

WHITE



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Phillips Cartner & Company, Inc.
File: B-236416.2
Date: November 22, 1989

DIGEST

1. Standard clause in invitation for bids providing that bids for supplies or services other than those specified will not be considered does not constitute a prohibition on "all or none" bids so as to render nonresponsive a bid containing an "all or none" qualification.
2. Expiration of bid acceptance period is tolled where bidder files protest challenging rejection of its bid and award to another bidder within the original bid acceptance period.

DECISION

Phillips Cartner & Company, Inc. protests the award of a contract to Shoals American Industries, Inc., under invitation for bids (IFB) No. N47408-89-B-2511, issued as a total small business set-aside by the Naval Facilities Engineering Command, Naval Construction Battalion Center, Port Hueneme, California, for full and half-height open-top storage and shipping containers. Phillips Cartner alleges that award to Shoals was improper because Shoals submitted an "all or none" bid in violation of the terms of the IFB, and because Shoals' bid had expired at the time of contract award.

We deny the protest.

The Navy initially rejected Shoals' low bid as nonresponsive for reasons unrelated to this protest, and made split awards to Phillips Cartner and TransTac Management Corp. Shoals contested the Navy's decision to reject its bid and filed a bid protest with our Office on August 3, 1989. Upon reviewing Shoals' arguments, the Navy concluded that its initial rejection of Shoals' bid was improper, terminated the contracts awarded to Phillips Cartner and TransTac, and

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awarded the contract to Shoals on August 5.¹/ Shoals then withdrew its protest to our Office. On August 7, Phillips Cartner protested the award to Shoals.

The IFB calls for bids on four contract line items (CLINs); Shoals' bid included two qualifications, "All or none of CLIN 0001" and "All or none of CLIN 0003." Phillips Cartner protests that Shoals' bid was improperly accepted because the IFB prohibits "all or none" bid qualifications. Phillips Cartner further argues that the "all or none" qualification in Shoals' bid was inconsistent with the evaluation criteria of the IFB, and that the placement of the qualification on Shoals' bid form rendered ambiguous the bid for one subitem in CLIN 0001.

Bidders may condition acceptance upon award of all, or a specified group of items, unless the solicitation provides otherwise. Federal Acquisition Regulation (FAR) § 14.404-5. Accordingly, where a solicitation does not expressly prohibit "all or none," or similarly restricted bids, a bidder may properly place such conditions on award. Tritech Field Eng'g, B-233357, Feb. 27, 1989, 89-1 CPD ¶ 207.

Here, the protester claims that paragraph L.5(d) of the IFB constitutes a prohibition against "all or none" bids. This provision, found in FAR § 52.214-12, states that, "[b]ids for supplies or services other than those specified will not be considered unless authorized by the solicitation." The provision merely prohibits consideration of bids that offer physical goods or services that differ from the goods or services sought by the IFB. The protester's assertion that the clause prohibits "all or none" bids is simply not supported by the language of the clause. Thus, since the instant solicitation does not expressly prohibit such bid qualifications, Shoals' "all or none" qualification did not render its bid nonresponsive.

Phillips Cartner further argues that Shoals' bid was inconsistent with the evaluation scheme set out in the IFB. Paragraph M.2(b) of the IFB states:

1/ The Navy had initially rejected Shoals' bid for failure to certify that all end items to be furnished would be manufactured or produced by a small business. In a recent decision, we held that the failure to so certify does not render the bid nonresponsive where, as here, the IFB includes the standard clause requiring the successful bidder to furnish only small business end items. See Concorde Battery Corp., B-235119, June 30, 1989, 68 Comp. Gen. ___, 89-2 CPD ¶ 17.

"(b) Award(s) will be made under this solicitation as follows:

EITHER

"(1) One award based on the lowest aggregate total of Line Item Nos. 0001 through 0004

OR

"(2) Two awards, one based on the lowest aggregate total of Line Item Nos. 0001 plus 0002 AND one based on the lowest aggregate total of Line Item Nos. 0003 plus 0004."

Shoals' qualification of its bid--"All or none of CLIN 0001" and "All or none of CLIN 0003"--in no way changed the Navy's ability to exercise either of these award options. Rather, in the event the Navy decided that it wanted to award a contract for only part of CLINs 0001 or 0003, Shoals' qualification gave the Navy notice that it would not accept such an award. We fail to see any inconsistency between Shoals' bid qualification and the evaluation criteria.

In its post-conference comments, the protester for the first time argues that Shoals' placement on the bid form of its "all or none" bid qualification for CLIN 0001 rendered the bid ambiguous. Specifically, Phillips Cartner argues that placement of the qualifying language between sub-CLIN 0001AC (the production quantity of the item) and sub-CLIN 0001AD (the warranty for the items) made it unclear whether Shoals intended to exclude the required warranty. This argument is untimely, as Phillips Cartner could have, but did not, raise it in its initial protest. See Amtron Corp., B-233978.2, Mar. 2, 1989, 89-1 CPD ¶ 226. In any event, we do not agree that Shoals' bid was ambiguous. Shoals stated that its bid covered all or none of CLIN 0001; there is no indication of any intention to exclude sub-CLIN 0001AD. Rather, the qualification, placed directly beneath the production quantity at sub-CLIN 0001AC, simply indicated that Shoals would not accept an award for fewer than the total production quantity.

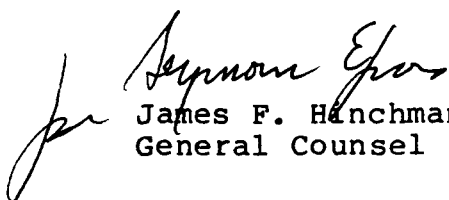
Phillips Cartner also argues that Shoals' original bid had expired by the time the Navy awarded a new contract to Shoals on August 5, and that the Navy's decision to ask Shoals to extend its bid violated the integrity of the competitive procurement system. As a preliminary matter, we note that the record reflects that Shoals' bid was valid for

the standard 60 days, or from the June 5 submission date until midnight on August 4, and that Shoals filed its protest with this Office on August 3. In such cases, we have held that the filing of a protest against an award made prior to the expiration of the protester's bid, has the effect of tolling expiration of the bid. See Mission Van & Storage Co., Inc., and MAPAC, Inc., a Joint Venture, 53 Comp. Gen. 775 (1974), 74-1 CPD ¶ 195; Professional Materials Handling Co., Inc., B-205969, Apr. 2, 1982, 82-1 CPD ¶ 297, aff'd, B-205969.2, B-205969.3, May 28, 1982, 82-1 CPD ¶ 501.

In any event, we do not find persuasive the protester's argument that the Navy's decision to ask only Shoals to extend its bid compromised the integrity of the competitive procurement system. A legitimate concern arises about the integrity of the competitive procurement system in cases where a bidder provides a bid acceptance period shorter than the period requested in the IFB, and is subsequently permitted to extend its bid. See Mid Atlantic Label Inc., B-234120, Mar. 31, 1989, 89-1 CPD ¶ 338. In such instances a bidder obtains an unfair advantage over competitors because that bidder is exposed to the risk of the marketplace for a shorter period of time, and is thus taking less risk than other bidders. Here, in contrast, Shoals' bid was valid for the standard 60-day period requested by the IFB, and there is no abbreviated bid acceptance period at issue by which Shoals could gain an advantage over other bidders.

Further, the Navy had already awarded a contract to Phillips Cartner and Transtac, and was reviewing the propriety of that award in light of the Shoals protest challenging rejection of its bid as nonresponsive. At that juncture, award to Shoals depended on the outcome of its protest, a matter over which Shoals had little direct control. Allowing extension of the bid acceptance period under these circumstances was proper, since, if the protest challenging the rejection of the protester's bid were found to have merit, the appropriate remedy would be to make award to the protester.

The protest is denied.


James F. Hinchman
General Counsel