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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-191163

DATE: June 20, 1978

MATTER OF: Savin Business Machines Corporation

DIGEST:

1. Failure of successful bidder to submit with bid preventive maintenance plan, key operator instruction plan, and samples of paper to be used with equipment for photocopying did not render bid nonresponsive since information related not to bidder's legal commitment to meet agency's needs, but to bidder's ability to perform, which may be determined on basis of information submitted after bid opening.
2. Sample requirement, although not generally imposed in connection with determining bidder responsibility, should normally be levied only upon bidder in line for award and not all bidders participating in procurement when requirement is imposed for that purpose.

Savin Business Machines Corporation (Savin) protests the award of a contract to Saxon Business Products, Inc. (Saxon) under invitation for bids No. IFB 10-0011-8, issued by the National Aeronautics and Space Administration (NASA), John F. Kennedy Space Center, Florida.

The IFB set forth a "copy purchase requirement" for photostatic reproduction, and required the successful bidder to furnish the necessary equipment, supplies, and maintenance to fulfill specified estimated monthly requirements for bond and electrostatic copies. The IFB specified that award would be made to the single responsive and responsible bidder offering the lowest per-copy price to the Government.

Savin contends that Saxon's low bid should have been rejected as nonresponsive because it was not accompanied by all of the material specified on page 5 of the IFB, which as amended states in pertinent part:

"Bidders must furnish with their bids such descriptive material, equipment specifications including original manufacturer's operating specifications, and related data necessary to define equipment capability and maintenance requirements, preventative maintenance plan, and key operator instruction plan. Bidders will specify model number and name of manufacturer of equipment to be furnished. A sample of each size paper printed by the machines must also be provided with each bid. The contractor will be expected to provide representative samples of the following:

8 1/2" x 11" Electrostatic or Bond
8 1/2" x 14" Electrostatic or Bond
11" x 10" (feet) Electrostatic."

NASA advises that Saxon submitted with its bid sufficient information to establish that its equipment could provide the volume and size of copies called for. However, NASA admits that Saxon failed to furnish with its bid a preventive maintenance plan, a key operator instruction plan, or the specified samples.

In this regard, the record shows that after bid opening, but prior to award, Saxon, which was the Kennedy Space Center's incumbent contractor for electrostatic and bond copy requirements, advised NASA in writing that NASA already had the omitted information, but reiterated that maintenance requirements under the instant IFB were identical to those on presently installed equipment under its existing contracts, and were explained in the Saxon Federal Supply Schedule under the Annual Maintenance Agreement section. Saxon further advised that if performance under the instant IFB required changing copiers from electrostatic to bond, it would instruct the key operators in the bond equipment as each machine is installed. Saxon also enclosed with its letter the required samples, which, according to the letter, were already in NASA's files.

NASA then determined that Saxon's presently installed machines were acceptable and met the specifications of the IFB; that no exceptions were taken to any IFB provisions; and that Saxon was responsible and capable of performing the requirements of the IFB. Award was accordingly made to Saxon.

NASA disagrees with Savin's contention that the material omitted from Saxon's bid went to the responsiveness of that bid. To the contrary, NASA contends that it relates to the bidder's ability to perform and therefore involves bidder responsibility rather than bid responsiveness. NASA advises that the information was requested to enable it to ascertain how bidders planned to implement certain requirements of the contract; it was not intended that the data become part of any resulting contract. In this regard, NASA points out that the IFB specified completely the Government's requirements and the contractor's obligations regarding preventive maintenance, key operators, and copy quality and sizes, so that Saxon's failure to include information on these three items with its bid had no effect on Saxon's legal commitment to perform the contract under the terms, conditions and specifications advertised.


We agree with NASA on this point. The terms of the solicitation required the contractor to furnish and install copying equipment supply the estimated quantities of paper in the required dimensions, provide emergency and preventive maintenance at the times specified on page 7, and provide key operator instructions at the time of equipment installation, as further specified at page 7. In our view, the requirement for submission of a maintenance plan and key operator instructions, along with data showing "equipment capability" (we note that this procurement was not for the purchase or rental of the equipment, but only for copy requirements) and with the paper samples, adds nothing to the bidder's commitment to perform in accordance with the IFB provisions and specifications that would arise from signing the bid. See Storage Technology Corporation--Reconsideration, B-190035, March 31, 1978, 78-1 CPD 257.

It should also be noted at this point that when descriptive data or bid samples are to be submitted with bids, a solicitation must contain certain specified information. NASA Procurement Regulation (PR) 2.202-5 (1977) sets forth the requirements and format for descriptive literature when that is required to permit NASA to determine whether products offered meet specification requirements and to establish exactly what the bidder proposes to furnish: the invitation must clearly state the purpose for which the literature is required, the extent to which it will be considered in the evaluation of bids, and the rules which will apply if a bidder fails to furnish it before bid opening, and must contain the clause set out at § 2.205-5(d)(2) of the regulation, which warns bidders of the consequences of not furnishing the data with the bid. This solicitation did not contain that clause or otherwise reflect the requirements of the regulation. Similarly, NASA PR 2.202-4, dealing with bid samples, requires that a bid sample requirement be accompanied by a listing of specific characteristics to be examined. No such listing with respect to the paper samples was included in the solicitation.

Accordingly, we have little difficulty in concluding that the IFB requirements for data submission and samples were included to enable NASA to determine the bidder's ability to perform in accordance with the contract terms, See BOW Industries, Incorporated, B-181828, December 12, 1974, 74-2 CPD 330; Cubic Western Data, Inc., 57 Comp. Gen. 17 (1977), 77-2 CPD 279; 53 Comp. Gen. 396 (1973); and not to enable NASA to determine exactly what the bidders proposed to furnish. In such an instance, a bid may not be rejected for failure to include the requested information, for such information bears on bidder responsibility; as such, it may be furnished after bid opening. This is so even where the solicitation states that the information must be submitted with the bid. See Cubic Western Data, Inc., supra, and citations therein; also BOW Industries, Incorporated, supra.

Consequently, it was not improper for NASA to take into account information provided by Saxon after bid opening and to accept Saxon's bid notwithstanding the fact that the bid was not accompanied by the data and samples.

However, since the data and sample requirements related to bidder responsibility, it was inappropriate for the solicitation to require submission of those items with the bids. Also, under the circumstances of this case, it is not clear to us why the paper samples were required at all. In general, sample requirements should not be imposed in connection with measuring a bidder's ability to produce an item, D.N. Owens Company, 57 Comp. Gen. 231 (1978), 78-1 CPD 66; B-173484(1), December 21, 1971; B-164732, September 30, 1968. Moreover, where a sample requirement can properly be justified for use in determining bidder responsibility, we would expect the requirement to be levied only upon the apparent low responsive bidder or other bidder in line for award, rather than uniformly upon all bidders participating in the procurement. The sample requirement here went beyond that, although we recognize that it dealt only with paper and apparently did not impose a significant burden on bidders. We are calling these deficiencies to the attention of the Administrator of NASA.


Acting Comptroller General
of the United States