

Van Schaik
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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ferange Industries, Inc.

File: B-246161.2

Date: March 12, 1992

Joseph P. Marcotullio, Esq., for the protester,
Del Stiltner Dameron, Esq., McKenna & Cuneo, for Keco
Industries, Inc., an interested party,
Jeffrey I. Kessler, Esq., and Carol Rosenbaum, Esq.,
Department of the Army, for the agency,
John W. Van Schaik, Esq., and John Brosnan, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Agency properly rejected as nonresponsive a bid for air conditioners which did not include prices for packaging where solicitation required packaging prices and packaging was a material solicitation requirement.
2. Agency's decision not to waive protester's price omission for packaging was reasonable where packaging was a material solicitation requirement and was not divisible from the other requirements of the solicitation.

DECISION

Ferange Industries Inc. protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DAAK01-91-B-0161, issued by the Army for air conditioners.

We deny the protest.

The solicitation required bidders to insert unit prices in the bid schedule for air conditioners to be ordered during the base year and for 2 option years and also required a price for first articles and for various data and technical publication items. In addition, the IFB required bidders to insert unit prices for three levels of packaging and marking in four locations on the bid schedule: for the base year requirement, for each of the option year requirements and for the first article test units.

Seven bidders responded to the IFB. The low bid was rejected as nonresponsive. Ferange's bid, the second low submitted, was \$6,198,245, and included no entry in the blank spaces on the bid schedule for packaging prices. The next low bid, submitted by Keco Industries, Inc., was \$6,509,702.

The contracting officer, believing Ferange's bid to be responsive, requested the missing packaging prices, which Ferange submitted. Based on the estimated delivery requirements in the solicitation, Ferange's total price for packaging was \$94,113.75. This would raise Ferange's bid to \$6,292,358.75.

After further review, the contracting officer concluded that Ferange's bid was nonresponsive and therefore the firm could not properly submit prices for packaging after bid opening. The agency notified Ferange that its bid had been rejected.

In a protest to the agency, Ferange argued that its failure to include prices in its bid for packaging was a minor informality or irregularity that could be corrected pursuant to Federal Acquisition Regulation (FAR) § 14.405. Alternatively, Ferange argued that it submitted packaging prices after bid opening only because the contracting officer asked it to do so and it was prepared to perform the contract and provide the required packaging at the price stated in its original bid, without any additional compensation for packaging. In this connection, Ferange argued that even with the addition of \$94,113.75 or some other reasonable amount for packaging, its bid of \$6,198,245 clearly was low after the rejection of the low nonresponsive bid.

In denying Ferange's protest, the Army stated that packaging was a material part of the solicitation and Ferange's bid, which did not include prices for packaging, was nonresponsive since it was not an unequivocal offer to comply with all the material terms of the solicitation. In addition, the Army stated that it could not allow correction of the bid to include prices for packaging since the bid included no pricing pattern by which the agency could ascertain the intended price for packaging. Finally, the Army rejected Ferange's contention that the omission of packaging prices could be waived and the contract awarded to the firm at the price stated in its original bid.

In its protest to this Office, Ferange argues that its bid as submitted was responsive and that the Army should have permitted the firm to waive the omission of packaging prices and perform the contract, including packaging, at the original bid of \$6,198,245. According to Ferange, "packaging was a material and indivisible part of the

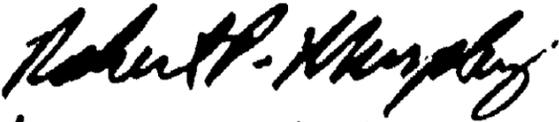
solicitation," and that by omitting packaging prices, Ferange did not free itself from the obligation to deliver packaged air conditioners. In this respect, Ferange refers to the table of contents on the cover sheet of the IFB, which states that the portion of the solicitation concerning packaging is applicable. In addition, Ferange notes that paragraph 12 on the IFB cover sheet states: "In compliance with the above, the undersigned agrees, if this offer is accepted . . . to furnish any or all items upon which prices are offered at the price set opposite each item. . . ." According to the protester, by signing its offer, it agreed to provide the air conditioning units "[i]n compliance with the above," including the applicable packaging requirements referenced on the cover sheet.

To be responsive, a bid must reflect an unequivocal offer to provide the exact item or service called for in the IFB so that acceptance of the bid will bind the contractor to perform strictly in accordance with the IFB's material terms and conditions. Biehn Constr., Inc., B-244364, Sept. 9, 1991, 91-2 CPD ¶ 231. Generally, a bid must be rejected as nonresponsive if it is submitted without a price for every item requested in the IFB, since the government's acceptance of the bid would not legally obligate the firm to furnish the unpriced items. Id. Packaging requirements are a material part of an IFB, and a bidder's exception to, or qualification of, an IFB's packaging requirements renders its bid nonresponsive. B&C Indus., Inc., B-244471.4, Oct. 7, 1991, 91-2 CPD ¶ 314; The Homer D. Bronson Co., B-220162, Nov. 22, 1985, 85-2 CPD ¶ 591. Here, since the IFB provided that the bidder was only obligated to provide the "items upon which prices are offered," Ferange's bid was nonresponsive since it included no prices for packaging, a material requirement.

An omitted bid price may be waived where the item for which the price was omitted is divisible from the solicitation's overall requirements, is de minimis as to total cost, and would not affect the competitive standing of bidders. Biehn Constr., Inc., supra. Here, the agency's decision not to waive Ferange's price omission was proper. Packaging is a material requirement of the solicitation and is not divisible from the other requirements of the IFB since the air conditioners cannot be delivered without packaging. Indeed, Ferange concedes that "packaging was a material and indivisible part of the solicitation." Under the circumstances, waiver is not allowed and there is no reason

to decide whether the price of packaging was de minimis or whether it would have affected the competitive standing of the bidders.

The protest is denied.


James F. Hinchman
General Counsel