Arsenoff

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Johnson Controls, Inc.

File: B-235517

Date: August 25, 1989

DIGEST

1. Protester's bid was properly rejected as nonresponsive where its commercial bid bond limited its surety's liability to the difference between its bid price and the amount of a replacement contract while the solicitation required liability covering the difference between bid price and all costs of securing replacement work.

2. Protester's inclusion with its bid of an unsigned government bond form with provisions which materially differed with the commercial bond contained in its bid created an ambiguity which rendered the bid nonresponsive.

DECISION

Johnson Controls, Inc., protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. GS-07P-88-HTC-0172/7ADB, issued by the General Services Administration (GSA) for the operation and maintenance of three federal buildings in New Orleans as a part of a cost comparison conducted pursuant to Office of Management and Budget (OMB) Circular A-76 to determine whether the government should continue in-house performance of the services. The protester contends that GSA incorrectly evaluated its bid guarantee.

We deny the protest.

Bidders were required to submit properly executed bid guarantees which obligated the surety to pay the difference between the bid price and "any cost of acquiring the work" through a replacement contract if necessary. Johnson submitted a commercial bid bond which obligated its surety to pay the difference between its bid price and "such larger amount for which the [government] may in good faith contract with another party to perform the work covered by said bid"; the commercial bond was signed by an individual identified

as an attorney-in-fact and was accompanied by a power of attorney from the surety. In addition, Johnson submitted a government-issued Standard Form (SF) 24, "Bid Bond" (the language of which conformed to the IFB), listing the surety, but, in lieu of a signature, containing the typewritten words: "See Attached."

Bids were opened on April 25, 1989, and on the same day, GSA informed bidders of a "tentative decision" to retain the required services in-house. In accordance with OMB Circular A-76, bidders were also informed of their right to appeal the cost comparison. By letter dated May 2, the agency notified Johnson that its bid had been rejected as nonresponsive because, in failing to provide for the recoupment of "all costs" associated with a replacement contract (including administrative costs) which exceed the amount of the bid, the commercial bond it submitted differed materially from the SF 24 and the IFB requirements.

First, Johnson asserts that the language of its commercial bond can, "considering the general law of damages, . . . be read to imply that [its surety] has exposure to and obligation for all costs of securing a replacement contract," and should, therefore, not serve as a basis for GSA's rejection of its bid. We disagree. A commercial bond which limits a surety's liability only to the difference between the bid price and the amount of a contract which is ultimately awarded, and does not specifically extend that liability to other costs that might be incurred in making that award (e.g., administrative costs), is nonresponsive. See Kiewit Western Co., 65 Comp. Gen. 54 (1985), 85-2 CPD ¶ 497. In our view, and notwithstanding Johnson's assertions to the contrary, the language of limitation contained in the commercial bond it submitted simply does not clearly indicate that its surety's liability is to extend beyond the actual amount of a replacement contract.

Next, Johnson argues, in essence, that the inclusion of a completed but unsigned SF 24 with its bid package, together with a power of attorney from its surety authorizing certain of the protester's employees to execute specified bond forms and similar documents, should have been read by GSA as

modifying the commercial bond so as to extend the liability of its surety to cover all costs required by the IFB.1/

The test applied in determining the responsiveness of a bid is whether the bid as submitted is an unequivocal offer to perform the exact thing called for in the IFB; thus, if a bid is ambiguous with regard to a material IFB provision such as a bonding requirement, it is nonresponsive. See Contract Services Co., B-226780.3, Sept. 17, 1987, 87-2 CPD ¶ 263. Thus, even if we were to agree with Johnson that the power of attorney submitted with its bid operated to bind its surety to the terms of the SF 24, since the obligations contained in its commercial bond materially varied from those in the SF 24, the ambiguity thus created would render the bid nonresponsive. See Tom Mistick & Sons, Inc., B-222326, Apr. 3, 1986, 86-1 CPD ¶ 323. In any event, we note that the power of attorney issued by Johnson's surety in this case was, by its own terms, limited to authorizing the protester's named employees to execute bond forms and similar documents which were "issued by the [surety] company in the course of its business"; thus, it did not appear to confer any authority on the protester to execute a government-issued SF 24 on the surety's behalf as claimed.

Finally, Johnson notes that at bid opening GSA's abstract of bids acknowledged the agency's receipt of its bid guarantee package without comment, which the protester characterizes as "an apparent acceptance." Likewise, the protester submits that the agency's April 25 announcement of a tentative decision to retain the required services in-house implies that GSA had satisfied itself with the contents of all of the bids submitted. Thus, Johnson argues that, since GSA waited until May 2 to reject its bid as nonresponsive, the agency "should not be allowed to backtrack on its initial approval." In our view, neither the acknowledgment of receipt nor the announcement of a "tentative" cost comparison decision constituted an approval of the protester's bid guarantee, and the fact that 1 week

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1/ Johnson also states that it was orally advised by a GSA contracting official prior to opening that it could substitute a commercial bond in lieu of an SF 24 and that it should fill out the front of an SF 24 and attach it to the commercial bond. GSA confirms that the conversation took place. We do not believe that the advice given was at all inconsistent with GSA's action in later rejecting Johnson's commercial bid because its language was inconsistent with the IFB's bid guarantee requirements.

passed before Johnson's bid was found to be nonresponsive simply does not affect the validity of that determination. Golden Reforestation, Inc., B-230169, Feb. 25, 1988, 88-1 CPD ¶ 196.

The protest is denied.

James F. Hinchman
General Counsel