



Decision

Matter of: Bailey Controls Company; The Foxboro Company

File: B-256189; B-256189.2

Date: May 23, 1994

James Wakelee, for Bailey Controls Company, and Albert B. Krachman, Esq., Bracewell & Patterson, for The Foxboro Company, the protesters.
Ronald E. Cone, Department of Energy, for the agency.
Jacqueline Maeder, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Award to offeror not specifically listed in Commerce Business Daily (CBD) notification of successful offerors under step one of two-step procurement is not improper where record shows that proposal submitted by awardee was determined to be technically acceptable; errors or omissions in CBD notification do not make competing firm ineligible for award if that firm submitted an acceptable proposal.
2. Bid which offers warranty terms which do not conform to the solicitation's warranty terms is nonresponsive.

DECISION

Bailey Controls Company and The Foxboro Company protest the award of a contract to Fisher-Rosemount Systems under invitation for bids (IFB) No. DE-FB96-94P019001, step two of a two-step sealed bid acquisition, issued by the Department of Energy (DOE) for hardware and software components for a control systems update of the St. James, Weeks Island, and West Hackberry Oil Storage Facilities.¹ Bailey Controls

¹Two-step sealed bidding is a hybrid method of procurement that combines elements of sealed bidding and negotiations. Step one is similar to a negotiated procurement in that the agency requests technical proposals, without prices, and may conduct discussions. Step two consists of a price competition among those firms which submitted acceptable proposals under step one, with each offeror submitting a bid

alleges that the awardee was not listed in the Commerce Business Daily (CBD) as submitting an acceptable technical proposal in step one and therefore could not properly be awarded the contract. Foxboro protests the rejection of its bid as nonresponsive under the IFB.

We deny the protests.

Three firms submitted technical proposals under step one of the procurement: Bailey Controls, Foxboro, and Fisher-Rosemount. The Fisher-Rosemount proposal was submitted by its sales representative Puffer-Sweiven, Inc. All three proposals were found technically acceptable. On November 3, the agency had an announcement published in the CBD stating that:

"This notice is for the benefit of prospective subcontractors in Step II of the sealed bidding process for complex integrated systems made up of hardware, software, and firmware components for a Distributed Control System. . . . Successful offerors in Step I include: Bailey Controls Company, 1655 Townhurst, Houston, Texas 77043; The Foxboro Company, 10707 Haddington Drive, Houston, Texas; Puffer-Sweiven, 4230 Greenbriar, Stafford, Texas, 77477. Inquiries concerning subcontracting opportunities should be directed to successful offerors in Step I."

All three firms submitted bids by the December 7 closing date. The Bailey Controls and Foxboro bids were determined to be nonresponsive. The agency made award to Fisher-Rosemount for \$2,554,482.

Bailey Controls argues that the award to Fisher-Rosemount was improper. The protester states that the CBD announcement identified three firms--Bailey Controls, Foxboro, and Puffer-Sweiven--as having submitted technically acceptable proposals and that FAR § 14.503-2(b) requires the government to contract only with firms listed as prequalified in the CBD announcement. Since "Fisher-Rosemount is not listed in the [CBD] as prequalified," the protester asserts, it is ineligible for award.

As noted above, step one of a two-step procurement involves the submission and evaluation of technical proposals and step two involves the submission of sealed bids by firms

¹(...continued)

based upon its own proposal. Federal Acquisition Regulation (FAR) Subpart 14.5; J&J Maintenance, Inc., B-240799; B-240802, Dec. 19, 1990, 90-2 CPD ¶ 504.

which submitted acceptable technical proposals, Award must be made to one of the firms submitting an acceptable technical proposal. Here, since Fisher-Rosemount, through its agent Puffer-Sweiven, submitted an acceptable technical proposal and a responsive step two bid, Fisher-Rosemount was eligible for award.

Contrary to the protester's assertion, FAR § 14.503-2(b) does not state that award must be made to a firm listed in the CBD announcement. That provision states only that:

"The names of firms that submitted acceptable proposals in step one will be listed in the Commerce Business Daily for the benefit of prospective subcontractors."

In essence, the notification the regulation provides for is a courtesy to potential subcontractors to help them obtain work under government contracts. The CBD reference to Fisher-Rosemount's agent--rather than to the firm itself--did not make Fisher-Rosemount ineligible for award since that firm had submitted a technically acceptable proposal. Accordingly, Bailey Controls' protest is denied.

Foxboro protests that its bid should not have been rejected as nonresponsive. Foxboro's bid was rejected as nonresponsive because (1) the agency found that it took exception to the warranty requirements of the solicitation and (2) the bid schedule included the words: "+ [plus] expenses if outside of Houston, Texas."

Concerning the warranty, the IFB provided, in relevant part, that the offeror shall guarantee the satisfactory performance of the items furnished and:

"shall also guarantee to remove and replace, or remove, repair, and replace without charge to the [g]overnment, and at the [g]overnment's convenience, any and all parts deemed defective by the [g]overnment, due to faulty material, design, or workmanship, for a period of 18 months after delivery of equipment by the [c]ontractor to the site. Any alterations or replacements necessary to meet tests or pass inspections, including cost of removal and replacement plus shipping costs, shall be made at the [c]ontractor's expense."

In its bid, in a section titled "Terms and Conditions," Foxboro stated that while it warrants that all products manufactured by the contractor shall be free from defects in material, workmanship, and title and agrees to replace or repair any product which is returned to the contractor's repair facility within 18 months from the date of delivery,

the costs of demonstrating the need to diagnose defects at the job site are to be paid by the government and any transportation charges must be prepaid by the government. The protester's warranty clause also stated that any repair or replacement necessitated by inadequate preventative maintenance, or by normal wear and usage, or by the fault of the government or power sources supplied by others, or by attack and deterioration under unsuitable environmental conditions shall be paid for by the government.

To be responsive, a bid must represent an unequivocal offer to provide the exact thing called for in the IFB, such that acceptance of the bid will bind the contractor in accordance with the solicitation's material terms and conditions. Westec Air, Inc., B-230724, July 18, 1988, 88-2 CPD ¶ 59. Warranty requirements are considered material, and therefore a bidder's exception to, or qualification of, an IFB's warranty provision renders its bid nonresponsive. ZOE Constr. Co., Inc., B-244877, Nov. 26, 1991, 91-2 CPD ¶ 493.

Here, the record shows that the protester's warranty terms required that the government pay the cost to diagnose defects and transportation charges involved in repairing or replacing the contractor's products. These warranty terms conflict with the warranty required by the solicitation, since the solicitation contemplated that the cost of repair or replacement and shipping costs would be at the contractor's expense. Thus, Foxboro's bid is nonresponsive because the warranty terms it offered in its bid did not conform to the IFB warranty terms. Instrument Technology, Inc., B-236983, Sept. 29, 1989, 89-2 CPD ¶ 300.

Foxboro argues that the warranty language included in its bid is irrelevant because of the application of the order of precedence clause.² According to the protester, the order of precedence clause "binds Foxboro to the warranty requirements of the [s]olicitation should a dispute arise between perceived inconsistent contract provisions." Therefore, according to the protester, even if the terms and conditions in Foxboro's bid are in conflict with the

²The IFB included FAR § 52.214-29, Order of Precedence-Sealed Bidding, which states that:

"Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order: (a) the [s]chedule (excluding the specifications); (b) representations and other instructions; (c) contract clauses; (d) other documents, exhibits, and attachments; and (e) the specifications."

provisions in the solicitation, the solicitation provisions would govern under the order of precedence clause and Foxboro would be bound by the warranties delineated in the solicitation.

The protester misunderstands the application of the order of precedence clause. The clause does not operate to negate the warranty terms in Foxboro's bid. The purpose of the clause is to assist in resolving any inconsistency which may appear among the solicitation's provisions themselves, not to nullify a submission by a bidder which makes its bid nonresponsive. Erincraft, Inc., B-235829, Oct. 10, 1989, 89-2 CPD ¶ 332. Accordingly, since the warranty submitted by Foxboro did not conform to the required warranty, its bid was properly rejected as nonresponsive.

The protests are denied.

/s/ Ronald Berger
for Robert P. Murphy
Acting General Counsel

³Although Foxboro also challenges the agency's determination that its bid was nonresponsive because it stated that travel costs could be charged to the government, we need not consider this issue, since we find that Foxboro's bid was properly rejected for offering nonconforming warranty terms.