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DECISION



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

FILE: B-218653 **DATE:** August 14, 1985
MATTER OF: Dillingham Ship Repair

DIGEST:

1. Bid is nonresponsive where bid omitted price for indefinite quantity item required by solicitation and price was not otherwise evident from the bid itself. Failure to submit price for the item created doubt as to whether the bidder would perform the work, and if it did, at what price.
2. Bid is nonresponsive where bidder omitted unit prices for 4,000 pounds of shaped and 4,000 pounds of flat shell plating required under solicitation. Although the bid contained a lump sum for the total amount (8,000 pounds) of the shell plating the unit prices for each type of plate could not be determined from the lump-sum bid, and the unit prices were necessary to establish the material terms of the contractor's obligation.
3. While protest against award is sustained, protester's claim for bid preparation costs and costs of filing and pursuing protest is denied where protester's bid was not eligible for award either and therefore was not unreasonably excluded from competition.

Dillingham Ship Repair (Dillingham) protests the award of a contract to Burrard Yarrow Corporation (Burrard) under invitation for bids (IFB) N62383-85-B-0021, issued by the Military Sealift Command (MSC) for the post shakedown availability drydocking and topside repairs to the USNS SPIKA.

We sustain the protest.

The invitation called for the performance of two categories of work. Category "A" items represented the

basic overhaul and repair work required to be done to the vessel, while category "B" items were indefinite in nature and might or might not be ordered depending upon the need for the vessel, urgency of the work, price and other factors, to be determined solely by the contracting officer. During performance of category "A" items, the government would determine whether or not performance of category "B" items were required, and in what quantity if the work was needed. There were two category "B" items. Item 135 was for chemical cleaning of the vessel's bilges and did not provide for insertion of a price under the specification. Item 920 called for 8,000 pounds of shaped shell plating and flat shell plating. The specification for this item divided the 8,000 pounds of shell plating into 4,000 pounds of shaped plating and 4,000 pounds of flat shell plating, and provided blanks for a per pound bid for each of these subitems.

Bids were evaluated on the basis of the total prices for all category "A" items, the extended prices for the two category "B" items, and interport differentials. The IFB also advised bidders that failure to quote a price on one or more "B" items "may render the bid nonresponsive." When bids were opened, MSC discovered that Burrard's bid failed to provide a price for item 135 and that Dillingham did not bid separate per pound prices for the shaped and flat shell plating under item 920. Instead, Dillingham bid a price of \$25,758, which Dillingham maintains was a lump-sum bid for both sub-items.

After bid opening, MSC determined that the item 135 specification was deficient because, in MSC's view, it failed to specify the manner in which the item was to be bid. MSC requested a bid breakdown from Burrard. This breakdown listed item 135 under category "A" with a bid price of \$76,000. MSC states that based on Burrard's assurance that the item had not been omitted, it determined it was in the best interests of the government to award to Burrard because its bid was low by approximately \$350,000.

Dillingham protested the award to Burrard, specifically arguing that Burrard's failure to submit a price for item 135 rendered Burrard's bid nonresponsive. MSC, in response to the protest, argues that Dillingham's bid is nonresponsive, because Dillingham did not bid separate per pound prices for the shaped and flat shell plating under item 920. MSC asserts that since Dillingham's bid is

nonresponsive, and Dillingham thus is not eligible for award, Dillingham is not an "interested party" under our Bid Protest Regulations, 4 C.F.R. part 21 (1985).

The responsiveness of Dillingham's bid (which we consider below) is not controlling here. Although in some cases we have held that a nonresponsive bidder is not an interested party to challenge the acceptance of a competitor's bid, see, e.g., Public Entity Underwriters, Ltd., B-213745, Sept. 20, 1984, 84-2 C.P.D. ¶ 326, these cases do not apply to situations where in essence the protester is seeking equal treatment. Here the agency is alleging a defect in the protester's bid which is substantially the same as the alleged defect in the awardee's bid. If Dillingham's bid is to be viewed as nonresponsive, then we think Dillingham should have the opportunity to protest that another's bid should be viewed as nonresponsive for the same reason. Put another way, we think a bidder or offeror on a government contract, as a matter of equal treatment, is entitled to protest, upon rejection of its bid, if it believes a competitor's bid suffers from the same deficiency that gave rise to the rejection of its bid. Consequently, regardless of whether Dillingham's bid is nonresponsive, we think it is appropriate to consider the merits of Dillingham's protest against MSC's acceptance of Burrard's bid.

Dillingham argues that Burrard's bid was nonresponsive because of Burrard's failure to bid a separate price for item 135. MSC responds that unlike the item 920 specification, the specification for item 135 did not use the customary format for category "B" items and did not contain a sentence requiring the submission of a separate bid price for this item. MSC also points out that item 135 is similar to category "A" items. MSC argues that, because the specification failed to indicate the manner in which item 135 was to be included in the contractor's bid, the specification was deficient. MSC argues that, since the specification was ambiguous, Burrard submitted the lowest price, and Burrard provided a post-bid-opening assurance that item 135 had not been omitted, it was in the best interest of the government to award the contract to Burrard. MSC also points out that the solicitation provided that failure to submit "B" item prices "may render the bid nonresponsive," which it argues supports its view that rejection of the bid was permitted but not required.

While the specification for item 135 did not contain an introductory sentence requiring the submission of a separate bid price for this item or a blank for inclusion of such a

bid price, we disagree with MSC that the item 135 specification was ambiguous. MSC Form 4330/5, specifically incorporated into the solicitation, instructed bidders to submit a lump-sum bid for all category "A" items and to bid on category "B" by each item or subitem in accordance with the specifications. Page 2 of MSC Form 4330/7 (Rev. 5-80), entitled Bid for Ship Repair, provided a place to submit a unit price for category "B" items. We view this language as requiring bidders to submit a price based on the specification for the item on the ship repair bid form. We note that all other bidders submitted their unit prices for item 135 on this bid form.

The solicitation clearly required submission of a price for item 135. Burrard's failure to submit a price created doubt as to whether it would perform the work and, if so, at what price. The existence of this doubt requires rejection of Burrard's bid as nonresponsive. See Space Services of Georgia, Inc., B-214499, Aug. 15, 1984, 84-2 C.P.D. ¶ 183, and E. H. Morrill Company, B-214556, May 3, 1984, 84-1 C.P.D. ¶ 508. A bid which is nonresponsive on its face, of course, may not be changed, corrected or explained by the bidder after bid opening. See Legeay, Inc., B-218307, Mar. 22, 1985, 85-1 C.P.D. ¶ 338; see also E. H. Morrill Company, B-214556, supra. For this reason, we must conclude that Burrard's bid was nonresponsive.

Furthermore, contrary to MSC's assertion, the use of the discretionary language that failure to price a "B" item "may render the bid non-responsive" does not permit the contracting officer to waive a material solicitation requirement. See, for example, Consolidated Installations Corp., B-202630, Apr. 20, 1981, 81-1 C.P.D. ¶ 301. Where, as here, the solicitation calls for bidders to insert prices for all items and warns that failure to do so may result in rejection of the bid, a bid which has such an omission generally must be rejected as nonresponsive. E. H. Morrill Company, B-214556, supra. This rule is applicable to optional indefinite quantity items to be ordered after award, as the need arises. See Space Services of Georgia, Inc., B-214499, Aug. 15, 1984, 84-2 C.P.D. ¶ 183. A bidder who has failed to submit a price for an item generally cannot be said to be obligated to provide that item.

Goodway Graphics of Virginia, Inc., B-193193, Apr. 3, 1979, 79-1 C.P.D. ¶ 230.

We therefore conclude that MSC improperly accepted Burrard's bid and we sustain the protest.

We are informed that the contract has been completely performed so that we cannot recommend any remedial action. The protester, however, also claims bid preparation costs and the costs of filing and pursuing the protest. Under our Bid Protest Regulations, a protester may be declared entitled to such costs if the contracting agency has unreasonably excluded the protester from the procurement. 4 C.F.R. § 21.6(e). To determine whether the agency unreasonably excluded Dillingham from the competition, we must now determine whether Dillingham's bid was responsive so that it could have been accepted for award upon a proper rejection of Burrard's bid. As explained below, we conclude that Dillingham's bid was also not eligible for award.

MSC requested the price per pound on two types of shell plating, in order for MSC to determine the cost of shaped and flat shell plate renewals if needed as part of the ship overhaul. Although bid evaluation was based on 4,000 pounds of each type of plate, this was an estimate for bid evaluation use only and the requirement was for an indefinite quantity of each subitem. While Dillingham submitted a lump-sum price for this work, it failed to provide the subitem unit price for each quantity of plate. As a result, it was impossible for MSC to compute separate unit prices for each type of plating from Dillingham's aggregate bid, and Dillingham was free to establish the price of each type of plate after award. It is clear from the solicitation that this requirement essentially related to the contractual obligations of the parties with respect to price adjustments necessitated by foreseeable changes in the work required and in this sense the provision was intended to specifically permit the agency to determine actual contract price based on the quantity ordered. See Master Construction Co., Inc., B-212525, Oct. 2, 1984, 84-2 C.P.D. ¶ 381; Thomas Construction Co., Inc., B-184810, Oct. 21, 1975, 75-2 C.P.D. ¶ 248. We have held that a requirement for a predetermined equitable adjustment factor, to which this provision is similar, is a material one. See Thomas Construction Co., Inc., B-184810, supra. Dillingham's failure to indicate the unit prices defeats the purpose of the clause. Thus, we must conclude that Dillingham's bid was nonresponsive.

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Accordingly, while we sustain the protest, we find that Dillingham was not unreasonably excluded from the competition and therefore is not entitled to costs.

for Seymour Epros
Harry R. Van Cleve
General Counsel