

DECISION



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

FILE: B-206275

DATE: February 1, 1983

MATTER OF: National Energy Resources, Inc.

DIGEST:

Where the IFB requires that coal analysis reports published by the Department of Energy show that the characteristics of the coal produced by the bidder's mine satisfy the specification, a bid that fails to demonstrate compliance with the specification may be rejected as nonresponsive because the requirement primarily concerns the suitability of the product, not the qualifications of the bidder.

National Energy Resources, Inc. protests the Defense Logistics Agency's (DLA) rejection of its bid under invitation for bids No. DLA600-81-B-0314. For the reasons stated below, we believe that DLA's rejection of National Energy's bid as nonresponsive was proper.

Solicitation -0314 was issued by DLA to obtain a year's supply of coal for a number of Federal installations. On the cover sheet to the IFB appeared the following notice:

"Before submitting bids, bidder shall have the coal they are offering sampled and analyzed by the Dept. of Energy, Coal Sampling and Inspection Office [DOE] * * *. Bids offering coal from mines that have not been sampled and analyzed are subject to rejection pursuant to Clause D14, Evaluation of Offers."

Clause D14 provided in pertinent part:

"(g) The Government will determine, based upon published and special reports issued by [DOE], if the coal offered from the 'mine' or 'mines' set forth in the offer meets all the requirements of the specifications shown

on the schedule. Coal not meeting the specifications will be rejected as nonresponsive. * * * It shall be incumbent upon offerors to insure that coal offered has been sampled by [DOE] prior to submitting an offer. * * *

Each Federal installation to be supplied under this IFB had its own unique requirements as to the methods by which and times during which coal could be delivered, the type of coal its equipment could utilize and the amount of coal it was estimated would be required each month. Therefore, with respect to each installation, the IFB contained a page upon which this information was listed, including the "minimum specification quality" of the coal required at that installation. On the reverse of each page there was an essentially identical listing of the physical characteristics of the coal to be supplied, beside each of which was a blank to be filled in by the bidder. The information entered by each bidder constituted the bidder's "guaranteed analysis" for that item. In addition, the bidder was to identify the mine or mines from which the coal was to be supplied. As we have outlined above, after bid opening, DLA would determine from reports on file at DOE whether coal from that mine or mines was of the minimum required quality.

At issue in this case is the acceptability of National Energy's bid under Item No. 4, which was for 50,250 tons of bituminous coal to be delivered to Wright-Patterson Air Force Base, Ohio. The "minimum specification quality" listed by DLA for this item included a minimum Ash Softening Temperature (AST) of 2,600 degrees fahrenheit. National Energy entered this figure in its bid as part of its "guaranteed analysis" which in every other respect, as well, either equaled or exceeded DLA's requirements. National Energy then indicated in its bid that it would supply coal from the Hardly Able Mine, Manchester, Kentucky.

At the time of bid opening DOE had issued seven reports analyzing coal from the Hardly Able Mine. These reports, when averaged, resulted in an AST of 2,508 degrees. DLA's evaluation of National Energy's bid, however, shows an average AST of 2,545 degrees based upon five reports. On the basis of this evaluation, DLA rejected National Energy's bid as nonresponsive.

National Energy contends that DLA arbitrarily selected five reports to evaluate the characteristics of coal from the Hardly Able Mine and that, had the outdated reports been ignored and only the five most recent ones considered, the resulting average AST would have been an acceptable 2,622 degrees. National Energy argues further that because the Hardly Able Mine consists of three separate stripping operations, each producing coal with different characteristics, it could have blended the coal to meet DLA's stated AST requirements, as it has done in the past under other DLA contracts. For this same reason, National Energy urges that any analysis of coal delivered under contracts requiring an AST less than 2,600 degrees should not be considered evidence of its ability to comply with the 2,600 degree requirement. Finally, National Energy contends that DLA should have conducted a preaward survey of the Hardly Able Mine to determine whether it could produce coal that satisfies the specification requirements since, in National Energy's view, the question whether its source of supply is satisfactory concerns its ability to perform, a matter of responsibility, not bid responsiveness.

DLA contends that the characteristics of the coal it purchases must be sampled in advance of bidding because coal characteristics vary widely from mine to mine and the Government's facilities are designed to burn coal with specific sets of characteristics. DLA argues that in order to protect the Government's interest under these circumstances, it must have the ability to match the coal offered with the specific requirements of a particular facility. Sampling after the fact is not satisfactory for these purposes, DLA urges, since DOE may not be able to conduct timely coal analysis tests upon request, which could result in the delivery of unacceptable coal, necessitating the procurement of replacement coal. DLA distinguishes between this process of using historical performance information to determine the responsiveness of the product offered and preaward surveys, which concern a bidder's responsibility. In arguing this distinction, DLA relies upon Jensen Corporation, 60 Comp. Gen. 543 (1981), 81-1 CPD 524, where we held that information bearing on the performance history of the product to be furnished involved a matter of bid responsiveness which could not be furnished after bid opening. Consequently, DLA believes that a preaward survey would be inappropriate.

DLA further advises that the apparent discrepancy between the five coal analysis reports for the Hardly Able Mine noted in DLA's evaluation and the seven reports actually issued by DOE was the result of an error, but that

because the mistake was in National Energy's favor the firm was not prejudiced. DLA points out that in four of the seven samples tested by DOE, the Hardly Able Mine produced coal with an AST less than the specified 2,600 degrees, which is a consistent indication that the characteristics of the coal produced by this mine do not satisfy the specification. Further, DLA reports that the solicitation clause requires DLA to consider all DOE coal analysis reports for the mine in question. For these reasons, DLA argues that it should not ignore any reports in evaluating the characteristics of coal produced by the Hardly Able Mine. DLA suggests that if coal is in fact being produced from three separate sites at the Hardly Able Mine, the operator should obtain a separate DOE coal analysis for each site and offer coal from the site that meets DLA's requirements in future procurements.

The first question for resolution is whether DLA may properly consider DOE's coal analysis reports in determining bid responsiveness, that is, the acceptability of the bid. In general, solicitation terms relating to a bidder's capability and experience are matters of responsibility, while those concerned with the history of the product to be furnished are matters of responsiveness. IFR, Inc., B-203391.4, April 1, 1982, 82-1 CPD 292; 52 Comp. Gen. 647 (1973). If it is a question of responsiveness, the bid as submitted must represent an unequivocal offer to provide the product called for in total conformance with the specification. Edw. Kocharian & Company, Inc., 58 Comp. Gen. 214, 217 (1979), 79-1 CPD 20. On the other hand, information bearing on a bidder's responsibility may be furnished after bid opening. Mark Dunning Industries, Inc., B-206569, March 19, 1982, 82-1 CPD 261. The distinction between the two concepts is not always easy to draw as some solicitation provisions seem to relate to both the bidder and to the product and it becomes necessary to ascertain the intention of the agency by examining the wording of the solicitation provision. See Phoenix Power Systems, B-204038, November 2, 1981, 81-2 CPD 374; E.C. Campbell, Inc., B-203581, October 9, 1981, 81-2 CPD 295. This is not to say, however, that the contracting agency may make a subject which is not a matter of responsiveness into a question of responsiveness by the terms of the solicitation. Career Consultants, Inc., B-198727, October 16, 1980, 80-2 CPD 285.

Here, it is clear that DLA intended to rely upon the DOE reports to determine responsiveness, that is, whether the coal it was being offered from a designated mine would satisfy the specification and thus whether a bid offering

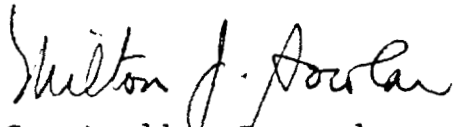
such coal was responsive to those specifications. We agree that the DOE reports may properly be used for this purpose because the reports primarily concern the characteristics of the coal itself, something not altered by the bidder's competence, experience or ability to mine coal. Also, we recognize DLA's special need to match the characteristics of the coal it procures with the particular coal burning installation, and the difficulties that would result if non-conforming coal were delivered to the installation. Moreover, we are persuaded by DLA's argument that it has no assurance that it will otherwise be able to obtain timely coal analysis reports from DOE if it is unable to rely upon DOE's published reports to determine responsiveness at the time of bid opening. In these circumstances, we believe that the solicitation properly restricted consideration to those bids where the published DOE coal analysis report indicate that the designated mine contains coal conforming to the specification.

As to DLA's actual determination, based upon DOE's coal analysis reports, that coal produced by the Hardly Able Mine would not satisfy the specification requirements, our Office will defer to the procuring agency's technical judgments unless it is clear from the record that it is erroneous or arbitrary. See E. C. Campbell, Inc., B-201025.2, July 8, 1981, 81-2 CPD 19. DLA advises that it considered all of the available DOE coal analysis reports for the Hardly Able Mine. While consideration of only the five most recent reports would have resulted in an acceptable AST, we cannot say that consideration of all available reports was arbitrary or unreasonable. As noted above, four of the seven samples resulted in an AST of less than 2,600 degrees. We recognize that there is an unexplained discrepancy between DLA's evaluation annotation on National Energy's bid form and its later calculations based upon all seven DOE coal analysis reports, but because National Energy's bid was nonresponsive to the AST specification under either alternative, National Energy suffered no prejudice through this error.

Finally, National Energy's explanation that the Hardly Able Mine consists of three separate stripping operations, each producing coal with different characteristics which could be combined to meet the specification requirements does not alter our conclusion. DOE's published reports must demonstrate that all coal offered complies with the specification requirements and it is incumbent upon the bidder to take the necessary steps, such as obtaining

separate DOE coal analysis reports for each stripping operation, to insure that DOE's reports fairly reflect the characteristics of the coal offered.

The protest is denied.

for 
Comptroller General
of the United States