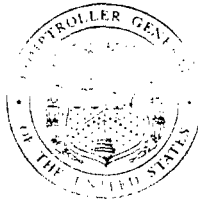


Proc 2

DECISION



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

10,437

FILE: B-194114

DATE: June 13, 1979

MATTER OF: Remco Business Systems, Inc.

[Protest Alleging Agency Made Special Exception For Award of IFB Requirements]
DIGEST:

1. Requirement that contractor furnish "brand name or equal" parts in course of providing maintenance service is performance requirement and not definitive responsibility criterion.
2. Contracting agency did not make special exception for bidder in permitting bidder to provide information pertaining to responsibility after opening of bids, since any bidder who might have chosen to furnish information after submission of bids would have been entitled to same treatment whether stated in IFB or not.

DLG-01764

Remco Business Systems, Inc. (Remco), protests the award of a preventive and emergency maintenance contract for Government-owned Remington Lektrievers to National Office Systems, Inc. (NOSI), under invitation for bids (IFB) No. 20-79-HEW-0S, issued by the Department of Health, Education, and Welfare (HEW).

DLG-01802

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Remco protests on two grounds: (1) that NOSI is neither authorized by Remington to service Remington equipment nor authorized to secure replacement parts for Remington Lektrievers; and (2) that HEW improperly waived certain informational requirements of the IFB for NOSI's sole benefit.

*Maintenance Service Contract
Bidder responsible
Contract award...*

The first ground of protest is based on Remco's interpretation of the last sentence of article II(B)(6) of the IFB's specifications, which Remco believes sets forth a definitive responsibility criterion. Article II(B)(6) provides:

"Thorough inspections by the Contractor are to be made in accordance with commercial practice governing maintenance of Lektrievers. The cost of inspections and service calls shall include necessary

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repair parts, unless otherwise specified, except supplies or accessories, to keep the Lektrievers in good operating condition. Only new, standard parts, manufactured by the maker of Lektrievers, or parts of equal quality, will be used." (Emphasis supplied.)

Since NOSI's bid neither limited, reduced nor modified its obligation to perform the required service, it must be considered responsive. 53 Comp. Gen. 396 (1973). Thus, NOSI's ability to furnish appropriate parts in the course of its performance of the required service is a matter of responsibility. Remco's allegation that NOSI is neither authorized to service Remington equipment nor authorized to secure replacement parts from Remington constitutes a protest against HEW's affirmative determination of NOSI's responsibility.

We do not review protests against affirmative determinations of responsibility unless either fraud is alleged on the part of procuring officials or the solicitation contains definitive responsibility criteria which have allegedly not been applied. Central Metal Products, Incorporated, 54 Comp. Gen. 66 (1974), 74-2 CPD 64; Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376. We do not share Remco's belief that its allegation falls within the ambit of the definitive responsibility criteria exception. In our view, a requirement that a contractor use what amounts to "brand name or equal" parts in the course of maintaining and servicing Government-owned equipment is a performance requirement. Descriptions of how work is to be accomplished do not become definitive responsibility criteria just because they are stated in detail. Contra Costa Electric, Inc., B-190916, April 5, 1978, 78-1 CPD 268. Therefore, we will not consider this aspect of Remco's protest.

Remco's second ground of protest concerns NOSI's reaction to the IFB's appendix "A," entitled "Bidder's Qualification Sheet," which reads in part:

"EXPERIENCE: List contract you are presently working on and those completed during the past two years of a nature

similar to the work described in the Invitation. It is preferred that you include those contracts performed for Federal Government Agencies, but contract for commercial organizations may also be included."

The facts surrounding Remco's contention, that HEW improperly waived the above informational requirement for NOSI's sole benefit, are as follows.

HEW reports that after its December 11, 1978, issuance of the IFB, it received a letter, dated December 29, 1978, from NOSI. The letter sought substantive and procedural information which NOSI required for the computation of its bid. One of the procedural aspects which concerned NOSI was the potentially adverse commercial impact of disclosing all of its current and previous contracts in its bid. NOSI asked:

"With respect to Appendix 'A' Bidders Qualification Sheet paragraph heading 'EXPERIENCE', is it required that we list our current and previous contracts, other than the ones with the Department of Health Education and Welfare? We will furnish this information if it will be treated as confidential by HEW, otherwise, such information could be useful to our competitors if it was to become public information."

On January 3, 1979, HEW responded to the NOSI inquiry as follows:

"With respect to Appendix 'A' Bidders Qualification Sheet paragraph heading 'EXPERIENCE', you may list any contracts other than those with DHEW, at your discretion. Information submitted in response to an Invitation for Bids is subject to public scrutiny. While we would not gratuitously disseminate such data, if it were asked for we could not withhold it."

At the January 15, 1979, bid opening, appendix "A" of NOSI's bid contained only the following entry:

"Pursuant to our letter of enquiry, 12/29/78, and your response of 1/2/79 we reserve the right to withhold information on other contracts for the reasons stated in our letter."

It is our understanding that subsequent to bid opening, but prior to award, NOSI furnished HEW with a list of its previous contracts which was used by HEW in its preaward survey of NOSI.

Remco recognizes that the appendix "A" information was to be used by HEW in arriving at a bidder responsibility determination. Remco also acknowledges that "the inadvertent failure of a bidder to supply information relevant to the determination of responsibility should not be considered a matter of bid responsiveness." (Emphasis in original.) However, Remco argues that the deliberate nature of NOSI's omission, executed under the aegis of HEW's ex parte sanction, raises the issue above a bid responsiveness versus bidder responsibility plane and turns it into a matter which touches the very integrity of the competitive bidding system. Remco believes that HEW's action in waiving the informational requirement for NOSI without notifying other bidders or potential bidders violates the principle that all competitors must be given the opportunity to submit offers on a common basis. Remco is further of the opinion that had HEW so notified all potential bidders, competition might have been increased.

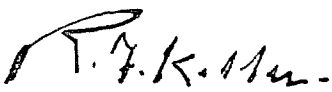
In our view, the issue raised concerns an invitation requirement which seeks to establish NOSI's general capacity to perform in accordance with the contract terms. We have observed that:

"The distinction between responsibility and responsiveness is an important one because a bid which is nonresponsive at bid opening must be rejected; it cannot be made responsive after bid opening through the submission of additional information.

46 Comp. Gen. 434 (1966); 40 id. 432 (1961); see Shnitzer, Government Contract Bidding 237-9 (1976). However, a bid may not be rejected for failure to include information relating to the bidder's responsibility; information bearing on responsibility may be furnished after bid opening. Allis-Chalmers Corporation, 53 Comp. Gen. 487 (1974), 74-1 CPD 19; Concept Merchandising, Inc., et al., B-187720, December 17, 1976, 76-2 CPD 505. This is so even where the solicitation states that the information must be submitted with the bid or that the bid will be rejected if the information is not included. Victory Van Corporation, 53 Comp. Gen. 750 (1974), 74-1 CPD 178; 52 Comp. Gen. 647, supra; id. 389 (1972); id. 265 (1972); 48 id. 158 (1968)."
Cubic Western Data, Inc., 57 Comp. Gen. 17, 20 (1977), 77-2 CPD 279.

As the foregoing quotation indicates, it is an established legal principle that any bidder who does not furnish data pertaining to its responsibility with its bid may submit such data any time before a determination of responsibility is made. Therefore, we do not find that HEW made a special exception for NOSI in permitting it to provide information pertaining to responsibility after the opening of bids. Any bidder who might have chosen to furnish the responsibility information after the submission of its bid would have been entitled to the same treatment whether stated in the IFB or not. Thus, bidders were not precluded from submitting bids on a common basis.

For the foregoing reasons, the protest is dismissed in part and denied in part.


Deputy Comptroller General
of the United States