



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

Decision

Matter of: Parsons Precision Products, Inc.
File: B-249940
Date: December 22, 1992

Kenneth B. Weckstein, Esq., Epstein Becker & Green, for the protester.
Alan M. Grayson, Esq., for Science Ecology Group, Inc., an interested party.
Beth Kelly, Esq., United States Army Corps of Engineers, for the agency.
Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Cover letter accompanying the step-two bid on a two-step sealed bid procurement proposing payment terms of "net 30 days," instead of "net 45 days," as required by the invitation for bids rendered the bid nonresponsive.

DECISION

Parsons Precision Products, Inc. protests the rejection of its bid by Bechtel National, Inc. under invitation for bids (IFB) No. 19987-144C14-R for munitions transportation containers, pursuant to Bechtel's prime contract No. DACA87-89-C-0007 with the U.S. Army Corps of Engineers for the acquisition of equipment for the Chemical Stockpile Disposal Program.¹ Parsons contends that Bechtel and the Corps improperly rejected its low bid on the second step of a two-step formal sealed bid procurement as nonresponsive for offering a payment term less than required by the IFB.²

¹Bechtel is designated as the Corps's agent in making these equipment acquisitions.

²In its report on the protest, the Corps asserts two other bases to reject Parsons's bid: Parsons's failure to price contract line items for sales and use taxes, and Parsons's failure to provide a time period for on-site service

(continued...)

We deny the protest.

Bechtel announced in the IFB that the procurement would be conducted in accordance with Federal Acquisition Regulation (FAR) section 14.5 using the two-step sealed bid procurement procedures. Under step one of a two-step sealed bid procurement, bidders submit technical proposals, which the agency evaluates to determine the technical acceptability of the supplies offered (conducting discussions as appropriate), leaving only price to be resolved in the second step of the procurement. In step two, bidders whose first step proposals have been found acceptable, submit formal bids, based on their own technical proposals, using forms provided by the agency. Consistent with the FAR, the IFB provided for a public bid opening and stated that "an award will be made . . . to that responsible bidder whose bid, conforming to the IFB, will be most advantageous to the [g]overnment, considering only price and price related factors included in the IFB."

The solicitation warned bidders to include "sufficient details to permit a complete and accurate evaluation of the Sealed Price Bid from a pricing standpoint," and specified the following payment terms in SPECIAL NOTE D:

"Payment terms are ([percent] discount) net 45 days subject to any limitations as provided elsewhere in this PC [purchase contract]."
(Emphasis in original.)

Bechtel received 13 step-one proposals, and following discussions and evaluation of the proposals, determined that 8 firms had submitted acceptable proposals, and were therefore qualified to submit step-two sealed bids. At the June 26, 1992, public bid opening, Parsons submitted the apparent low bid as follows:

Parsons	\$38,686,099
Scientific Ecology Group	43,802,294

Parsons's bid included a cover letter signed by its program manager that, in part, stated, "Terms: Net 30 days."

²(...continued)
representation. We need not consider these issues, since we find that Parsons's bid was properly rejected for offering nonconforming payment terms.

Bechtel rejected Parsons's bid as nonresponsive because the cover letter took exception to the IFB's "net 45 days" payment term. Parsons's officials called Bechtel upon learning of the rejection and stated that Parsons's use of the non-conforming payment term was a typographical error--the result of the inadvertent inclusion of Parsons's standard commercial terms (i.e., net 30 days). Parsons timely protested its bid's rejection first to the agency and then to our Office.

All bidders must compete for sealed bid contracts on a common basis. No individual bidder can reserve rights or immunities that are not extended to all bidders by the conditions and specifications advertised in the IFB. See Free-Flow Packaging Corp., B-204482, Feb. 23, 1982, 82-1 CPD ¶ 162. Therefore, in order to be responsive, a bid must contain an unequivocal offer to provide the requested items in total conformance with the material terms of the solicitation, and any bid which imposes conditions that would modify material requirements of the solicitation must be rejected as nonresponsive. Bishop Contractors, Inc., B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555. A material deviation is one which affects, in more than a trivial way, the price, quality, or quantity of goods or services offered. Aluminum Co. of Am., 71 Comp. Gen. 245 (1992), 92-1 CPD ¶ 184. Any bid premised upon earlier payment than stated in the IFB is nonresponsive. RAD Oil Co., Inc., B-209047, Oct. 20, 1982, 82-2 CPD ¶ 352; see also Valley Forge Flag Co., Inc., B-216108, Sept. 4, 1984, 84-2 CPD ¶ 251. A bid which is nonresponsive on its face may not be converted into a responsive bid by post bid opening clarifications or corrections. Propper Mfg. Co., Inc., B-245366, Dec. 30, 1991, 92-1 CPD ¶ 14; Buckeye Pacific Corp., B-212183, Aug. 30, 1983, 83-2 CPD ¶ 282.

Parsons's cover letter expressly conditioned its bid by basing it on Bechtel's acceptance of "net 30 days" payment terms, which is materially different from the terms required by the IFB, inasmuch as Parsons's payment terms would require the government to pay Parsons 15 days before it would have to pay any other bidder that accepted the IFB's "net 45 days" payment terms. RAD Oil Co., supra; Valley Forge Flag Co., supra. Nevertheless, Parsons presents numerous arguments in urging that Bechtel improperly rejected its bid.

First, Parsons asserts that the IFB did not limit bidders to the above quoted "net 45 days" payment terms because the IFB also stated that the terms were subject to "any limitations as provided elsewhere in this [purchase contract]." Parsons

now states that it understands this to be an invitation to propose alternate payment terms, and points to part D of the IFB, which is the face page of the draft purchase contract, where, among other things, the words "TERMS OF PAYMENT" followed by a space appear.³

Where a dispute exists as to the actual meaning of a solicitation requirement, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. Adrian Supply Co., B-246611, Mar. 11, 1992, 92-1 CPD ¶ 277; Romer Labs, Inc., B-243027, June 25, 1991, 91-1 CPD ¶ 602.

Our review of the IFB, as amended, shows that Parsons's asserted interpretation is unreasonable and that bidders were not permitted to propose payment terms at odds with the IFB minimum requirements. The space following the words "TERMS OF PAYMENT" on the cover page is just a blank without any explanatory material. In contrast, Special Note D clearly states what the "[p]ayment terms are." This note then states the payments terms are "net 45 days," with provision for offered prompt payment discounts, subject to "any limitations as provided elsewhere in this [Purchase Contract]." The last stated provision to the payment terms obviously means that the stated payment terms are subject to limitations that are already included (i.e., "provided") in the IFB. There is no other provision in the IFB that permits bidders to premise their bids on payment on less than "net 45 days." To the contrary, the IFB's "INSTRUCTIONS TO BIDDERS, F. Payment Terms," advises bidders that the payment terms are set out in part D, section 1, "Material Description and Pricing," and that is where Special Note D's "net 45 days" payment terms are found.

The purchase contract face page appears to be primarily for completion at the time of contract execution; it includes signature blocks for the contractor and Bechtel as well as other important information about the contract, such as the contract number and total contract price.⁴ Assuming that bidders elected to complete this form (other than signing it), even though they were not requested to do so, the IFB's

³This face page of the purchase contract includes a variety of administrative information (e.g., contract number, effective date, delivery terms, etc.) regarding the basic terms of the contract.

⁴The bid prices were on the IFB bid schedule.

provision of space following the words "TERMS OF PAYMENT" could only have been intended as a place where bidders can submit percentage discounts or offer more favorable terms than the IFB requires, and not as an invitation to take exception to the material minimum payment terms of the IFB. See generally Perkin-Elmer Corp., 69 Comp. Gen. 27 (1989), 89-2 CPD ¶ 352 (provision of space for a bid acceptance period does not permit the proposal of a bid acceptance period less than the minimum elsewhere required by the IFB). In this regard, we note that Special Note D, Price and Payment Terms, authorizes the bidding of prompt payment discount percentages (i.e., when it specified "[percent] discount") without furnishing a space for the discounts--the blank in Special Note D is filled with the parenthetical information "[percent] discount," so that bidders who want to propose prompt payment discounts could insert this information in the blank space following "TERMS OF PAYMENT" on the face page of the IFB if they chose.

Here, Parsons's argument that it was misled by the payment term blank on the purchase contract cover page seems contrived, since it is inconsistent with Parsons's alternative claim that its inclusion of the noncompliant payment term was a clerical error and because Parsons did not insert its proposed payment terms in the blank on the purchase contract cover page, but instead placed them in its cover letter attached to its bid. Parsons's inclusion of the offending payment terms in a cover letter accompanying its bid renders the bid nonresponsive, since the cover letter clearly conditions Parsons's bid upon unauthorized payment terms. See The Ramirez Co. and Zenon Constr. Corp., B-233204, Jan. 27, 1989, 89-1 CPD ¶ 91.

Parsons contends, in the alternative, that even if the IFB required a "net 45 days" payment term, Bechtel and the Corps were required by the Prompt Payment Act, 31 U.S.C. § 3901 et seq. (1988), as implemented by FAR § 32.905, to pay contractors in a manner consistent with Parsons's "net 30 days" payment terms. Parsons argues that the Prompt Payment Act provisions therefore render its payment terms deviation immaterial, notwithstanding the IFB's stated "net 45 days" payment terms, since Bechtel is required, in any case, by FAR § 32.905 to pay the contractor within 30 days in any case.

Parsons concedes that the IFB did not include FAR § 52.232-25 (FAC 90-13), which incorporates the Prompt Payment Act provisions. Thus, Parsons's argument rests on the premise that FAR § 52.232-25 is required to be read into the solicitation by operation of law because the Prompt Payment Act and its implementing provisions are mandatory. Even assuming that these prompt payment provisions are

applicable to Bechtel's purchases, we are unaware of any principal of procurement law that allows the incorporation by operation of law of mandatory clauses that have been inadvertently omitted from solicitations to make otherwise nonresponsive bids responsive. While there is limited precedent that permits the inclusion of some omitted mandatory clauses into government contracts, see G.L. Christian & Assoc. v. United States, 160 Ct. Cl. 1, 312 F.2d 418, rehearing denied, 160 Ct. Cl. 58, 320 F.2d 345, cert. denied, 375 U.S. 954 (1963), they have been limited to the incorporation of mandatory contract clauses into otherwise validly awarded government contracts, and do not extend to incorporating inadvertently omitted mandatory provisions into an IFB for purposes of interpreting the IFB or curing a defective bid. 48 Comp. Gen. 593 (1969), modified on recon., 48 Comp. Gen. 689 (1969); MET Elect. Testing Co., B-198834, Nov. 28, 1980, 80-2 CPD ¶ 398; see also Mosler Sys. Div., Am. Std. Co., B-204316, Mar. 23, 1982, 82-1 CPD ¶ 273.⁵

Parsons argues that since its first step proposal, on which its second step bid was based, expressly acknowledged that Parsons would comply with the solicitation's payment terms, Bechtel should have realized that Parsons did not intend to take exception to the IFB payment terms. In this regard, Parsons's first step proposal included a completed check list, one blank of which acknowledged that Parsons would adhere to the IFB payment provisions. Parsons contends that Bechtel, being aware of Parsons's first step proposal, which Parsons asserts evidenced an intent to comply with all the terms of the IFB, violated FAR §§ 14.405 and 14.406 when it failed to seek verification or clarification of Parsons's apparent mistake or clerical error in proposing "net 30 days" payment terms as part of its second step bid.

⁵To the extent that Parsons protests Bechtel's failure to include the Prompt Payment Act provisions in the IFB, this protest of an apparent solicitation defect is untimely under our Bid Protest Regulations, and will not be considered. 4 C.F.R. § 21.2(a)(1) (1992); see Mosler Sys. Div., Am. Std. Co., supra. In any case, a bidder who participates in a procurement through the point of bid opening without objection is deemed to have acquiesced in the agency's statement of the terms and conditions. See Oakland Scavenger Co., -- Recon., B-232958.2, June 1, 1989, 89-1 CPD ¶ 541; Patterson Constr. Co., B-180290, Feb. 28, 1974, 74-1 CPD ¶ 113.

It is true that the contracting officer should take into account step one offers in interpreting step two bids where the step two bids are ambiguous. See International Med. Indus., Inc., 62 Comp. Gen. 31 (1982), 82-2 CPD ¶ 386; Universal Comms. Sys., Inc., B-205032, Sept. 20, 1982, 82-2 CPD ¶ 236.⁶ We do not think that Parsons's second step bid, including a one-page cover letter, signed by Parsons's program manager (the same person who signed the bid), was ambiguous nor can it reasonably be characterized as an apparent mistake or clerical error. This letter could more reasonably be read as a corporate decision to obtain better payment terms. In submitting a step-two bid, a bidder is charged with notice that the terms and conditions of the step-two solicitation will govern the ultimate award, and since a step-two competition is nothing more than a sealed bid procurement with the competition limited to those proposing technically acceptable approaches during step one, the standard rules of bid responsiveness and evaluation must apply. International Med. Indus., Inc., *supra*. Therefore, a finding that a firm's technical proposal under step one of a two-step procurement is acceptable cannot bind the government to accept the firm's bid under step two, where, as here, the bid is nonresponsive to the terms and conditions of the IFB, even though the bidder had previously agreed to these terms and conditions in the first step. Id.

Parsons argues that even if its bid were premised on payment terms of "net 30 days," while other bidders bid the "net 45 days" payment terms contemplated by the IFB, Parsons's use of noncompliant payment term has a negligible effect on price, particularly considering Parsons's substantial price advantage, and, therefore, this bid deviation was required to be waived under FAR § 14.405. That regulation only permits the waiver minor informalities and irregularities, and not exceptions taken to material requirements. A deviation to a material IFB provision, such as when the government is obligated to pay the contractor, effectively changes the legal relationship between the parties, and is therefore material and cannot be waived, even if the impact of the deviation on price is trivial. Bishop Contractors, Inc., *supra*; Versailles Maint. Contractors, Inc., B-203324, Oct. 19, 1981, 81-2 CPD ¶ 314. While we recognize that Parsons's bid is considerably lower than the next low bid, it is more important to maintain the integrity of the competitive bidding system than to realize isolated monetary savings by allowing the correction or waiver of material

⁶In those cases, we stated that there was a "presumption" of responsiveness of second step bids where they contain some ambiguity.

deficiencies in low nonresponsive bids. See Pettinato Associated Contractors and Eng'rs, Inc., B-246106, Feb. 19, 1992, 92-1 CPD ¶ 201; Kari-Vac, Inc., B-194202, July 3, 1979, 79-2 CPD ¶ 4.

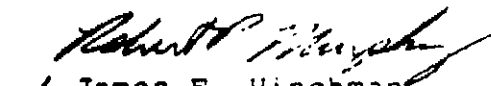
Parsons also contends that Bechtel violated FAR § 14.407 by failing to make award to the responsible bidder whose bid would be most advantageous to the government considering only price and price related factors. Parsons's argument only references a portion of the language contained both in the IFB and in the standard clause, FAR § 52.214-10, Contract Award--Sealed bidding, found in all nonconstruction IFBs. FAR § 14.201-6(e)(2). That clause reads, in pertinent part:

"[A]n award will be made . . . to that responsible bidder whose bid, conforming to the IFB, will be most advantageous to the Government, considering only price and price related factors included in the IFB." [Emphasis supplied.]

Since Parsons's bid took exception to a material IFB requirement, it does not "conform" to the IFB and must therefore be rejected as nonresponsive. Accordingly, Bechtel's actions are consistent with FAR § 14.407.

Finally, Parsons claims that Bechtel treated Parsons unfairly because of defects in the awardee's bid which, in Parsons's view, should have rendered the awardee ineligible under the standard of responsiveness that Bechtel has applied to Parsons. Although Parsons characterizes this complaint as a matter of fairness and therefore within the general scope of its initial protest, we view it as an untimely piecemeal challenge of the responsiveness of the second low bid. In this regard, on October 23, 1992, we dismissed this protest basis as untimely, since it was admittedly raised more than 10 working days after Parsons's was provided a copy of the awardee's bid. 4 C.F.R. § 21.2(a)(2). Parsons has provided no basis for us to reconsider this matter.

The protest is denied.


for James F. Hinchman
General Counsel

⁷Parsons acknowledges receiving the awardee's bid on September 17, but only raised this issue on October 5, more than 10 working days later.