

Sylvia Schatz



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Cobra Technologies, Inc.

File: B-239172

Date: August 2, 1990

Steven N. White, Esq., Hopkins & Yampolski, P.C., for the protester.

Vasio Gianulias, Esq., Department of the Navy, for the agency.

Sylvia Schatz, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Bid which takes no exception to solicitation requirement for repair or maintenance by manufacturer authorized service representatives obligates bidder to provide authorized service representatives and therefore is responsive; requirement is merely part of the general specifications concerning how and by whom work is to be accomplished and does not establish a definitive responsibility criterion or precondition to award.

2. Protest that awardee failed to comply with the 50 percent subcontracting limitation in the solicitation as issued is denied where the requirement was deleted by an amendment changing the procurement from a small business set-aside to an unrestricted procurement.

DECISION

Cobra Technologies, Inc. protests the Department of the Navy's award of a contract to Mark Dunning Industries, Inc. (MDI), under invitation for bids (IFB) No. N62467-90-B-4175, for the maintenance, repair, and operation of the Naval Consolidated Brig, Naval Weapons Station, Charleston, South Carolina.

We deny the protest.

The IFB was issued as a total small business set-aside on January 18, 1990. In clause K-13 of the IFB, entitled

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"Limitations on Subcontracting," the solicitation cited a provision of the Federal Acquisition Regulation (FAR) § 52.219-14, requiring that where a solicitation is set aside for small business, at least 50 percent of the cost of contract performance incurred for personnel must be expended for employees of the concern. See FAR § 19.508(e). Clause K-13 required bidders to certify "that at least 50 percent of the cost of contract performance incurred for personnel [] shall, [] shall not, be expended for employees of the concern." By amendment 0001, the Navy changed the solicitation from a small business set-aside to an unrestricted procurement; the amendment also instructed bidders to "delete any references to the solicitation being set aside for small business concerns." In addition, amendment 0001 added to the work statement the requirement that "the contractor shall provide manufacturer authorized service representatives" for various types of equipment and stated that "proof of certification will be required prior to commencing work."

Seven bids were received by bid opening on March 6. After the apparent low bidder was found to have made a mistake in its bid and was allowed to withdraw, MDI's bid became low, while the bid of Federal Service Industries, Inc. became next in line for award. Cobra, the third-low bidder, then filed an agency-level protest alleging that the lower priced bidders had failed to comply with the solicitation requirement for authorized service representatives and with the 50 percent limitation on subcontracting. When its agency-level protest was denied, and the contract was awarded to MDI, Cobra filed this protest with our Office.

Cobra contends that MDI's bid is nonresponsive and MDI is nonresponsive because the firm failed to furnish prior to award any evidence of commitment from authorized service representatives to service the equipment at the installation. In this regard, Cobra claims that it was the only bidder who solicited, and included in its bid price, quotations from the equipment manufacturers for providing authorized service representatives. Cobra maintains that by making award to MDI, the Navy waived a definitive responsibility criterion--that is, a requirement that bidders obtain commitments for manufacturer authorized service representatives as a prerequisite to award--and thereby conferred a competitive advantage on the lower priced firms which allegedly did not structure their bids to ensure compliance with the requirement.

We disagree with Cobra's characterization of the requirement. The solicitation work statement describes how and by whom the contract work is to be performed. The terms of the

specification do not require each bidder to request quotations and commitments from manufacturers prior to contact award; rather, they require only that the "contractor [awardee] provide manufacturer authorized service representatives" [emphasis added] in performing necessary maintenance and repair on specified types of equipment. This requirement therefore concerned contract performance and did not establish a precondition to award. See Motorola Communications and Elecs., Inc., B-225613, Jan. 27, 1987, 87-1 CPD ¶ 91.

Furthermore, a bid is "responsive" if, as submitted, it is an offer to perform the exact thing called for in the IFB, without exception. Behavioral Sys. Southwest, Inc., B-215471.2, Oct. 2, 1984, 84-2 CPD ¶ 382. By submitting a bid that took no exception to the requirements of the IFB, MDI obligated itself to provide authorized service representatives, and otherwise to perform according to the terms of the IFB. We therefore have no basis for finding its bid nonresponsive. Whether MDI actually performs its contract with authorized service representatives and in accordance with other contract requirements is a matter of contract administration. With respect to the protester's suggestion that the awardee failed to comply with a definitive responsibility criterion, we note that the requirement for using manufacturer authorized service representatives concerns the contractor's performance obligation, and not its ability to perform; as such, the requirement does not establish a definitive responsibility criterion. See Telos Field Eng'g, B-233285, Mar. 6, 1989, 89-1 CPD ¶ 238.

Cobra argues that MDI's bid also is nonresponsive because MDI indicated in clause K-13 that it would not comply with the 50 percent subcontracting limitation. This argument ignores the fact that amendment 0001, in effect, deleted the 50 percent subcontracting limitation. FAR § 19.508(e) clearly states that FAR § 52.219-14, referenced as the authority for clause K-13, applies only if part or all of the procurement is set aside for small businesses. Thus, in citing the clause at FAR § 52.219-14 as its authority for clause K-13, the solicitation made clear that clause K-13 was included only because a small business set-aside was contemplated. When the Navy changed the solicitation from a small business set-aside to an unrestricted procurement, it explicitly instructed bidders to delete any references to the solicitation being set aside for small businesses. In our view, therefore, clause K-13, and the associated subcontracting limitation, were eliminated from the solicitation when the set-aside was removed. Accordingly, award was properly made to MDI as the low, responsive bidder, irrespective of its certification with respect to

the proposed extent of subcontracting. See generally
Techno-Sciences, Inc., B-238270, Apr. 24, 1990, 90-1 CPD
¶ 415.

The protest is denied.

for 
James F. Hinchman
General Counsel