The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of:	General Electric Company; Westinghouse Electric Corporation
File:	B-228140; B-228140.2; B-228160; B-228160.2 B-228162; B-228162.2; B-228166
Date:	January 6, 1988

DIGEST

1. Contention, not raised until after bid opening, that agency abused its discretion by failing to delete labor surplus area (LSA) clause and cancel solicitations set-aside for LSA concerns after realizing that one required place of performance no longer was designated as an LSA, constitutes an untimely challenge to the agency's initial determination to set aside the procurements, and will not be considered.

2. Bid guarantee (in the form of an irrevocable letter of credit), unless otherwise required by the procuring agency's own regulations, need only be available for the full duration of the solicitation's acceptance period; there is no general requirement that a bid guarantee extend for a full year.

3. There is no discrepancy between the legal entity named on a bid and a bid guarantee where the nominal bidder is an operating unit of the corporation designated as principal on the bid guarantee.

4. The naming of a federal employee on a bid guarantee who is required to certify as to the bidder's default before payment would be made under irrevocable letter of credit is unobjectionable since it would not affect the procuring agency's ability to enforce the bid guarantee in the event the bidder failed to carry out its obligations under the solicitation.

5. Bid incorporating statements set forth in bidder's internal guidelines that did not parallel the language of the IFB but did not conflict with any of the IFB's requirements or otherwise reduce the bidder's affirmative obligation to perform in strict conformance with the solicitation is responsive.

6. Statement in bid that bidder did not currently have an affirmative action plan on file because of a recent corporate reorganization did not render the bid nonresponsive, as a bidder's compliance with such requirements is a matter of

the bidder's responsibility that can be satisfied any time prior to award.

7. Inclusion in bid of statement reserving bidder's right to provide performance and payment bonds from any surety reasonably could be construed as limiting the government's right to enforce the bidder's bid guarantee in event of default and, therefore rendered the bid nonresponsive.

DECISION

General Electric Company (GE) and Westinghouse Electric Corporation protest the award of contracts under four different solicitations issued by the General Services Administration (GSA). These solicitations, each of which was set-aside for firms agreeing to perform as labor surplus area (LSA) concerns, sought bids for the removal and replacement of PCB-contaminated transformers at the following sites, all located in Washington, D.C.: Federal Building 10B (invitation for bids (IFB) No. GS-11P87MKC7468); Federal Buildings 6 and 8 (IFB No. GS-11P87MKC7434); the National Courts building (IFB No. GS-11P87MCK7444); and the General Accounting Office building (IFB No. GS-11P87MKC7439). GSA found Sun Environmental, Inc., Retrotex Division, to be the low responsive, responsible bidder under each of the first three solicitations, Westinghouse under the other, and hence selected Sun for award for removal of the contaminated equipment at Federal Buildings 6, 8 and 10B and the National Courts building1/ and Westinghouse for the removal of the equipment at the GAO building.

GE contends that GSA abused its discretion by failing to delete the LSA set-aside restriction from each of the solicitations. Westinghouse asserts that Sun's bids did not comply with material terms of the solicitations and, thus, should have been rejected as nonresponsive. We dismiss GE's protests, and deny Westinghouse's protest of the award for Federal Buildings 6 and 8. We sustain Westinghouse's protest of the award for Federal Building 10B.

1/ GSA has notified our Office of its plans to cancel the award to Sun for performance of the work at the National Courts building, and to award a replacement contract to Westinghouse, the bidder next in line for award. In view of this intended action, Westinghouse has agreed to withdraw its protest of this award.

GE Protests

GE's protests of all four contract awards stems from GSA's inclusion of the standard clause, "Notice of Total Labor Surplus Area Set Aside" in each of the four solicitations. See Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.220-2 (1986). This clause requires offerors to agree to perform as LSA concerns--defined as a firm that will perform substantially (over 50 percent of the contract price) in a geographical area designated by the Department of Labor as an area of concentrated unemployment or underemployment, or an area of labor surplus--or else be considered nonresponsive and thus ineligible for award. GSA routinely included this clause in solicitations for construction projects in Washington, D.C., which had been classified as an LSA. Unbeknownst to GSA, however, Washington, D.C., no longer was listed as an LSA at the time of issuance of the four solicitations. GSA states that the contracting officer first became aware of this change during the period between bid opening and contract award (although GE states it advised the agency of this fact prior to bid opening). Although the contracting officer indicates he would not have set the contracts aside for LSA concerns had he been aware of the change at the time the IFB's were issued, he decided that the change did not warrant the cancellation of any of the solicitations in view of the affirmative representations by both Sun and Westinghouse that they would abide by the LSA requirement.

GE asserts that GSA's failure to cancel the solicitations after realizing that Washington, D.C., no longer was an LSA amounted to an abuse of agency discretion. GE maintains that GSA was obligated under FAR, 48 C.F.R. § 20.205.5(a), to withdraw the set-aside, as it had reason to know before award, and indeed even before bid opening (based on GE's advice), that the set-aside was unduly restrictive of competition and therefore detrimental to the public interest.

Although GE would have us characterize it differently, we view this argument as a challenge to GSA's initial determination to set-aside the procurement for LSA concerns. In this regard, GE was aware prior to bid opening that Washington, D.C., was no longer an LSA, and even claims it brought this fact to the agency's attention. Thus, the LSA provision constituted an alleged defect on the face of the IFB which, under our bid protest regulations, was required to be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1987).

In any case, we find that GSA acted properly in not canceling the solicitations. Contrary to GE's assertions,

FAR, 48 C.F.R. § 20.205, did not mandate the withdrawal of the set-aside and the resolicitation of the four procurements. This provision provides for withdrawal of such a set-aside only if the contracting officer determines prior to award that the set-aside is detrimental to the public interest, e.g., because of unreasonable prices. Here, the contracting officer did not make such a determination, and the record does not show that he should have; the prices offered by both Sun and Westinghouse were significantly below those offered by GE and the record does not contain any evidence suggesting that the prices offered by either of the two awardees were unreasonable.

Moreover, the fact that GSA acknowledges it may not have set-aside the solicitations had it known at the time of their issuance that Washington, D.C., no longer was an LSA does not render the set-sides improper per se. Rather, the inclusion of this clause remained within the discretion of the agency, see Friedrich Air Conditioning & Refrigeration Co., B-212777, Sept. 6, 1983, 83-2 CPD ¶ 308; since the contracts still could be performed at reasonable prices by firms qualifying as LSA concerns, it was well within the agency's discretion to proceed with the awards instead of canceling the IFB's, thereby serving the original purpose of the set-asides.

Accordingly, General Electric's protests are dismissed.

Westinghouse Protests

Westinghouse asserts that Sun's bid for Federal Buildings 6 and 8 should have been rejected as nonresponsive because its bid guarantee, which was in the form of an irrevocable letter of credit: (1) is not valid for a full year; (2) named a principal, Sun Environmental, Inc., different than the bidder, Sun Environmental Inc., Retrotex Division; and (3) required a statement signed by a named individual identified as the contracting officer (an official who in fact held a different position), certifying that Sun was in default on its bid; if this individual is unable or unwilling to sign a certified statement to this effect, Westinghouse argues, the bank could refuse to honor the letter of credit on grounds of improper presentation. These arguments are without merit.

The letter of credit was available for the full duration of the IFB's acceptance period and consequently satisfied all applicable requirements; there is no requirement that a bid guarantee extend a full year. See Control Center Corp. et al., B-214466.2 et al., July 9, 1984, 84-2 CPD ¶ 28. Westinghouse states that the Department of the Treasury regulations require bid guarantees to extend a full year.

Since this procurement was not subject to those regulations, however, this is irrelevant. Similarly, the designation of Sun Environmental, Inc., as the principal on the letter of credit was consistent with all requirements. Sun's Retrotex Division, the nominal bidder, is not an independently incorporated concern or a separate or distinct legal entity but, rather, is an operating unit of Sun Environmental. Accordingly, there is no discrepancy between the legal entity named on the bid and the bid bond. See generally Montgomery Elevator Co., B-220655, Jan. 28, 1986, 86-1 CPD ¶ 98; Lamari Electric Co., B-216397, Dec. 24, 1984, 84-2 CPD ¶ 689. As for the provision naming an individual to certify a default by Sun, since the individual named was a federal government employee, and thus merely an agent of the federal government, we see no reason, and Westinghouse has not furnished a persuasive explanation, why a certification by any authorized government agent would not ultimately be found sufficient to permit the government to draw against the letter of credit. We thus do not believe the potential unavailability or unwillingness of this named individual to sign the required certification would affect GSA's ability to enforce the letter of credit if Sun failed to carry out its obligations under the IFB. See generally Flagship Cruises, Ltd. v. New England Merchants, 569 F.2d 699 at 705 (1st Cir. 1978) (a variance between documents specified and documents submitted is not fatal if there is no possibility that the documents could mislead the payer bank to its detriment).

Westinghouse also challenges the award of the contract for Federal Buildings 6 and 8 on the ground that Sun's bid is ambiguous with respect to Sun's affirmative obligation to perform the contract in exact conformance with the IFB requirements. Sun, as required by the IFB, submitted certain information to establish its capabilities and qualifications with its bid, which included the statement that "all work on this project will be in compliance with all Federal and State EPA regulations and Retrotex corporation specifications as attached." Westinghouse speculates that Sun may have attached internal guidelines to its bid inconsistent with the terms and conditions of the IFB. Westinghouse also asserts that two other statements in these bid materials--offering to furnish "paperwork verifying proper disposal" of the PCB contaminated materials by the disposal agent and to use waste haulers "fully licensed and approved" by the Environmental Protection Agency (EPA)--took exception to IFB requirements that the contractor provide "EPA-approved PCB disposal certificates of destruction," and that subcontractors selected for haulers be "EPA-permitted." These arguments are without merit.

Contrary to Westinghouse's speculation, the record does not show that Sun's qualification materials included corporate policies, guidelines, or specifications inconsistent with the terms of the IFB. While Sun's qualification materials did include statements regarding disposal verification and use of waste haulers which did not parallel the language of the IFB, the substance of these statements appears consistent with the IFB requirements. In this regard, we believe Sun's general offer to furnish "paperwork" necessary to verify proper disposal constituted sufficient agreement to provide the documentation called for (i.e., EPA-approved certificates of destruction). By the same token, we think the broad term EPA "licensed and approved" reasonably encompasses the term EPA "permitted;" Westinghouse has not explained why it believes the terms would be given different effect.

Finally, Westinghouse questions the responsiveness of Sun's bid with respect to Sun's compliance with the affirmative action requirement set forth in the IFB. The IFB contained the standard clauses set forth in the FAR, 48 C.F.R. §§ 52.222-22 and 52.222-25, requiring the bidder to represent that (1) it either has or has not participated in contracts subject to affirmative action requirements; and (2) that it has or has not submitted compliance reports and/or developed and filed an affirmative action plan. Westinghouse argues that Sun's statement that it did not currently have an affirmative action plan on file because of a recent corporate reorganization rendered its bid nonresponsive.

We have held that a bidder's compliance with affirmative action requirements is a matter of the bidder's responsibility, rather than of bid responsiveness. A&C Building and Industrial Maintenance Corp., B-218035, Feb. 13, 1985, 85-1 CPD ¶ 195; the standard clauses in the IFB here are for informational purposes and do not purport to obligate the bidder upon acceptance of the bid. Id. Before award was made to Sun, the contracting officer necessarily determined that Sun was responsible. Accordingly, we deny Westinghouse's protest of this award.

Westinghouse challenges the award to Sun for Federal Building 10B because Sun's bid contained the following statement typewritten on the bottom of a page of its bid: "Sun Environmental, Inc., Retrotex Division, reserves the right to provide performance and payment bonds from any surety. These bonds will be backed by an approved irrevocable letter of credit." Westinghouse asserts that the phrase "from any surety" materially qualified Sun's bid, thereby rendering it nonresponsive. This reservation,

Westinghouse maintains, could severely limit the government's right to enforce Sun's bid guarantee in the event of default; that is, if the government agreed to accept bonds from any surety, it would be unable to go against Sun's bid guarantee in the event Sun furnished performance and payment bonds from sureties GSA considered unacceptable, e.g., because the surety's assets are pledged against several other contracts.

GSA (and Sun) responds that this phrase was merely a restatement of a bidder's already existing right to provide bonding from any surety, subject to the right of the government to accept or reject those bonds. In addition, GSA points to the language "approved letter of credit" as recognizing the government's right to approve any proposed surety, any other language notwithstanding. GSA further notes that Sun, as requested by the contracting officer, ultimately deleted this statement, thereby assuring Sun's performance under the terms and conditions set forth in the IFB.

Where a bid is ambiguous with respect to a material requirement, i.e., is subject to more than one reasonable interpretation, and under one of the interpretations the bid is nonresponsive, the bid must be rejected as nonresponsive. Achievement Products, Inc., B-224940, Feb. 6, 1987, 87-1 CPD ¶ 132. We find this to be the situation here. The plain language of the reservation "reserves the right" to provide bonds "from any surety." While GSA reads the reservation as being subject to GSA's regulatory discretion to reject a surety it deems unacceptable, the reservation does not include any such language. Indeed, we consider persuasive the reasoning that GSA's interpretation would turn the reservation into a nullity; since GSA has existing authority to determine a surety's acceptability, there is no reason to assume that the bidder's underlying intent was merely to restate, essentially, the agency's authority.

The fact that Sun referred to an "approved irrevocable letter of credit" does not alter our view; GSA could find fault with a surety even if the letter of credit backing the surety's bond were considered acceptable (e.g., where the letter of credit was the surety's only asset and was overpledged against several contracts). We emphasize that Sun did not offer to submit a letter of credit in lieu of a bond (in which case the government could draw directly against the instrument in case of default). Rather, Sun offered to submit a bond backed by a letter of credit. As with any assets underlying performance or payment bonds, an irrevocable letter of credit, even if acceptable to the government, could be pledged by the surety against several contracts simultaneously; this is precisely what contracting

officers are to consider in determining a surety's acceptability. See FAR, 48 C.F.R. § 28.202-2. Thus, if a letter of credit, or other legitimate asset, were found to be overpledged, the government could reject the surety. It appears the reservation in Sun's bid could be found to preclude the government from doing so here; at minimum, it is unclear whether the reservation would be interpreted in the government's favor in the event of a dispute.

Sun's deletion of the qualifying language after bid opening upon the insistence of the contracting officer did not cure this material deficiency; a nonresponsive bid cannot be made responsive after bid opening. Imperial Maintenance, Inc., B-224257, Jan. 18, 1987, 87-1 CPD ¶ 34.

We sustain Westinghouse' protest of the award for Federal Building 10B and, by separate letter to the Administrator, we are recommending that Sun's contract be terminated for the convenience of the government, and that a replacement contract be awarded to Westinghouse, the next low bidder, if found otherwise eligible.

Milton J. Socolar

for Comptroller General
of the United States