

DECISION



McLody
PL2
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

25007

FILE: B-210094

DATE: April 29, 1983

MATTER OF: Owl Resources Company

DIGEST:

1. Whether a bidder is capable of performing in accordance with the terms of the solicitation is a matter of that bidder's responsibility as a prospective contractor. Affirmative determinations of responsibility are based in large part on the business judgments of the contracting officer, and will not be questioned by GAO absent circumstances not present here.
2. An IFB requirement that the low bidder submit resumes and other specified information after bid opening but prior to award relates to responsibility, not bid responsiveness. GAO will not review the sufficiency and relative quality of the information submitted pursuant to such a requirement.
3. An amendment is not material, and a bid not containing an acknowledgment of its receipt will not be found nonresponsive, where the amendment imposes no different or additional requirement on bidders; a mere theoretical possibility that the amendment could have increased bid prices does not make it material where the record contains no evidence substantiating that possibility.
4. Allegation that agency should have used a different procurement format is untimely and not for consideration on

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the merits since it concerns a defect apparent on the face of the solicitation but was not raised before the bid opening date as required by GAO Bid Protest Procedures.

Owl Resources Company protests the proposed award of a contract to General Ener-Tech, Inc. under invitation for bids (IFB) No. N62474-82-B-1035, issued by the Department of the Navy for the development of geothermal energy sources at the Naval Air Weapons Training Center, Fallon, Nevada. Owl principally contends that Ener-Tech's bid did not conform to several solicitation requirements and thus should be rejected. For the reasons discussed below, we dismiss the protest in part and deny it in part.

Bids for this project originally were solicited under the two-step formal advertising procedure. After issuing the step-one request for technical proposals, however, the Navy determined that technical proposals were not necessary. On August 12, 1982, it issued this IFB which superseded the step-one solicitation and deleted the requirement for detailed technical proposals. The solicitation sought bids to develop a capability to furnish 75 megawatts (MW) of electrical power by the end of 5 years, according to a timetable in the IFB. Award was to be made to the responsible bidder offering the lowest unit price per kilowatt hour (kh) of electrical power delivered. Page one of the IFB also contained the following provision:

"3. After bid opening and prior to award, the entity submitting the apparent low bid will be required to submit data substantiating its capability of performing work required under this contract (see Section I, Part 1, paragraph M)."

Paragraph M, entitled "Pre-Award Survey," stated that the Government may investigate whether a bidder has the ability to perform according to the specifications and whether the bidder is regularly engaged in the type of work required under this contract and has a satisfactory record of performance. It further provided that--

"The low bidder, within 5 calendar days after request shall submit the following data to the Government to assist in determining offeror's capabilities in Geothermal Power Development. * * *"

The information to be submitted fell into three categories: business factors (organization, experience, method of financing and management plan); environmental and cultural resources factors (demonstrate understanding and ability to comply with management and technical requirements of solicitation and outline program to obtain permits); and technical and administrative factors (proposed plans for field investigation and research, drilling, field development, power production and field closure).

Only Owl and Ener-Tech submitted bids prior to the October 21 bid opening date. Ener-Tech was the low bidder at \$.0394 per kh. Owl bid \$.054945 per kh. The Navy's estimate was \$.0364 per kh. On October 25, in response to an October 22 letter request from the Navy, Ener-Tech submitted approximately 175 pages of material to satisfy paragraph M. On November 4, Ener-Tech made presentations and furnished additional information to a preaward survey team visiting its offices and plant. Based on all the information reviewed, the survey team, in a November 1 report, concluded that Ener-Tech was capable of performing the contract, and recommended award. A financial report submitted by Ener-Tech on November 23 also indicated that satisfactory financial arrangements would be made.

Owl's protest primarily challenges the sufficiency of the data submitted by Ener-Tech in response to paragraph M. Specifically, it notes that Ener-Tech did not furnish most of the information called for under this provision, including evidence of its knowledge of geothermal geology, an outline of its permit coordination approach, the several specified proposed plans (under technical and administrative factors), a schedule of work, an organizational chain of command, and resumes for several key personnel. Owl contends that Ener-Tech's incomplete response to paragraph M rendered its bid nonresponsive. Owl also alleges that the Navy conducted an inadequate preaward survey, leading it to improperly conclude that Ener-Tech has the capacity to perform. We will not review the merits of these contentions.

Although Owl characterizes the matter here, in part, as relating to the responsiveness of Ener-Tech's bid, all of these allegations actually concern Ener-Tech's responsibility as a prospective contractor. Responsiveness

concerns the promise of a bidder to perform in accordance with the specifications; a bid is responsive if, as submitted at the time of bid opening, it is an offer to perform the exact thing called for in the solicitation. See Patterson Pump Company, B-204694, March 24, 1982, 82-1 CPD 279. Nothing in Ener-Tech's bid takes exception to the solicitation requirements, so we have no basis for finding Ener-Tech's bid nonresponsive.

The qualifications and experience of a bidder and its ability to perform a particular contract in accordance with the specifications relate to a bidder's responsibility which, unlike responsiveness, may be established after bid opening. See E.H. Hughes Company, Inc., B-205556, August 31, 1982, 82-2 CPD 189. Preaward surveys concern a bidder's ability to perform. See Keco Industries, Inc., B-204719, July 6, 1982, 82-2 CPD 16. The information required under paragraph M also was clearly for the purpose of determining bidder responsibility. The solicitation, as already noted, specifically stated that the information was to be submitted after bid opening to substantiate the low bidder's "capability of performing" under the contract. Further, the information called for--resumes, work schedules and proposed plans--is of a kind which relates to the ability of a bidder to perform rather than its agreement to perform.

The Navy has found Ener-Tech responsible based on the preaward survey, the information submitted under paragraph M, and other available information. Our Office will not review protests challenging affirmative responsibility determinations, which are based largely on business judgments, absent a showing of possible fraud or bad faith on the part of Government officials, or an allegation that definitive responsibility criteria have not been met. See World Wide Diesel, Inc., B-205599, May 6, 1982, 82-1 CPD 433. Owl has neither alleged nor shown the possibility of fraud or bad faith on the Navy's part. The solicitation did, however, require the bidder to submit information regarding its experience, knowledge and capability. Owl has furnished information of the general type called for. The sufficiency and relative quality of the information submitted are matters within the judgment of the contracting officer, not our Office. See generally Preventive Health Programs, B-195846, February 20, 1980, 80-1 CPD 144; Patterson Pump Company, supra. Thus, we find no basis for objecting to the contracting officer's determination that Ener-Tech is a responsible prospective contractor.

Owl further contends that Ener-Tech's bid was nonresponsive since it failed to acknowledge Amendment 0001 to the solicitation. Owl argues that this amendment was material, and thus had to be acknowledged, because it changed the solicitation to provide that the Navy "will" purchase all electricity produced, up to a 75 MW capacity. The solicitation had provided that the Navy "may" accept up to 75 MW of electric power, so the amendment created a firm obligation on the Navy's part to purchase all electric power produced, up to 75 MW. Owl theorizes that this change could have led a bidder to increase its bid price because it obviated the possibility under the original IFB that part of the first 75 MW of power produced would not be purchased by the Navy and thus could be sold to other Government users possibly at higher rates. Owl concludes that the amendment could have significantly increased Ener-Tech's bid price and thus was material.

Owl is correct that a bid which does not include an acknowledgment of a material amendment must be rejected; absent such an acknowledgment, the bidder is not obligated to comply with the terms of the amendment, and its bid is thus nonresponsive. See James Lopez and Sons Wholesale Fumigators, Inc., B-200849, February 12, 1981, 81-1 CPD 97. An amendment is material, however, only if it has more than a trivial or negligible effect on price, quantity, quality or delivery of the item or services bid upon. See Defense Acquisition Regulation (DAR) § 2-405 (iv)(b); G.E. Webb, B-204436, September 21, 1981, 81-2 CPD 234. It seems that the amendment here imposed no additional or different requirement on bidders. Indeed, by definitizing the Navy's obligation to accept 75 MW and thereby removing the contractor's risk of selling less than 75 MW (or even selling no electricity at all), the amendment would increase the Government's obligation and benefit the contractor. Thus, the amendment does not appear to have had any effect on quantity, quality or delivery of the service required under this procurement.

Owl has presented no evidence in support of its view. There is no evidence that Ener-Tech actually factored the possibility of excess power sales into its bid, and Owl does not indicate that its own bid was increased as a result of Amendment 0001. There also is no evidence that other potential users of electricity were available, or

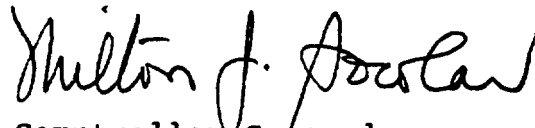
that any user would pay higher prices than provided for under this contract. Finally, Owl has not shown how much the elimination of possible sales of excess power could have increased a bidder's bid price, if at all. The record does show, on the other hand, that the Navy had a 200-300 MW electricity requirement at installations which could be reached by the Fallon facility, reducing the chance that the contractor would be left with unused power to sell. Further, the IFB prohibited transporting power off the Fallon base without express Government authorization. Thus, it is not clear that the contractor would even be permitted to sell any excess power under the original solicitation. We therefore conclude that the amendment was not material and that Ener-Tech's failure to acknowledge it did not render its bid nonresponsive.

Owl finally argues that it was "arbitrary and inappropriate" for the Navy to conduct this procurement under formal advertising procedures instead of using the two-step format as originally planned. Owl believes technical proposals should have been required given the significance and unique technical character of this procurement. This allegation is untimely. Under our Bid Protest Procedures, protests alleging defects apparent on the face of an IFB must be filed with the contracting agency or our Office prior to bid opening. See 4 C.F.R. § 21.2(b)(1) (1983). Here, it was clear on the face of the IFB issued on August 12 that the two-step advertising procedure was being abandoned and that technical proposals no longer were required. See Ingersoll-Rand Company, B-203727, July 2, 1981, 81-2 CPD 6. Owl first asserted this basis of protest on January 13, the date we received its comments on the Navy's report. Since bids were opened on October 21, this basis of protest is untimely and will not be considered on the merits. See generally Sprayfoam Southwest, Inc., B-201071, July 16, 1981, 81-2 CPD 41.

Owl seems to argue that its pre-bid opening oral complaints to the Navy regarding the propriety of the change in procurement format constituted a timely protest. We find nothing in the record indicating such an intent to protest. See Decision Planning Corporation, B-202536, July 8, 1981, 81-2 CPD 20. In any event, even

if Owl did protest to the Navy prior to October 21, the allegation is still untimely because it was not filed in our Office within 10 working days after the agency's initial adverse action. See 4 C.F.R. § 21.2(a). In this instance, the October 21 bid opening would be the initial adverse action. See 4 C.F.R. § 21.0(b); Bird-Johnson Company, B-199445, July 18, 1980, 80-2 CPD 49.

The protest is denied in part and dismissed in part.

for 
Comptroller General
of the United States