

Pietrovito

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Comptroller General
of the United States

Washington, D.C. 20543

328263

Decision

Matter of: United States Coast Guard--Advance Decision

File: B-252396

Date: March 31, 1993

Ann M. Perisano, Department of Transportation, for the agency.

Gene Moorman for Automated Power Systems, Inc., an interested party.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where an invitation for bids (IFB) contemplates the award of a firm, fixed-price contract, a bidder's request in its bid cover letter for an additional charge of \$1,000 per hour for government conducted pre-acceptance inspections and tests at the bidder's facility, which tests the government reserved the right to conduct in the IFB, renders the bid nonresponsive because the bid did not offer to meet all material specifications at a firm, fixed-price, where the IFB did not contemplate a separate bid price for the government conducted testing and provided no means of predicting the amount of testing the government would conduct.

DECISION

The United States Coast Guard, Department of Transportation, requests an advance decision concerning the responsiveness of the apparent low bid of Automated Power Systems, Inc. (APS) under invitation for bids (IFB) No. DTCG36-93-B-B5B005 for solid state flashers.

We find APS's bid to be nonresponsive.

The IFB contemplated the award of a firm, fixed-price contract for various quantities of three different types of solid state flashers. Detailed performance and functional

specifications were stated, and the specifications, in pertinent part, set forth the contract inspection and test requirements. Specification paragraph 4.1.1. provided that:

"The Coast Guard reserves the right to verify and to perform any bench tests on production flashers to verify that the flashers function only as described in this specification. These bench tests may be different than tests called for in this specification."

The IFB also incorporated by reference the standard "Inspection of Supplies-Fixed Price" clause, as set forth in Federal Acquisition Regulation (FAR) § 52.246-2.¹ This clause provides, in pertinent part, that:

"(c) The [g]overnment has the right to inspect and test all supplies called for by the contract, to the extent practicable, at all places and times, including the period of manufacture, and in any event before acceptance. The [g]overnment shall perform inspections and tests in a manner that will not unduly delay the work.

"(d) If the [g]overnment performs inspection or test on the premises of the [c]ontractor, or a subcontractor, the [c]ontractor shall furnish, and shall require subcontractors to furnish, without additional charge, all reasonable facilities and assistance for the safe and convenient performance of these duties. Except as otherwise provided in the contract, the [g]overnment shall bear the expense of [g]overnment inspections or tests made at other than the [c]ontractor's or subcontractor's premises. . . ." ² [Emphasis added.]

The Coast Guard received five bids. While APS was the apparent low bidder for all three flashers, APS included with its bid a cover letter that stated the following:

¹This clause is required by FAR § 46.302, and is to preserve the government's right to make inspections and tests while work is in process. See FAR § 46.202-2(b)(2).

²The IFB also incorporated by reference the "Contractor Inspection Requirements" clause, as set forth in FAR § 52.246-1, that provides that the contractor is responsible for the performance of all inspections and tests necessary to substantiate that the supplies conform to contract requirements.

"Be advised that if the government elects to exercise the option in 4.1.1. of the specification, that the APS fee for additional unscheduled testing is \$1,000.00/hr. including set-up and breakdown time. This statement of fee rates associated with a government option, takes no exception to the terms of the solicitation."

The Coast Guard did not evaluate APS' bid price for possible government testing under specification paragraph 4.1.1., and determined that APS was the apparent low bidder, considering only its bid prices entered in the three contract line items for the different flashers. The IFB did not contemplate separate bid prices for government testing or state an estimated quantity for the government testing.

The Coast Guard is unsure whether APS' bid cover letter renders APS' bid nonresponsive and has requested our Office for an advance decision in the matter. In response to our request for comments; APS states that before bid opening APS asked the Coast Guard whether APS could enter a separate price on the Standard Form (SF) 33 bid sheet for the testing contemplated by specification paragraph 4.1.1. APS states that the agency informed it that alteration of the SF-33 would render its bid nonresponsive, but that "the question of additional costs for additional testing [should] be included in separate correspondence." APS asserts that its bid is responsive because it included the statement in its bid cover letter that it took no exception to the terms of the solicitation.

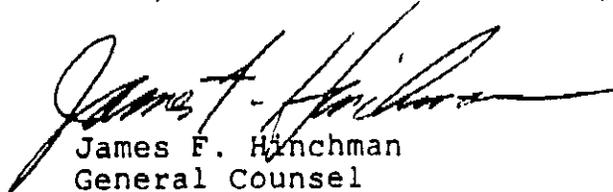
To be responsive, a bid, as submitted, must unequivocally promise to provide the requested items and meet the material specifications at a firm, fixed-price. GSX Gov't Servs., Inc., 69 Comp. Gen. 539 (1990), 90-1 CPD ¶ 570. A bid that varies from the terms and conditions of the solicitation, limits the firm's contractual obligations, or does not offer to perform at a firm, fixed-price where a fixed-price contract is contemplated must be rejected as nonresponsive. Id.; Turbine Engine Servs.--Recon., 64 Comp. Gen. 639 (1985), 85-1 CPD ¶ 721. A bidder's intended total bid price must be evident from the all the bid documents submitted at the time of bid opening. Id. In this regard, a cover letter is considered part of the bid for purposes of determining the bid's responsiveness. General Elec. Co., 65 Comp. Gen. 377 (1986), 86-1 CPD ¶ 223.

We find that APS failed to offer a firm, fixed-price in accordance with the terms of the IFB, and therefore its bid is nonresponsive. The IFB, in specification paragraph 4.1.1. and in the "Inspection of Supplies" clause, reserved the right of the government to conduct whatever pre-acceptance tests or inspections it believed were necessary,

and provided that if the agency performed the tests at the contractor's facility, the contractor was required to furnish, without additional charge, all reasonable facilities and assistance in performing the tests. The IFB provided no estimate as to how often the agency intended to conduct the pre-acceptance tests contemplated by specification paragraph 4.1.1., or as to the estimated length of time involved in conducting these tests. Thus, the solicitation provided no means of predicting the amount of testing the agency would conduct, and there is no way of translating APS' requested additional charge of \$1,000 per hour into a firm, fixed-price.

The Coast Guard, in determining that APS was the apparent low bidder, did not consider APS' additional charge for possible government testing at its facility because the IFB did not contemplate the provision of a separate charge for the government testing. However, since APS has apparently agreed to allow the agency to perform these pre-acceptance tests, as required by the IFB, but at an additional charge, this additional charge for testing would have to be considered in evaluating APS' bid price. As noted above, APS' bid price for government testing cannot be calculated and evaluated with any certainty. Thus, there is no way to determine whether APS' bid would be low, and its bid cannot form the basis for award. See GSX Gov't Servs., Inc., supra.

Therefore, APS' bid should be rejected as nonresponsive.


James F. Hinchman
General Counsel