



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Southeast Crane and Monorail Systems, Inc.;
Southern Systems, Inc.

File: B-227080.2; B-227080.3

Date: October 26, 1987

DIGEST

1. Bid that does not include proper signature must be rejected as nonresponsive.
2. Challenge to awardee's Walsh-Healey and small business certification should be properly raised with the Small Business Administration or the Department of Labor and will not be considered by this Office.
3. Basis for protest is untimely where protester alleges, after bid opening, that solicitation contained improprieties.
4. The determination of the technical adequacy of bids, based on submission of descriptive literature, is within agency's discretion, and our Office will not disturb a determination involving technical acceptability absent a clear showing of unreasonableness.

DECISION

BACKGROUND

Southeast Crane and Monorail Systems, Inc., and Southern Systems, Inc., protest the award of a contract to R.J. Mack Company in response to invitation for bids (IFB) No. N68836-87-B-0037 issued by the Naval Supply Center (Navy), Jacksonville, Florida. The solicitation, a small business set-aside, was for installation of a crane system and included an option to add two more bridge cranes to the system at a later time. The IFB required bidders to provide with their bids sufficient descriptive literature to clearly demonstrate specification compliance.

At bid opening on April 23, 1987, five bids were received. Two bids that did not include the required descriptive literature were rejected as nonresponsive. Of the remaining

three bids, the lowest was submitted by Southeast, followed by Southern and Mack, respectively.

After bid opening but prior to award, Mack protested to the General Accounting Office that the bids of Southeast and Southern were nonresponsive. The protest was subsequently withdrawn because the Navy, agreeing with Mack, declared the bids of Southern and Southeast nonresponsive and awarded the contract to Mack. Specifically, the Navy concluded that Southeast's bid was nonresponsive on grounds that the firm had indicated that it would supply end items manufactured by ACCO-LOUDEN, a large business, and had certified itself as other than a small business. Southern's bid was declared nonresponsive for failing to provide sufficient descriptive literature and for offering a product which failed to conform to the specifications stated in the solicitation.

Subsequently, Southeast filed an agency-level protest (in an undated letter received by the Navy on May 14) arguing that the solicitation was inappropriate for a small business set-aside because "[t]here were no qualifying small business [sic] represented at this solicitation." It also asserted that Mack had improperly certified itself as a small business on grounds that one of Mack's suppliers, Yale Industrial Products, was not a small business and another, Philadelphia Tramrail Company, though a small business, was actually a distributor for a large manufacturer, American Monorail.

The Navy referred the issue of Mack's size status to the Small Business Administration (SBA). The SBA determined that Mack, which had certified itself as a dealer, qualified as a small business (i.e., a dealer with less than 100 employees) and planned to use materials from Tramrail, a small business, and Yale, a non-small business. The SBA concluded that Tramrail was the manufacturer of the only end product, and found that Yale would be providing only components, which would be delivered directly to Tramrail. The SBA also found that Tramrail was indeed an authorized distributor for Monorail but that Tramrail would actually manufacture the items it was supplying for this particular job. Thus, the SBA concluded that Tramrail was a small business manufacturer for purposes of this procurement.

In addition, because Southern included literature in its bid from ACCO-LOUDEN, which Southeast's bid had indicated was not a small business, the Navy also requested that the SBA determine the small business size status of Southern. The SBA concluded that Southern, which self-certified as a manufacturer, qualified as a small business (i.e. a manufacturer with less than 500 employees), and planned to purchase mere components from ACCO-LOUDEN, a large business

concern. Thus, although some components of the end item offered by Southern were being manufactured by ACCO-LOUDEN, the end item would be manufactured by Southern, a small business. As noted above, however, the Navy concluded that the Southern bid was nonresponsive because of insufficient descriptive literature and, accordingly, rejected that bid. A contract was therefore awarded to Mack on June 25, 1987. Protests were then filed in our Office by Southeast on July 5, and by Southern on July 10. The Navy suspended performance pending the outcome of these protests.

SOUTHEAST'S PROTEST

Southeast's primary ground of protest is that the SBA "redefined" the work statement contained in the solicitation. According to Southeast, had they known how the work statement would be construed by the SBA (i.e., what would be considered an end item and what would be considered a component) they would have certified themselves as a small business, and thus would not have submitted what was ultimately determined to be a nonresponsive bid. Additionally, Southeast argues that, as a result of this "redefinition," Mack was able to qualify as a small business, whereas, if SBA had used the work statement as stated in the solicitation, Mack would not have been determined to be a small business by the SBA.

The agency responds that, although Southeast may be dissatisfied with the SBA's ruling with respect to Mack, nonetheless GAO is an inappropriate forum in which to challenge the SBA's determination since, under the Small Business Act, 15 U.S.C. § 637(b) (1982), the SBA has conclusive authority to render size determinations and this Office cannot overturn such a determination. Additionally, the agency argues that whether or not the SBA's ruling with respect to Mack's size status was consonant with the solicitation's work statement is irrelevant because Southeast failed to sign its bid and consequently was nonresponsive on this ground as well.

We agree with the Navy that the failure of Southeast to sign its bid renders the bid nonresponsive. As a general rule, an unsigned bid must be rejected as nonresponsive because without an appropriate signature, the bidder would not be bound should the government accept the bid. Power Master Electric Co., B-223995, Nov. 26, 1986, 86-2 CPD ¶ 615. While the requirement that a bid must be signed may be waived under certain circumstances, Southeast has not alleged a circumstance permitting waiver.

Furthermore, although Southeast alleges for the first time in its post bid protest conference comments that it did in

fact sign its actual bid and that the unsigned copy of its bid which the agency submitted as part of its report to our Office is merely a copy of its actual bid, Southeast has proffered no evidence to support this contention. Therefore, we find no merit to this argument.

To the extent that Southeast allegedly was "misled" by the terms of the solicitation into failing to properly certify its offered size, the firm was not prejudiced since its bid was properly rejected on other grounds. Insofar as Southeast is challenging the determination by the SBA that Mack is a small business, this Office will not review that determination since authority to render size determinations is vested exclusively with the SBA by the Small Business Act, 15 U.S.C. § 637(b). See 4 C.F.R. § 21.3(f)(2) (1987), Georgetown Air & Hydro Systems, B-222203, Apr. 4, 1986, 86-1 CPD ¶ 328.

Accordingly, Southeast's protest is denied in part and dismissed in part.

SOUTHERN'S PROTEST

Southern raises essentially three grounds of protest. The first ground is that the specifications contained in the solicitation were inconsistent, contained errors and were not in accordance with industry standards. Southern also objects to the requirement for descriptive literature.

We find these objections untimely. Any allegations concerning the solicitation's specifications constituted improprieties apparent on the face of the solicitation. See Captain Hook Trading Co., B-224013, Nov. 17, 1986, 86-2 CPD ¶ 566. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), such improprieties must be protested prior to bid opening. Captain Hook Trading Co., *supra*. Accordingly, Southern's protest on these grounds is untimely and we dismiss it without considering the merits.

Southern next argues that Mack improperly certified itself as a regular dealer for Walsh-Healey Acts purposes because not all products offered by it were small business components. Southern also argues that the SBA erred in concluding that Mack is a small business. As noted above, our Office will not review the SBA's determinations with respect to size, 4 C.F.R. § 21.3(f)(2), Georgetown Air & Hydro Systems, *supra*. This Office also will not consider protests which challenge the legal status of a firm for Walsh-Healey Act purposes; the authority to review these determinations is vested with the Department of Labor,

41 U.S.C. §§ 35 et seq. (1982). 4 C.F.R. § 21.3(f)(9), Inter-Continental Equipment, Inc., B-224244, Feb. 5, 1987, 87-1 CPD ¶ 122.

Finally, Southern argues that the agency acted improperly in rejecting its bid on responsiveness grounds while at the same time accepting Mack's bid which, according to Southern, was also nonconforming. Southern acknowledges that its bid failed to conform in at least one material respect; the proposed "travel speed ratios" for the crane offered by Southern differed substantially from those called for in the solicitation. Accordingly, we conclude that Southern's bid was properly found nonresponsive.

As to Mack's bid, Southern alleges that the hoist offered by Mack differs from the one called for in the solicitation and that the published descriptive literature from Mack fails to show that Mack is offering a "patented track" crane as called for in the solicitation. The agency responds simply that Mack's offer conforms to the specifications in all material respects and that the descriptive literature submitted by Mack, along with Mack's notations thereto, adequately describes the product offered by Mack.

The determination of the technical adequacy of bids, based on the submission of descriptive literature, is essentially a technical evaluation. Calma Co., B-209260.2, June 28, 1983, 83-2 CPD ¶ 31. In keeping with our basic standard of review of technical evaluations, we have held that we will not disturb the determinations of the technical evaluators of contracting agencies concerning the adequacy of technical data absent a clear showing of unreasonableness, an arbitrary abuse of discretion or a violation of procurement statutes and regulations. Interad, Ltd., B-210013, May 10, 1983, 83-1 CPD ¶ 497.

With regard to the requirement for a hoist classified H-4 (heavy duty), in several places Mack's bid clearly stated that the "Hoist being provided will be rated H-4." Although Mack's descriptive literature described an H-3 hoist, however, given the unequivocal offer to supply an H-4 hoist the agency reasonably accepted the literature as illustrative of the hoist features generally.

Further, the agency determined that Mack's bid otherwise adequately addressed the crane requirements. While Southern disagrees with the Navy's view that Mack's proposed equipment will operate as required, Southern has not indicated how the Navy's finding that Mack's bid is compliant with the crane specifications was unreasonable.

Under these circumstances, we conclude that the Navy properly accepted Mack's bid.^{1/} Washex Machinery Corp., B-214591.2, Sept. 25, 1984, 84-2 CPD ¶ 352.

The protest of Southern is dismissed in part and denied in part.

for *James F. Hinchman*
James F. Hinchman
General Counsel

^{1/} In a letter filed with our Office on August 25, 1987, Southeast also raised allegations as to how Mack's bid is nonresponsive to the specifications. These allegations are untimely filed under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2), because they were filed more than 10 working days after Southeast knew or should have known these grounds of protest.