

30716

DECISION



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

FILE: B-217548 **DATE:** March 19, 1985
MATTER OF: Continental Forest Products Inc.

DIGEST:

Where an invitation permits telegraphic bids, a telegraphic bid that indicates agreement to be bound to the solicitation's material terms is responsive.

Continental Forest Products Inc. (Continental) protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DLA720-85-B-0009, issued by the Defense Logistics Agency (DLA) for 12 items of teak decking for the USS Missouri. Continental also complains about problems the firm had in receiving a copy of the solicitation.

We sustain the protest.

Background

DLA issued the IFB on October 24, 1984, with bid opening scheduled for November 13. By amendment No. 0001, DLA changed the average length of decking from 18 feet to 16 feet and the point of inspection and acceptance from origin to destination. The bid opening date was extended to November 29.

Continental requested the solicitation documents by telephone on four occasions, the first being in a conversation with the buyer on November 1. Continental telephoned again on November 12 to say it had not received the IFB, and the buyer connected the caller with the activity's customer service representative, who was given Continental's mailing address. However, the post office box number and the zip code number were recorded incorrectly, so that Continental did not receive the document subsequently mailed.

Continental called the buyer again on November 19, was connected to the customer service representative, and was told that a second copy of the IFB would be sent; that copy, however, also was mailed to the address as recorded incorrectly. In the fourth telephone call, on November 21, Continental advised that it would send a courier for a copy of the invitation. The bid package was given to the courier on Friday, November 23, and was delivered to Continental on the following Monday, November 26.

031500

Amendment 0001 to the IFB, received on November 26 by Continental with the bidding documents, showed it was issued on November 19, with 10:30 a.m. on November 26 the time for the submission of bids. Continental nevertheless submitted a bid by telegraph, as permitted by the invitation. The firm also sent a copy of a completed bid form to DLA, by regular mail.

In fact, and as stated above, November 29 was the date for submission of bids. As DLA explains in reporting on Continental's protest, the agency did not actually issue the amendment on November 19. Instead, DLA issued the amendment on November 26, setting bid opening as November 29; the agency, however, evidently failed to correct the copy given to Continental. In this respect, on November 16, a telegram was sent to all bidders then on the bidders mailing list notifying them of the change. However, Continental had not yet been added to the list (and, in any event, DLA had the firm's address wrong).

Continental's telegraphic bid, in addition to listing the line items and prices, stated, "We quote as per yr. specifications and amendments." The bid was low at \$175,992.43, but was rejected as nonresponsive because, in DLA's view, the statement in the bid failed to meet the requirements for a proper telegraphic bid. (The copy of the bid that Continental sent to DLA did not reach the Agency before bid opening.)

Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.214-13 (1984), incorporated into the IFB by reference, provides that a telegraphic bid must refer to the IFB and include:

"the items or subitems, quantities, unit prices, time and place of delivery, representations and other information required by the solicitation, and a statement of agreement with all the terms, conditions, and provisions of the [IFB]."

The IFB further provided in paragraph L05 that telegraphic bids should be submitted in "substantially the following format":

". . . Subject to all the terms, conditions, and provisions of Solicitation No. (INSERT NUMBER SHOWN IN BLOCK 3 SF 33) and amendment Nos. (INSERT NUMBER(S) OF ANY AMENDMENTS TO THE SOLICITATION) the following offer is made for the CLIN(S) indicated. . . ."

DLA considered that the word "specifications" used by Continental related only to the section of the IFB that set out the detailed specifications for the teak decking and noted that the bid failed to express agreement with terms and conditions of the solicitation such as time and place of delivery and the country of origin for the teak. The Agency then awarded the contract to the next low bidder at \$182,854.54.

Protest

Continental protests that it was prejudiced by the late receipt of the bid package, together with the wrong bid opening date, because the bid had to be submitted hurriedly. Continental also alleges that its intent was to be bound by the terms of the IFB without qualification by the use of the word "specifications." In response, and in addition to reiterating the concerns that led to the rejection of Continental's bid, DLA asserts that the difficulties Continental experienced in obtaining a copy of the bid were not the result of any intent not to furnish Continental a copy of the bid package or to preclude Continental from competing. DLA further argues that since Continental received a copy of the bid package on November 23 and did submit a timely bid, the firm was not harmed by the failure to receive the bid package earlier.

Discussion

Initially, it is clear from the record that DLA's series of errors in transmitting the invitation to Continental were significant factors in Continental's inability to return the bidding documents themselves in a timely manner. Had Continental received the IFB sooner than November 26, as requested; been placed on the bidders mailing list properly in early November so that the firm would have been sent the November 16 telegram clarifying the bid opening date; or received on November 26 a correct copy of the IFB amendment, Continental presumably would have been able to submit properly executed documents in time. Nevertheless, since there is no substantive evidence to show that DLA deliberately attempted to exclude the firm from the competition, these factors alone do not provide a legal basis for our Office to disturb the procurement. Capital Engineering & Mfg. Co., B-213924, April 2, 1984, 84-1 C.P.D. ¶ 374.

We think Continental's telegraphic bid was responsive under the circumstances, however. The responsiveness of any bid depends on whether the bid reflects an offer to meet, without exception, the solicitation's material terms, so that acceptance by the government will bind the contractor to so perform, Balongas, S.A., B-215153, July 23, 1984, 84-2 C.P.D. ¶ 86; the standard solicitation provisions of the instant IFB merely reflect that principle. If the bidder's intention in that regard is apparent from the bid, the bid is responsive. The Entwistle Co., B-192990, Feb. 15, 1979, 79-1 C.P.D. ¶ 112.

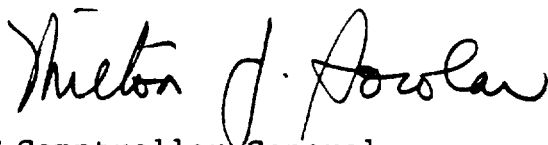
As stated above, Continental's bid provided, "We quote as per yr. specifications and amendments." That statement was followed by a list of each line item by number, with a corresponding unit price. In addition, the bid included the IFB number, the product involved ("hardwood, teak"), and a line "Project name: USS Missouri." Further, the specifications section of the invitation also included the delivery requirements--since it is obvious that Continental had the IFB in hand when it prepared the telegraphic bid, we believe DLA's position that Continental's reference to "specifications" might not include delivery terms is tenuous. We also note that the only amendment issued was the one given to Continental's courier, so that there can be no question what the word "amendments" in the telegraphic bid refers to. In this regard, there is nothing else in the telegraphic bid that could be construed as an exception to any IFB terms or conditions. Compare Williamsburg Steel Products Co., B-185097, Jan. 23, 1976, 76-1 C.P.D. ¶ 40, in which a firm's letter bid properly was found nonresponsive because, in addition to quoting a price "per plans and specifications," the bid stated that it was subject "to conditions on the reverse side hereof," which were materially different than the invitation's conditions.

As to the point of origin provision that concerns DLA, which is at section I32(b) of the invitation, the provision states that the contractor agrees to furnish domestic products unless the firm specifies otherwise. Since the provision thus does not require any particular certification by the bidder, the submission of a responsive signed bid itself indicates the bidder's commitment to supply a domestic product and satisfies the provision.

Under the circumstances, we think it clear that acceptance of Continental's telegraphic bid would have bound the firm to furnish the supplies as required by the IFB. In this respect, while we recognize that the bid package mailed to DLA was received after bid opening, it evidently was properly prepared and executed, thereby confirming the intention reflected in the telegraphic bid.

Continental's bid therefore should have been accepted (there is no suggestion in the record that the firm is not a responsible business concern). Since the record indicates that contract performance has not yet begun, we are recommending that the awarded contract be terminated for the convenience of the government and a new contract be awarded to Continental. The protest is sustained.

Since this decision contains a recommendation that corrective action be taken, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations under section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (1982), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

for 
Comptroller General
of the United States