



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

Decision

Matter of: Krielow Brothers, Inc.; King Fisher Marine Service, Inc.

File: B-243384; B-243384.2

Date: June 21, 1991

Christopher Solop, Esq., Ott, Purdy & Scott, Ltd., for Krielow Brothers, Inc., and Joseph A. Hackenbracht, Esq., Starfield & Payne, for King Fisher Marine Service, Inc., the protesters. Lester Edelman, Esq., and Beth A. Kelly, Esq., Department of the Army, for the agency. Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Low bidder's contention that solicitation was misleading is sustained where solicitation's Certificate of Procurement Integrity failed to provide a signature line or space, causing bidders reasonably to conclude that a separate signature on the certificate was not required.
2. Eighth low bidder's contention that it should receive award because it was the lowest-priced bidder to properly complete the Certificate of Procurement Integrity is dismissed as academic where low bidder's argument that solicitation was misleading is sustained and the General Accounting Office concludes that agency should cancel the solicitation and resolicit the requirement.

DECISION

Krielow Brothers, Inc. and King Fisher Marine Service, Inc. protest the award of a contract to Hassell Construction Company, Inc. under invitation for bids (IFB) No. DACW64-91-B-0008 for channel rectification in Willow Marsh Bayou, Texas, and drainage and flood control in Taylors Bayou, Texas. Krielow protests the rejection of its low bid as nonresponsive for failure to include a completed Certificate of Procurement Integrity. King Fisher, the eighth low bidder, protests that

it should receive the contract on the grounds that it was the lowest-priced bidder that properly completed the Certificate of Procurement Integrity. According to King Fisher, the seven lower priced bids, including the bid submitted by the awardee, should have been rejected as nonresponsive.

We sustain the protest of Krielow, and dismiss the protest of King Fisher.

The IFB sought bids by January 24, 1991. Twelve bids were received by the bid opening date with Krielow the apparent low bidder. Of the 12 bids received, only 5 bidders submitted a signed Certificate of Procurement Integrity with their bids: 6 of the other 7 bidders partially completed the certificate but did not sign it, while 1 bidder disregarded the certificate completely. Upon review, both Krielow's bid and the second low bid were rejected as nonresponsive for failure to sign the Certificate of Procurement Integrity. On March 14, the Army awarded the contract to the third low bidder, Hassell Construction. Krielow and King Fisher both filed protests on March 22. The procurement has been stayed pending our decision.

BACKGROUND

The Certificate of Procurement Integrity clause, Federal Acquisition Regulation (FAR) § 52.203-8, is required by FAR § 3.104-10 to be included in all solicitations where the resulting contract is expected to exceed \$100,000. The clause implements 41 U.S.C.A. § 423(e) (1) (West Supp. 1990), a statute that bars agencies from awarding contracts unless a bidder or offeror certifies in writing that neither it nor its employees has any information concerning violations or possible violations of the Office of Federal Procurement Policy Act (OFPP Act) provisions set forth elsewhere in 41 U.S.C. § 423. The activities prohibited by the OFPP Act involve soliciting or discussing post-government employment, offering or accepting a gratuity, and soliciting or disclosing proprietary or source selection information.

The text of the procurement integrity clause, set forth in full in the solicitation, includes instructions to bidders and offerors on how to execute a Certificate of Procurement Integrity, as well as the applicable certificate. On its face, the clause requires submission of the signed certificate with the bid, and explicitly advises that "[f]ailure of a bidder to submit the signed certificate with its bid shall render the bid nonresponsive." In addition, FAR § 3.104-9(b) (3) (A) provides that for procurements using sealed

bidding procedures, a signed procurement integrity certification "shall be submitted by each bidder with the bid submission," while FAR § 14.404-2(m) provides that "[a] bid shall be rendered nonresponsive and rejected if the bidder fails to submit the signed certificate . . . with its bid."

KRIELOW PROTEST

Krielow argues that the Army cannot reasonably reject its bid for failure to include a signed Certificate of Procurement Integrity because the certificate form included in the IFB is misleading due to the lack of a signature line, or even sufficient space for a certifier's signature. Alternatively, Krielow argues that its failure to sign the certificate is a minor deviation from the solicitation's requirements that should be waived since Krielow included the unsigned certificate with its bid. Finally, Krielow argues that the FAR provisions implementing the OFPP Act exceeds the scope of the statute by specifying that failure to provide a signed and completed certificate at the time of bid submission will render a bid nonresponsive.

Since the Certificate of Procurement Integrity implements several provisions of the OFPP Act, and imposes additional and substantial legal obligations on the contractor, omission from a signed bid of a separately signed, completed certificate is a material deficiency properly resulting in rejection of a bid as nonresponsive. Mid-East Contractors, Inc., B-242435, Mar. 29, 1991, 91-1 CPD ¶ _____. However, we will not sanction rejection of bidders reasonably misled by confusing solicitations. See American Cyanamid Co., B-232200.2, June 23, 1989, 89-1 CPD ¶ 593.

The facts here are nearly identical to those in our recent decision in Shifa Servs., Inc., B-242686, May 21, 1991, 91-1 CPD ¶ _____. In Shifa, the record showed that the majority of bidders were evidently misled by the certificate's omission of a signature line--which, in our view, constituted a latent solicitation defect. Both here and in Shifa, the text of the procurement integrity certificate in the solicitation included a parenthetical request for the "signature of the officer or employee responsible" for the certification, yet there was no indication where the signature should be placed. Without a signature line or space in the clause to reasonably indicate a signature in addition to the one on the face of the bid, we concluded that the solicitation was misleading.

Here, due to the lack of a signature line, or sufficient space for a signature, only 5 of the 12 bidders submitted signed certificates. To sign their certificates, four of these bidders wrote in margins on the form contained in the IFB, while the fifth retyped the certificate to add space. As in Shifa, we find it unreasonable to require bidders to creatively alter a solicitation provision to make space for a signature as a prerequisite to submitting a responsive bid. In addition, 11 of the 12 bidders, including Krielow, completed the provision in the certificate inquiring about procurement integrity violations--the only provision in the certificate's text where there was sufficient space to respond. By filling in the only space available, these 11 bidders indicated that they were aware of the requirement to complete the certificate, but were misled about the requirement to sign the certificate given the omission of a signature space.

Given the lack of a signature line or space in the certificate form in the IFB, we conclude that the solicitation was ambiguous regarding how bidders were to certify compliance with the requirements concerning procurement integrity.^{1/} Accordingly, we recommend canceling the IFB and resoliciting the requirement to include a distinct signature line on the required Certificate of Procurement Integrity. This change should clearly indicate to bidders that a separate signature is required on the certificate itself. See Shifa Servs., Inc., B-242686, supra. We also find that Krielow is entitled to the costs of filing and pursuing its protest. 4 C.F.R. § 21.6(d)(1) (1991).


KING FISHER PROTEST

King Fisher protests that it should receive the contract award because, in its view, King Fisher is the lowest responsive bidder. Unlike the other bidders, King Fisher retyped the text of the certificate to provide the information required rather than attempt to alter the certificate found in the

^{1/} Since we sustain Krielow's protest on the ground that the solicitation was misleading, we need not consider Krielow's arguments that its failure to complete the Certificate of Procurement Integrity was a minor informality that could be corrected after bid opening, or that the implementing regulations exceed the scope of the OFPP Act. We note, however, that our decision in Mid-East Contractors, Inc., B-242435, supra, rejected the contention that the certificate could be completed after bid opening.

solicitation.^{2/} Given our conclusion that the solicitation was misleading and should be canceled, King Fisher's protest is academic and will not be considered on the merits. Morey Machinery, Inc.--Recon., B-233793.2, Aug. 3, 1989, 89-2 CPD ¶ 102.

The protest by Krielow is sustained; the protest by King Fisher is dismissed.


Acting Comptroller General
of the United States

^{2/} A close comparison of King Fisher's retyped certificate with the solicitation provision, however, reveals that the retyped certificate deviated from the required text--including the omission of an entire paragraph found in the solicitation provision.