



Comptroller General
of the United States

Washington, D.C. 20548

Shimmella

Decision

Matter of: Northwest Pesticide Enterprises, Inc.

File: B-235982

Date: September 28, 1989

DIGEST

1. Where bidder's notation in an attachment to its bid clearly takes exception to a material requirement of the solicitation, the performance period, contracting officer properly rejected bid as nonresponsive.
2. Low bidder whose bid properly was rejected as nonresponsive is not an interested party to argue that second low bidder's bid should be rejected where there is another bidder which could be considered for award if the second low bid were rejected, since protester would not be in line for award even if the protest were sustained.
3. Protest challenging adequacy of experience questionnaire submitted by awardee with its bid will not be considered since it was first raised in protester's comments on the agency report and therefore is untimely, and in any event constitutes a challenge to the contracting officer's affirmative responsibility determination, a matter which the General Accounting Office generally does not review.

DECISION

Northwest Pesticide Enterprises, Inc., the low bidder, protests the rejection of its bid as nonresponsive and the award of a contract to Trical, Inc., under invitation for bids (IFB) No. R5-03-89-42, issued by the Forest Service, U.S. Department of Agriculture for soil fumigation services for its nursery in Placerville, California. Northwest contends that it should have been awarded the contract based on its low bid which was improperly rejected as nonresponsive. Additionally, Northwest contends that the Forest Service improperly allowed Trical to correct a mistake in its bid.

We deny the protest in part and dismiss it in part.

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The IFB, issued on April 12, 1989, requires the contractor to furnish fumigation services in accordance with the solicitation's terms and specifications. Under the specifications, the contractor must furnish all labor, supervision, materials, equipment and any incidentals necessary to fumigate the soil. The solicitation requires the completion of work within 14 days of the starting date. The IFB also states that when the contractor is notified by the agency that ground and weather conditions are suitable for fumigation, the contractor must be prepared to take immediate action and have its forestry technician report within 48 hours to the nursery with all equipment and supplies.

Three bids were received by the June 6 bid opening date. Northwest's \$27,280.67 bid was lowest and Trical was second lowest with a bid of \$32,328.75. Trical subsequently was allowed to correct a mistake in its bid which reduced its price to \$27,668.75. The contracting officer rejected Northwest's bid as nonresponsive because the protester noted in an experience questionnaire attached to its bid that it would have all supplies "drop shipped" at the nursery, and that the firm "may have a contract ongoing that may change [the] starting time 3-5 days."

Northwest contends that the contracting officer has confused matters of bidder responsibility and bid responsiveness. The protester argues that the notations with regard to the delivery of supplies and the starting date written on the experience questionnaire concern its ability to perform the contract, and do not constitute exceptions to any material requirements of the IFB. Therefore, Northwest contends, its bid was improperly rejected as nonresponsive. We disagree.

To be responsive, a bid, as submitted, must comply in all material aspects with the terms of the IFB. AMP, Inc., B-230120, Feb. 17, 1988, 88-1 CPD ¶ 163. Delivery terms are a material requirement. Therefore, a bid that takes exception to the stated delivery or performance schedule is nonresponsive and must be rejected. Wilmington Shipyard, Inc., B-214467, June 27, 1984, 84-1 CPD ¶ 677. Responsibility, on the other hand, concerns a bidder's apparent ability and capacity to perform the contract. Western Roofing Service, B-234314.2, May 22, 1989, 89-1 CPD ¶ 486. A prospective contractor's relevant experience is traditionally considered in making a determination of responsibility. Arrowsmith Industries, Inc., B-233212, Feb. 8, 1989, 89-1 CPD ¶ 129.

Here, the two notations by Northwest were included in the "remarks" section of the experience questionnaire required

to be submitted with the bid. As noted above, one of the notations stated that Northwest's starting date under the contract might be delayed by 3 to 5 days; the IFB, however, specifically requires that the contractor's technician report to the job site with all equipment and supplies within 48 hours of issuance of a notice to proceed, and complete the job within 14 days. The notation thus made it unclear whether Northwest agreed to the performance period and terms required by the IFB. Contrary to Northwest's contention, the fact that Northwest chose to add the notation to its experience questionnaire does not mean that the notation is a matter of responsibility since in determining responsiveness, a bid must be examined as a whole. See Inscop Electronics Corp., B-225858, Feb. 10, 1987, 87-1 CPD ¶ 147. Rather, since the notation took exception to a material requirement of the IFB, the performance period, the contracting officer properly rejected Northwest's bid as nonresponsive. Wilmington, Shipyard, Inc., B-214467, supra. In view of our conclusion, we need not consider whether Northwest's notation that supplies would be "drop shipped" also constituted an exception to a material requirement of the IFB.

Northwest also contends that Trical should not have been allowed to correct the alleged mistake in its bid and that the bid should be rejected. Northwest is not an interested party to raise this issue.

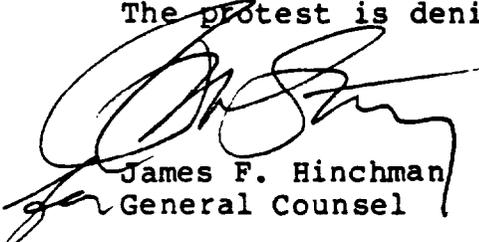
Under the Competition in Contracting Act of 1984, 31 U.S.C. § 3551(2) (Supp. IV 1986), and our Bid Protest Regulations, 4 C.F.R. §§ 21.0(a) and 21.1(a) (1989), a protest may be brought only by an interested party, defined as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award or failure to award the contract at issue. In general, a party will not be considered interested where it would not be in line for award even if its protest were sustained. JC Constr. Co., B-229486, Dec. 29, 1987, 87-2 CPD ¶ 640.

Here, since Northwest's bid properly was rejected as nonresponsive, and there is another bidder which could be considered for award if Trical's bid was rejected, Northwest would not be in line for award. As a result, Northwest is not an interested party to challenge the award on this basis. See Schlumberger Industries, B-232608, Dec. 27, 1988, 88-2 CPD ¶ 626.

Finally, in its comments on the agency report, Northwest for the first time argues that Trical did not properly complete the experience questionnaire submitted with its bid. This argument is untimely because it could have been, but was

not, raised in Northwest's initial submission. See Hartford Constr. Corp., B-235642.2, Aug. 29, 1989, 89-2 CPD ¶ 606; Consolidated Devices, Inc., B-232651, Dec. 20, 1988, 88-2 CPD ¶ 606. In any event, Northwest's argument constitutes a challenge to the agency's determination that Trical is a responsible firm, a matter which we do not review except in circumstances not alleged or evident here. See 4 C.F.R. § 21.3(m)(5).

The protest is denied in part and dismissed in part.



James F. Hinchman
General Counsel