interpreted this statement to mean that Tioga had no applicable duty for the purpose of completing Provision D14. Provision D14 required offerors of "other than domestic source end products" to state the "applicable duty" for application and evaluation of the preference under the Buy American Act. Since DAR § 7-104.3 defines domestic source end products as including items for which the Secretary of Defense has waived application of the Act, Tioga's offered items were domestic source end products for the purpose of Provision D14. Therefore, under the terms of Provision D14 alone, Tioga had no applicable duty and did not have to complete D14.

However, the "Notes" to the Percent Foreign Content clause, supra, expressly informed offerors of MOU countries' items to complete Provision D14. For example, Note 2 observed that an offer to furnish such items represents a "foreign" content for the purpose of completing the certification as to the presence of foreign content in the end products. Note 1 required that D14 "be completed" when the certification indicating foreign content is completed.

We believe the Notes to the Percent Foreign Content clause directly conflict with the protesters' interpretation of the IFB's and reasonably support Tioga's interpretation. We believe that the IFB's were vague and sufficiently confusing as to whether items from MOU countries gained the status of domestic source end products for the purpose of completing Provision D14 that the protesters' and Tioga's interpretations were reasonable.

Generally, when it is discovered after bid opening that an IFB is subject to two reasonable interpretations so that bidders did not compete on an equal basis, the proper course is to reject all bids and resolicit using a corrected solicitation free from ambiguity, if the ambiguity affects the outcome of the competition. See New England Engineering Co., Inc., B-184119, September 26, 1975, 75-2 CPD 197. Since both the protesters' and Tioga's interpretations of the IFB's were reasonable and under their own interpretations each would be the low bidder, we recommend that DCSC cancel the solicitations and resolicit using language that clearly states whether or not bidders offering MOU countries' products should state duty in Provision D14 and include the duty in their bid prices.

Regarding DLA's view that Tioga was responsible for the difficulty in interpreting its bids, we find nothing in the record which indicates that Tioga discovered or should have discovered the ambiguity prior to Pines' and TI's protests. Tioga reasonably concluded that the duty must be included; therefore, we cannot agree with DLA's view that Tioga should have clearly stated in its telegraphic bids whether or not duty was included in its bid prices.

Pines and TI raise other grounds of protest. Both bidders argue that Tioga applied the wrong tariff in calculating the duty stated in its bids. TI contends that its bid, not Tioga's would be low if the correct tariff were applied. However, we believe that it is apparent from the face of Tioga's bids what duty was applied by Tioga, and that same

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(for Elmer B. Staats,
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amount, even if mistaken, must be subtracted from its bids. Therefore, the question whether Tioga applied the correct duty is academic and does not affect the relative standing of the bidders.

Finally, Pines contends that Tioga's bids are ambiguous in that they offer a domestic product and cite West Germany as its source. Assuming Tioga's bids are ambiguous in this regard, the ambiguity is immaterial since in either case the Buy American Act would be inapplicable and the items evaluated without duty. Therefore, the ambiguity could be waived as a minor irregularity. See DAR § 2-405 (1976 ed.).

The protests are denied. However, because the solicitations are defective, they should be cancelled. Any resolicitation should be corrected to remove the offending ambiguity.

Milton J. Socolar

For the Comptroller General
of the United States