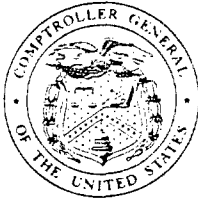


DECISION



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

9813

FILE: B-192996

DATE: April 12, 1979

MATTER OF: International Harvester Company

CNG 02136

DIGEST:

[Protest of Army Contract Award]

1. Under an invitation for bids which requires a bidder to supply information relating to point of origin and mode(s) of transportation for delivery of contract items F.O.B. origin, and to load items on carrier's vehicle, failure of bidder to furnish all or some of transportation data did not render bid nonresponsive. Where solicitation requires delivery F.O.B. origin, information concerning mode of transportation can be acquired by the Government after bid opening because bidder signed Standard Form 33 (SF 33) committing itself to deliver to designated points at Government's option, and information is extrinsically verifiable and is not under bidder's control.
2. Information furnished by bidder under second step solicitation requiring transportation data for F.O.B. origin bids, which indicated that contract item's shipping weight exceeded the specification's maximum weight for highway transport, does not render bid nonresponsive. Bidder's proposal under step one, which was incorporated in its step two bid, proposed to furnish item capable of disassembly to meet requirement, which was permitted by the Government's specification.
3. Bidder's failure to submit entire solicitation package does not render bid nonresponsive where portions of package submitted unambiguously incorporate by reference material terms and conditions of solicitation.

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4. Bidder's insertion of N/C (no charge) or a price next to each line item representing data items described on forms not returned with bid package obligates bidder to supply data items in accordance with specifications.
5. Protest concerning award to alleged nonresponsive bidder filed within 10 days of receipt of notice of award is timely filed even though protester had prior knowledge of alleged non-responsiveness of competitor's bid, since grounds for protest arose only upon receipt of notice of award.
6. Statement in solicitation that bids would be rejected if they allowed less than number of days specified in "Offer" portion of Standard Form 33 (SF 33) does not establish a minimum bid acceptance period where SF 33 is not altered to establish a minimum period which would eliminate the option provided bidders to offer less than a 60 day acceptance period.

International Harvester Company (International) DLG 00039
protests the award of a contract to Caterpillar Tractor Co. (CAT) under invitation for bids (IFB) No. DAAK70-78-B-0411 issued by the Army. The IFB, the second step in a two-step procurement, requested offers for the manufacture and delivery of 177 Rough Terrain Container Handlers with top-handlers.

International maintains that CAT's bid is nonresponsive for five reasons: (1) CAT's bid contemplates shipment by only one mode of transportation even though the solicitation provides for delivery of contract items on an F.O.B. origin basis and provides the Government with the option of deciding the most economical mode of transportation for delivery; (2) the item described in CAT's bid does not comply with the payload weight limitation for highway transport; (3) the firm's bid does not offer to supply the required data items; (4) CAT altered the bid acceptance period in its bid after bid opening; (5) the bid acceptance period in CAT's bid is ambiguous.

For the following reasons, we deny the protest.

Bids were solicited on an F.O.B. origin basis. Because delivery points were unknown, the costs of transporting supplies to destination would not be evaluated for award. The F.O.B. point for delivery on F.O.B. origin bids was specified as F.O.B. carrier's equipment, wharf or freight station at the Government's option.

The solicitation stated in clause B.16, entitled "Transportation Data for F.O.B. Origin Offers", that "the Government will ship the contract items using that mode of common carrier and the type and size of equipment which will result in the lowest overall transportation cost." Because shipment might be made utilizing a variety of modes and sizes of common carrier's equipment, the Government required submission of transportation characteristics, including the type and size of carrier's equipment. The protester maintains that by providing the information sought from bidders under this clause, bidders were offering a choice of transportation modes to the Government. Unlike International and one other bidder which listed rail and truck transport for their F.O.B. origin point(s), CAT listed only one mode of transportation (motor) from its plant and one mode of transportation (rail) from its subcontractor's plant. International argues that a bidder's failure to provide information regarding more than one mode of transportation nullifies the Government's right of choice because of the absence of alternative data. The protester also refers to other clauses in the solicitation which reaffirm the requirement that the Government have complete freedom of choice between multiple modes of shipment.

We basically disagree with the purpose and effect attributed by the protester to clause B.16. In our opinion, the bidder's offer to deliver at the points designated by the Government arises from the express statement to that effect in its signed offer on Standard Form 33 (SF 33) and is not perfected by providing information under clause B.16. The protester attributes too much significance to the act of providing information required by this clause. B.16

expressly states that the information would be used by the Government at the time of shipment in selecting the mode, type and size of common carrier equipment. We think it is clear that the Government did not intend to require a further affirmative offer to deliver as designated.

Although CAT may not have provided complete information concerning transportation modes, we do not construe this deficiency as limiting its offer in SF 33 to furnish the items at the designated points, that is "F.O.B. carrier's equipment, wharf or freight station at the Government's option." This information may be acquired by the Government after bid opening because the availability of a particular mode of transportation is extrinsically verifiable and is not under the bidder's control. 42 Comp. Gen. 434 (1963); Beta Systems, Inc., et al., B-184413, February 18, 1976, 76-1 CPD 109.

The protester argues that the solicitation establishes a maximum weight limitation of 72,000 pounds for highway transport of the trucks deliverable under the contract but that CAT bid a nonresponsive shipping weight of 78,100 pounds. To support its allegation of a maximum shipping weight limitation, the protester refers to clause 3.1.2.1 of the applicable military specification for the item. This provides:

"3.1.2.1 Highway transport. The truck shall be transportable on semitrailer(s)
* * *. Limited disassembly of the truck
* * * is acceptable to meet height, width,
length and weight requirements.

* * * * *

"Weight - the maximum payload weight for highway transport shall not exceed 72,000."

CAT's technical proposal, submitted under step one, responded directly to this specification and was incorporated in its step two bid. CAT designed its trucks with the capability for disassembly to meet this weight

limitation for highway transport. CAT's step-one proposal stated, "The 5,700 lb. slab counterweight, and two of the 1,800 lb. corner counterweights that fit into pockets within the rear bumper may be left on the truck and still have a weight less than the 72,000 lb. payload * * *." However, CAT's response to the invitation's requirement in the second step for shipping data (clause B.16) described the truck as weighing 78,100 pounds. The protester believes that CAT therefore does not contemplate disassembly of its trucks for shipment purposes. It argues that the Government would have to bear the expense of disassembly if it chooses delivery by motor carrier.

In our opinion, CAT did not qualify its bid regarding the cost of preparing the trucks for delivery. We take this position because the solicitation required the contractor to provide, at its bid price, delivery F.O.B. origin, carrier's equipment, wharf or freight station and to be responsible for loading the trucks on the carrier's vehicle. Moreover, the bidder executed SF 33, expressly offering delivery at the designated points. We believe CAT thus committed itself to meet any weight limitation incident to the mode of transportation selected by the Government, as long as the truck's design permits compliance with the weight limitation, as it does in this case. Moreover, the 78,100 pounds stated in CAT's bid was furnished in the context of rail shipment. Apparently, rail transportation can accommodate a truck weighing 78,100 pounds and we therefore find no inconsistency in CAT's bid.

The protester cites prior decisions of this Office in which the shipping data furnished with the bid indicated that the bidder would not comply with other specifications. For example, see B-163181, February 7, 1968 and B-161984, January 29, 1968. The present case, however, is distinguishable because we have concluded that the shipping information does not necessarily conflict with the design requirement to which the bidder has committed itself.

The protester argues that by CAT's failure to submit DD Form 1423, "Contract Data Requirements List", and DD Form 1664, "Data Item Description" with its bid, CAT

avoided any obligation to supply data in accordance with the detailed requirements contained in those forms. Although the protester concedes the fact that CAT inserted a bid price or N/C (no charge) for each data item listed in the bid schedule, it argues that, nevertheless, CAT's offer does not indicate that these data items would comply with the forms' data item description. International states that CAT's contract contemplates something less than the data described in the solicitation.

The protester argues that bidders were required to return these forms with their bids because item 4 of the bid schedule states, "Data in accordance with Contract Data Requirements List, DD Form 1423, * * * Marked Exhibit 'A' hereto and made a part hereof, individually priced per following data items." Contrary to the protester's assertion, this language does not expressly require a bidder to attach the DD Forms to its bid. Rather, the forms were attached to the IFB by the Government and marked Exhibit A for identification purposes. Moreover, paragraph 2 of the General Provisions merely requires a bidder to sign the solicitation and print or type its name on the bid schedule and continuation sheets.

Generally, where the bidder fails to return the entire solicitation package, the bid must be submitted in a form so that the Government's acceptance creates a valid and binding contract requiring the bidder to perform in accordance with all the material terms and conditions of the invitation. International Signal and Control Corp., et al., 55 Comp. Gen. 894 (1976), 76-1 CPD 180. A responsive bid must not deviate from the material terms and conditions of the invitation. See 49 Comp. Gen. 538 (1970); 49 Comp. Gen. 289 (1969).

In this case, CAT signed and returned SF 33. This form listed all of the documents comprising the IFB, including "Sec. M List of Documents and Attachments." Section M specifically listed the "Data Requirements List, DD 1423", as part of the IFB. DD Forms 1664 describe in more detail each data item listed on the DD 1423's. The use of the words "In compliance with

the above" on Standard Form 33, in conjunction with the documents' listing which comprises the invitation package, incorporates the entire package by reference, making a signed bid responsive even though portions of the solicitation are not physically returned. 49 Comp. Gen. 538, supra. This is so even though the references to the material provisions are general and can be identified only through an examination of the complete IFB. Armada, Inc.--Reconsideration, B-189409, April 17, 1978, 78-1 CPD 288.

In this connection the protester urges that CAT's bid did not unambiguously incorporate the amended DD Forms 1423, because both the amended as well as the original DD 1423s, as issued by the Government, were dated July 31, 1978. Consequently, the protester argues that unless a bidder submitted the amended DD Forms 1423 with its bid, the Government could not be certain which forms were offered by the bidder. The record, however, shows that the original DD Forms 1423 were dated May 1, 1978, the amended forms are dated July 31, 1978. In any event, we think the Government would be in a position to prove which forms were sent with the amendment to the solicitation.

Furthermore, even though the data item descriptions in the schedule are generally worded, CAT's insertion of N/C or a price next to each line item is evidence of its intent to be bound by the solicitation's requirements, and absent a material requirement to do more, obligates CAT to furnish the data items. 45 Comp. Gen. 222 (1965); Storage Technology Corporation--Reconsideration, B-190035, March 31, 1978, 78-1 CPD 257.

International also contends that CAT took exception in its step-one proposal to two of the data requirements. However, these items were deleted by an amendment.

The protester also alleges that CAT's bid was non-responsive because it indicated a bid acceptance period of less than 60 days. International contends that CAT's bid was altered after bid opening in an attempt to make the bid responsive but that the alteration succeeded only in making the bid ambiguous. The agency, however, argues that this basis for protest is untimely raised

because the protester was aware of the alleged nonresponsiveness more than 10 working days before filing its protest. Timeliness, however, is measured from the time the protester learns that the agency has accepted or intends to accept an allegedly nonresponsive bid, since it is at that time, rather than when the alleged nonresponsiveness is discovered, that grounds for protest arise. See Carco Electronics, B-186747, March 9, 1977, 77-1 CPD 172. Thus, the protest filed here within 10 days after the protester received notice of the award to CAT is timely. 4 C.F.R. § 20.2(b)(2) (1978).

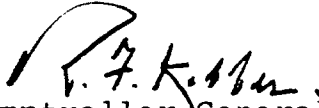
The threshold issue is whether the solicitation contained a minimum bid acceptance period. The agency claims it did not because of inadvertent error. The protester states that an informational copy of the IFB for step two contained a clause entitled "Minimum Acceptance Period" which expressly stated that bids offering less than 60 days for acceptance would be considered nonresponsive. The IFB, as finally issued, contained the statement that bids would be rejected if they allowed less than the number of days specified in the "Offer" portion of SF 33. Nevertheless, a minimum acceptance period was not included in this IFB because the "Offer" portion of SF 33 was not revised in accordance with Defense Acquisition Regulation (DAR) 2-201(a)C (xviii). That regulation provides that a minimum bid acceptance period must be inserted in the "Offer" portion of SF 33 and that the form must be altered to eliminate the option provided bidders to offer less than 60 days.

In our opinion, it would be incongruous to construe the IFB as requiring a minimum bid acceptance period merely because one section of the IFB refers to a nonexistent minimum period in another section. The language in SF 33 that a bid will remain open for "60 calendar days" if no other time is specified by the bidder merely presents an option to the bidder to offer less than a 60 day acceptance period. 47 Comp. Gen. 769, 771 (1968). Ordinarily, nothing in the "Offer" portion of SF 33 prevents a bidder from providing an acceptance period greater or less than 60 days. 47 Comp. Gen., supra. Moreover, we think the preliminary informational copy of the IFB cannot be given effect where

the official solicitation as finally issued otherwise provides. Although the protester cites several prior decisions in which we found a minimum acceptance period to exist, the decisions are distinguishable because there was other language in the solicitations which justified imposing a specific minimum period for bid acceptance; such language is not present in this case.

Thus, we conclude that the period for bid acceptance was not made a material requirement in this procurement. The other issues raised in this regard assume the materiality of the bid acceptance period and, therefore, are academic.

For the reasons stated, the protest is denied.


Deputy Comptroller General
of the United States