



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Copley International Trading Partners; Western States Electric, Inc.

File: B-248751; B-248751.3

Date: September 10, 1992

Edson G. Pap for Copley International Trading Partners; Michael T. Munch for Western States Electric, Inc., the protesters.

Allen W. Smith, Department of Agriculture, for the agency. Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly awarded contract to bidder whose bid was nonresponsive both because it did not contain required descriptive literature for an offered equal product and because it was improperly qualified.

DECISION

Copley International Trading Partners and Western States Electric, Inc. protest the award of a contract to Reynolds Metals Company under invitation for bids (IFB) No. R6-3-92-20s, issued by the Forest Service, Department of Agriculture. Both Copley and Western States argue that the agency improperly rejected their bids as nonresponsive, and both contend that Reynolds's bid should have been rejected as nonresponsive.

We sustain the protests.

The IFB solicited bids for 342,000 linear feet of powerline cable for delivery to Coldwater Ridge vault sites at the Gifford Pinchot National Forest, Washington. The powerline is composed of six components: conductor; conductor semiconducting shield; conductor insulation; insulation semiconducting shield; concentric neutral; and overall outer (insulating) jacket. Each component was separately described in the IFB, along with certain minimum requirements. These descriptions specified Union Carbide or

Cablec or equivalent material for the two semiconducting shields and insulation, and Union Carbide or equivalent compound for the outer jacket.

The IFB's brand name or equal clause required bidders to identify and provide descriptive literature for any equal item offered to enable the agency to evaluate the equal item on the basis of information furnished by the bidder or identified in its bid. In particular, the clause provided that the "bidder must furnish as a part of its bid all descriptive material" (e.g., cuts, illustrations, and drawings) necessary for the agency to determine whether the product met the salient characteristics and to establish exactly what the bidder proposed to furnish. Among other items, bidders also were required to submit the information specified on Table 1 of the IFB. Table 1 required information on the six components including the manufacturer for each brand name component. The IFB also notified prospective bidders that "qualified bids will be rejected."

Nine bids were received by the April 13, 1992, bid opening date. The agency rejected eight of the bids as nonresponsive. Copley's low bid offered a Dae Won Cable Co. product for the four brand name cable components, and was rejected for failing to include descriptive literature on the Dae Won products. Western States, the second low bidder, was rejected because its bid provided for "Shipment 14 weeks ARO," while the IFB called for delivery between September 1 and 15, 1992. The agency rejected Western States's bid on the basis that it was unable to determine when delivery would occur.

Reynolds's bid, which was fourth low, was found responsive, and the agency awarded it the contract on May 6.¹ Copley and Western States then filed protests with our Office. The agency was not required to stay performance of the contract.

Copley contends that its bid should not have been rejected since the IFB allegedly was not clear on its descriptive literature requirements and because its bid provided sufficient information to show the acceptability of its "equal" product. Protests based upon alleged improprieties in the IFB, apparent before bid opening, must be filed prior to bid opening. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1992). Thus, Copley's protest of the IFB's brand name or equal and descriptive literature provisions is untimely. Further, notwithstanding its generalized contention that it submitted sufficient information, in

¹The agency states that the third low bid was rejected because the bidder qualified its bid by changing the conductor shield.

fact, Copley's bid failed to provide any descriptive literature whatsoever for the equivalent product it listed. Concerning the cable, Copley concedes that it included only "the specification sheet furnished by the agency," rather than descriptive literature relevant to the equivalent cable it bid; Copley does not claim to have submitted any information at all concerning the compounds that make up the cable which it bid. Therefore, the agency properly rejected the bid as nonresponsive. T & T Prods., Inc., B-243895, Aug. 7, 1991, 91-2 CPD ¶ 139.

Western States argues that the agency lacked any basis for concluding that the company had qualified its bid. According to Western States, its notation of "14 weeks ARO" is a "widely understood industry term" meaning shipment 14 weeks after award. Since there were more than 16 weeks between the May 6 award date and the September 1 to 15 IFB delivery requirement and transportation "rarely" requires more than one week, Western States contends that its bid was responsive to the delivery requirement. We disagree.

To be responsive, a bid as submitted must comply in all material aspects with the terms of the IFB. Achievement Prods., Inc., B-224940, Feb. 6, 1987, 87-1 CPD ¶ 132. Delivery terms are a material requirement and thus a bid that takes exception to the stated delivery schedule is nonresponsive and must be rejected. AMP Inc., B-230120, Feb. 17, 1988, 88-1 CPD ¶ 163.

Contrary to protester's contention regarding the meaning of "ARO," that term means "after receipt of order," which we find is equivalent to "after receipt of notice of award." HoseCo, Inc., B-226420, Mar. 12, 1987, 87-1 CPD ¶ 282. Western States's bid qualified the IFB requirement by committing merely to ship the product within a certain period of time, while remaining silent as to the date of delivery. The IFB requires that the cable actually be delivered between September 1 and 15 to the appropriate vaults at some 58 different mile post destinations spanning more than 20 miles along a highway. Western States's commitment to ship by a particular date did not create a contractual agreement that the cable would actually be delivered by the dates specified in the IFB. Because it impermissibly qualified the IFB's terms, the bid was properly rejected as nonresponsive.

Both protesters contend that Reynolds's bid also contained various deficiencies which rendered it nonresponsive, and that by waiving these deficiencies the agency afforded Reynolds preferential treatment. We agree that the awardee's bid should have been rejected as nonresponsive.

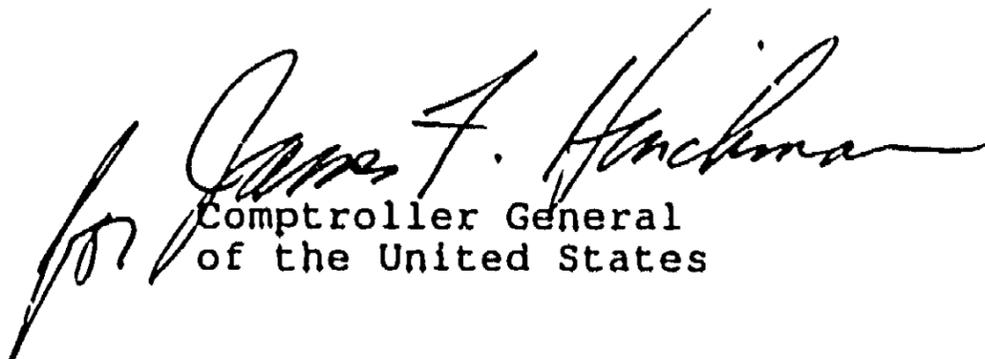
While the protesters have alleged that there were a number of deficiencies in Reynolds's bid, we need consider only one, as it is dispositive. Reynolds's bid was nonresponsive because that company failed to provide descriptive literature for an allegedly "equal" item. For the cable jacket listed in Table 1, Reynolds bid the brand name (Union Carbide) compound "or Reynolds equivalent compound," but did not submit any descriptive literature for this allegedly equal compound. Thus, Reynolds reserved the right to deliver a non-brand name compound without submitting descriptive literature for that alternative product. Where there is a requirement for the submission of descriptive literature for "equal" products and the bidder reserves the right to furnish one or more such alternative products, the bid is nonresponsive unless the descriptive literature requirement is satisfied for every one of those alternatives. Safeware, Inc., B-246405.2, May 7, 1992, 92-1 CPD ¶ 426. Accordingly, we sustain the protests on this basis.²

Ordinarily, where none of the bids submitted under an invitation for bids is responsive, we will recommend that the solicitation be canceled and the requirement resolicited. Because the agency advises us that the powerline has been manufactured and will be ready for delivery on or before the time set in the IFB, such relief would serve no purpose here. Accordingly, Copley and

²Generally, where a protester's bid was properly found nonresponsive, that protester is not an interested party for the purpose of raising other, unrelated defects in the source selection process, because the protester lacks the requisite direct economic interest in the procurement. See 4 C.F.R. § 21.0(a) (1992). However, where the awardee's bid is the sole remaining apparently responsive bid, we will consider a protester's challenge to the responsiveness of that bid. General Sales Agency, B-247529.2, Aug. 6, 1992, 92-1 CPD ¶ _____. We do so because, if the protest is sustained, the appropriate remedy is generally the termination of the awardee's contract and the issuance of a new solicitation, under which the protester could compete, thus demonstrating its direct economic interest in the procurement. Id.

Western States are entitled to reimbursement of their reasonable costs of filing and pursuing their protests, and the costs of preparing their bids, 4 C.F.R. § 21.7(d) (1992).

The protests are sustained.


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