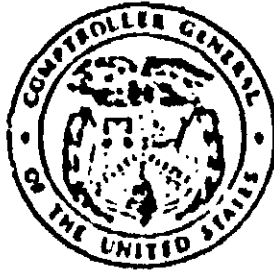


DECISION



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

*P.L. - 2
Ribeiro
119581*

FILE: B-207600

DATE: September 28, 1982

MATTER OF E. F. Matelich Construction Co.

DIGEST:

Waiver of the low bid's noncompliance with a bidding instruction is proper where acceptance of the bid will fulfill the agency's needs and would not prejudice other bidders.

E. F. Matelich Construction Co. protests the award of a contract for modification of the Lake Sherburne Dam in Montana to Stimpel-Baker & Associates (S-B) under solicitation No. 6D-C7502 issued by the Department of the Interior's Bureau of Reclamation (Bureau). Matelich contends that S-B's bid should have been rejected because it did not comply with the solicitation's prohibition against bidding on more than one combination of contract line item schedules.

Since S-B's bid served the actual needs of the Bureau, and Matelich and other bidders were not prejudiced by the Bureau's acceptance of S-B's bid, we deny the protest.

BACKGROUND

The Lake Sherburne Dam modification solicitation included three schedules of line items. Schedule 1 contained line items 1 through 33 involving mobilization and preparatory work for construction. Schedule 2 consisted of line item 34 which called for the erection of "Reinforced earthwall" retaining structures. Schedule 3 consisted of line item 35 which called for the erection of "Retained earthwalls" as an alternative to reinforced earthwalls.

The solicitation contained the following statement:

"Bids will be considered for award only on a combination of schedules that will cover all of the work required under these specifications. Schedules 2 and 3 are alternative schedules for the type of retaining structure system to be used.

"Award of contract will be made for only one of the following combinations of schedules.

"Schedules 1 and 2.

"Schedules 1 and 3.

"No bid will be accepted from any one bidder that covers more than one of the combinations of schedules listed above."
(Emphasis added)

The underscored instruction is at the center of this protest because the Bureau, contrary to the stated prohibition, accepted S-B's low bid for schedules 1 and 2 even though S-B also submitted a bid for schedules 1 and 3.

Eight bids were received in response to the solicitation. Of these, four firms did not abide by the solicitation's prohibition, that is, each included a bid for the combination of schedules 1 and 2 and the combination of schedules 1 and 3. The other four firms, including Matelich, bid on only the schedule 1 and 2 combination. S-B submitted the low total bid on schedules 1 and 2 in the amount of \$1,492,903.90, and a total bid on schedules 1 and 3 in the amount of \$1,516,022.20. Matelich submitted the low bid among those four firms bidding only on one combination of schedules when it bid a total of \$1,526,469.34 for the combined schedules 1 and 2. Matelich believes that in view of the solicitation's instruction, S-B's low bid on schedules 1 and 2 should be rejected and its own bid on that combination of schedules accepted for award.

WAIVER OF NONRESPONSIVENESS

It is a basic principle of Federal contract law that for a bid to be responsive it must, at the time of bid opening, represent an unequivocal offer to provide the requested item or service in conformance with the material terms and conditions of the solicitation. Edward L. Hezelek, Inc., B-192478, June 19, 1980, 80-1 CPD 431. Otherwise, bidders will not be competing on an equal basis, with the result that one bidder may obtain an unfair advantage over another. See Thomas Construction Company, Inc., B-184310, October 21, 1975, 75-2 CPD 248.

It is undisputed that S-B's bid on both schedule combinations literally was not responsive to the solicitation's instruction prohibiting such bids. Although it is not clear that the solicitation instruction was a material one, we need not decide that. The reason is that even if it was, we believe acceptance of S-B's bid was proper because a technically nonresponsive bid may be accepted where the awarded contract will serve the purchaser's actual needs and no bidder will be prejudiced by the acceptance of the nonresponsive bid. Union Carbide Corporation, 56 Comp. Gen. 487, 491 (1977), 77-1 CPD 243; George Hyman Construction Company; Blake Construction Company, Inc., B-180603, June 15, 1977, 77-1 CPD 429.

Acceptance of S-B's bid clearly fulfills the actual needs of the Bureau because S-B offered to perform under all possible combinations of schedules. Therefore, our decision as to whether S-B's deviation from the solicitation's instruction could be waived turns on whether the Bureau's acceptance of S-B's bid prejudiced any other bidder. The test of prejudice in this case is whether it is reasonably clear that another bidder, given the benefit of a similarly relaxed requirement--waiver of the bidding instruction requiring single schedule combination bids--would have bid in such a manner that it would have been in line for award. See American Automotive Machinery, Inc., B-204385, December 24, 1981, 81-2 CPD 494; RET Inc.--Request for Reconsideration, B-199983, January 12, 1981, 81-1 CPD 17.

The Bureau accepted not just the lowest bid on schedules 1 and 2, but the lowest bid on any combination of schedules; it appears that the reason for the Bureau's choice of that combination alternative was, simply, that

it would cost the Government the least. On that basis, we do not believe that Matelich was prejudiced by the acceptance of S-B's bid.

First, Matelich does not suggest that it would have bid lower on the combination the Bureau selected, which was the one Matelich in fact offered, if it had been permitted to bid on schedules 1 and 3 as well. Second, our review of the bids actually submitted shows that a firm's selection of the schedule 2 or the schedule 3 method would not affect the firm's bid for the basic schedule 1, and that schedule 3 represents a more expensive method of performance than schedule 2 does. Thus, it is reasonably clear that neither Matelich nor any of the other three bidders on the combination of schedules 1 and 2 only would have submitted a lower alternate bid based on a combination of schedules 1 and 3.

CONCLUSION

Consequently, we conclude that even if all firms submitted bids for both combinations of schedules, S-B would have remained the low bidder. Since the Bureau's acceptance of S-B's bid therefore did not prejudice other bidders, and since S-B's low bid fulfills the Bureau's actual needs, S-B's failure to comply with the solicitation's prohibition against bidding on both alternates properly was waived. We point out, however, that the Bureau advises that it no longer will use a bidding instruction like the one in issue because it serves no useful purpose and is an apparent source of confusion to bidders.

The protest is denied.

Harry D. Canine
Comptroller General
of the United States