Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Manatts, Inc.

File: B-237532

Date: February 16, 1990

Donald O. Pratt, Esq., Gandy Michener Swindle Whitaker & Pratt, for the protester.
L. James Tillman, Office of Clearance and Support, Department of Energy, for the agency.
Sabina K. Cooper, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging Buy American Act requirements in an invitation for bids as ambiguous is untimely when filed after bid opening.

2. Agency properly rejected protester's apparent low bid as nonresponsive because of the firm's failure to submit a list of the quantity and price of each foreign item proposed, as required for a Buy American Act evaluation in a construction contract. Such information could not be submitted after bid opening since it would allow the protester the opportunity to manipulate its bid so it could either accept or decline award of the contract.

DECISION

Manatts, Inc., protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DE-FB96-89P015379, issued by the Department of Energy (DOE) for construction of the sustained drawdown at the Bryan Mound Oil Storage Facility in support of the Strategic Petroleum Reserve. Manatts argues that its failure to include an itemization of the quantity and price of each foreign item proposed, as required under the Buy American Act, does not make its bid nonresponsive; and that DOE's refusal to clarify ambiguities regarding the Buy American Act certification, before bid opening, had a direct impact upon Manatts' ability to complete the certification.

We deny the protest.

The IFB, issued on July 14, 1989, included Federal Acquisition Regulation (FAR) § 52.225-5, which implements the Buy American Act with reference to construction materials. The Buy American Act, 41 U.S.C. §§ 10a-10c (1982), and its implementing regulations, generally require that only domestic construction materials be used unless the contracting agency determines that domestic materials are unavailable or unreasonably priced. The IFB required the bidder to certify whether any construction material to be used is or is not a "domestic construction material" and referred to FAR § 52.225-5. Section 52.225-5(b) states as follows:

> "The Contractor agrees that only domestic construction material will be used by the contractor, subcontractors, material men, and suppliers in the performance of this contract, except for foreign construction materials, if any, listed in this contract."

The IFB further included the Buy American Act policy clause, FAR § 25.202(a), which states that foreign construction materials may be acceptable for award if the government determines that comparable domestic construction material is unavailable, impracticable, or would unreasonably increase the cost. With respect to that determination, the IFB stated that offers including foreign material "shall include data clearly demonstrating, for each particular foreign construction material, that the cost thereof, plus 6 percent, is less than the cost of comparable domestic construction material;" that, for evaluation purposes, the government shall add to the offer 6 percent of the cost of the foreign material; and that, when offering foreign material, offerors may also offer, at stated prices, an available comparable domestic material.

In addition, the information mailed to all bidders following the August 1, 1989, pre-bid conference included the following:

> "Unless the bidder specifically states that his bid is based upon the use of foreign-made material, he is certifying that only domestic material will be used. A Contractor certifying domestic material will be required to perform using only domestic materials.

> "Bids based upon foreign material must include the cost of the foreign material plus applicable duty and the cost of delivery to the site. Bidders offering foreign material are encouraged to include an alternate bid based upon the use of domestic material. This will prevent rejection of your bid in the event the use of foreign material is not approved."

DOE received three bids by the August 28 bid opening. Having tried and failed to obtain clarification from DOE as to what it should do with respect to its Buy American Act certification in the event that the delivery of domestic material could not satisfy particular contract scheduling requirements, Manatts checked both boxes indicating that it would use domestic materials for the project and inserted the word "some" before the box indicating that it would use foreign material. Manatts also wrote in at the bottom of its bid, "Approximate value of foreign material $243,709." Manatts did not protest either the alleged ambiguities in the IFB, or DOE's refusal to clarify the Buy American Act requirements, to DOE or our Office prior to bid opening.

Manatts was the apparent low bidder at $8,885,000. The next two bidders submitted bids of $9,497,537 and $9,677,700. On October 3, DOE notified Manatts by telephone that its bid was nonresponsive because it was not in compliance with the Buy American Act provision of the solicitation since it did not identify each foreign item and its cost, nor include a list of comparable domestic items; DOE confirmed that rejection in writing by letter of October 6. Manatts submitted a protest to our Office on October 20, having previously filed an agency-level protest on October 3, raising the same issues.

As a preliminary matter, we find Manatts' assertion regarding DOE's refusal to clarify ambiguities concerning the Buy American Act certification to be untimely. A protest concerning an alleged impropriety apparent from the face of the solicitation is required to be filed before bid opening. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1989). Manatts concedes that its problem with interpreting the Buy American Act requirements in the IFB became apparent during preparation of its bid, and, as a result, Manatts sought oral clarification of the issue from DOE. When its request for clarification was unsuccessful, Manatts should have filed a protest raising the issue, before bid opening, with either DOE or our Office. Since the protest was not filed until after bid opening, it is untimely on this ground.

We also find that DOE properly rejected Manatts' bid as nonresponsive. In support of its position DOE cites our decision in 51 Comp. Gen. 814 (1972), where we held that a bid that did not contain information concerning the amount of foreign material to be used and provide data to demonstrate that the cost of domestic material would exceed, by more than 6 percent, the cost of comparable foreign material; had omitted information that concerns responsiveness; and, that it would be prejudicial to other bidders and detrimental to the competitive bidding process to permit correction after bid opening. Manatts cites, in support of acceptance of its bid, Illinois Constructors Corp., B-209214, Feb. 28, 1983, 83-1 CPD ¶ 197, which held that a bid that did not contain a specific quantity and price of proposed foreign items should not have been rejected as nonresponsive since the bid otherwise provided the information necessary for the Buy American Act evaluation.

In finding that the protester's bid should be rejected as nonresponsive in 51 Comp. Gen. 814, we held that sufficient information establishing that the cost of foreign products in a bid is less than the cost of domestic products should be submitted with the bid in order to preclude any change, after bid opening, in the claimed percentages of foreign and domestic products which would affect either the relative standing of a bid or its status as a domestic bid. The protester's bid in that case did not specify the percentage of foreign material it would use, and no Buy American Act evaluation could be made without that information. We found that such information could not be supplied after bid opening because the protester could then have determined the manner in which its bid would be evaluated.

In comparison, in Illinois Constructors, Corp., B-209214, supra, the case cited by Manatts, it was clear from the bid alone what proposed material was foreign and what the price of that material was. Accordingly, the agency could, through its own investigation, provide information on the availability or prices of domestic materials in order to perform a Buy American Act evaluation. In other words, since the bid was responsive to the terms of the IFB, there would be no opportunity after bid opening for the bidder to affect the relative standing, or acceptance or rejection, of its bid.

Following the reasoning of these cases, a bid should not be rejected as nonresponsive because it does not contain all of the information necessary to perform a Buy American Act evaluation only where the additional information required

from the bidder would not change the relative standing of the bidders, see Key Constructors, Inc., B-205280, B-205280.2, Apr. 8, 1982, 82-1 CPD ¶ 328, or allow the bidder to manipulate its bid to its advantage. Illinois Constructors, Corp., B-209214, supra. Generally, the information in the bid must establish what amount of the proposed material is foreign and what the price of that material is. Key Constructors, Inc., B-205280, B-205280.2, supra.

Here, Manatts indicated that it would use some foreign material and identified the approximate value of that material as $243,709. The additional information that would be required of Manatts after bid opening, a list of the exact items that the firm intended to acquire from a foreign source, is the kind of information that would allow a bidder to manipulate its bid to its advantage. For example, Manatts could, if it decided it no longer wanted the contract after bid opening, supply a list of foreign construction materials that the firm knew had cheaper domestic equivalents available, and its bid would then be rejected. Moreover, although DOE could have determined the price of comparable domestic material by its own investigation had Manatts provided the list of foreign items, without such a list no comparative evaluation, necessary for Buy American Act purposes, was possible. Compare C.R. Fedrick, Inc., 58 Comp. Gen. 493 (1979), 79-1 ¶ 309.

Accordingly, we conclude that the only reasonable reading of Manatts' bid establishes that the additional information required from Manatts for a Buy American Act evaluation would allow Manatts the opportunity to manipulate its bid so it could either accept or decline award of the contract after bid opening. DOE therefore properly rejected Manatts' bid as nonresponsive.

The protest is denied.

James F. Hinchman
General Counsel