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DECISION



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

FILE: B-208366

DATE: March 7, 1983

MATTER OF: Bus Industries of America, Inc.

DIGEST:

Grantee's decision to reject both bids received under IFB and to negotiate with both offerors to effect a technically acceptable contract was proper where both bids were originally nonresponsive because they failed to meet salient characteristics in brand name or equal procurement. After both firms were given opportunity to cure deficiencies, protester's offer was still unacceptable in several areas while awardee's offer substantially satisfied grantee agency's minimum needs. Awardee's one minor deviation from specifications was acceptable to grantee agency's technical personnel, and, in view of number of deficiencies still found in protester's proposal, award to awardee was justified.

Bus Industries of America, Inc. (Bus Industries), has submitted a complaint concerning the award of a contract by the Transit Authority of Northern Kentucky (TANK) to Gillig Corporation (Gillig). TANK is a recipient of Federal grant funds from the Urban Mass Transportation Administration (UMTA), Department of Transportation, pursuant to UMTA grant projects Nos. KY-03-0019 and KY-05-0011. Bus Industries charges that TANK improperly awarded the contract to Gillig, even though the bid submitted by Gillig was nonresponsive. Our review is undertaken pursuant to 40 Fed. Reg. 42406 (1975).

We find that Bus Industries' complaint is without merit.

The invitation for bids (IFB) called for furnishing ten 35-foot, heavy-duty, air-conditioned buses. In addition to the IFB, the procurement documents included general conditions and instructions, special provisions, and technical specifications. The technical specifications described the vehicles to be furnished in some detail. For most major

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components or subsystems of the vehicles, the specifications stated specific brand names which were to be supplied. In lieu of the brand name components, bidders were allowed to submit "approved equals" which met the design and performance specifications set forth in the IFB. Bids were opened on April 23, 1982, and only Bus Industries and Gillig submitted bids.

After reviewing the bids, TANK officials "noted a few discrepancies" between the IFB and the bids submitted by Bus Industries and Gillig. TANK contacted both firms and asked for a written response to the discrepancies noted. According to TANK, Bus Industries' bid remained non-compliant. Gillig, however, submitted information to TANK that "effectively cleared up the discrepancies." Accordingly, the TANK board members determined that Gillig's bid was acceptable and voted unanimously to award Gillig the contract.

Bus Industries protested to TANK against the proposed award to Gillig. TANK denied Bus Industries' protest. Bus Industries protested to UMTA, essentially arguing that, since both bidders were initially nonresponsive, Bus Industries should have been awarded the contract as the lower priced bidder rather than allowing Gillig to correct its nonresponsive bid. UMTA denied this protest by letter dated July 14. UMTA indicated that Gillig was allowed to correct its bid because, in TANK's opinion, the deficiencies were "informalities that were not substantive and material to the bid and therefore * * * could be waived and corrected after the bids had been opened," while the deviations in Bus Industries' bid were determined by TANK to be "substantive and material." On August 10, Gillig was awarded the contract.

In its complaint to our Office, Bus Industries contends that since both bids were nonresponsive to the IFB's specifications, either: (1) Bus Industries should be awarded the contract since its price was lower than Gillig's price, or (2) the contract with Gillig should be canceled and the requirement readvertised.

We review the propriety of contract awards made by grantees to insure that Federal Government agencies are requiring their grantees, in awarding contracts, to comply

with any applicable Federal legal requirements, including the terms of the grant agreement. See Copeland Systems, Inc., 55 Comp. Gen. 390 (1975), 75-2 CPD 237. The grant agreement between TANK and UMTA requires TANK to follow the minimum procurement requirements of attachment "O" to Office of Management and Budget Circular A-102. In effect, TANK was required to insure that the maximum practicable competition was obtained and that all bidders were given a full and fair opportunity to compete on an equal basis. See International Business Machines Corp., B-194365, July 7, 1980, 80-2 CPD 12. Since none of the parties has cited any State law dealing with responsiveness of bids, our review is founded on whether TANK's actions were consistent with the fundamental principles of Federal procurement inherent in the concept of competition. See Wismer & Becker Contracting Engineers, B-202075, June 7, 1982, 82-1 CPD 538; see also International Business Machines Corp., supra.

We have held that, where all bids received by a grantee agency in response to an IFB are nonresponsive, the grantee agency may properly reject all bids and negotiate with the nonresponsive bidders to effect an acceptable award. See Babcock & Wilcox Company, B-189150, November 15, 1977, 77-2 CPD 368. The test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform without exception the exact thing called for in the invitation, which upon acceptance will bind the contractor to perform in accordance with all its material terms and conditions. National Radio Company, Inc.; Bruno-New York Industries Corp., B-198240, July 25, 1980, 80-2 CPD 67. Here, there is no question that both Gillig and Bus Industries initially submitted nonresponsive bids since the bids of both firms failed to meet the salient characteristics of the brand name products which were specified in the IFB. See Cohu, Inc., B-199551, March 18, 1981, 81-1 CPD 207. When a design feature such as maximum size or weight is specified, the "equal" product must meet the requirement precisely. Cohu, Inc., supra; Ebsco Industries, Inc.; American of Martinsville, B-206401, B-206401.2, June 2, 1982, 82-1 CPD 524. Since both bids received under the IFB were nonresponsive, TANK properly could have rejected them both and negotiated with Bus Industries and Gillig in order to obtain an acceptable product under the holding of Babcock & Wilcox Company, supra.

Even though TANK did not specifically announce its intention to reject all bids and negotiate, its actions were tantamount to doing just that. On April 26, TANK notified both bidders of the specific discrepancies between their bids and the IFB's specifications and gave them an opportunity to clarify or remedy their original bid deficiencies. In effect, TANK was negotiating with both nonresponsive bidders at this point.

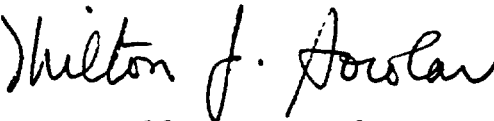
Bus Industries' response to TANK's inquiry showed that Bus Industries remained technically unacceptable in several important areas. More specifically, Bus Industries was judged by TANK to remain noncompliant regarding warranties, air conditioning and road test plans, engine performance curves (Bus Industries responded that they could provide a rear end ratio performance curve of only 4.375 instead of the IFB-specified 5-3/8.), and brake system air reservoir capacities.

On the other hand, the original Gillig bid did not meet the design specifications (salient characteristics) in two specific areas. The IFB required the rear axle ratio of "5-3/8," but Gillig specified in its bid a rear axle ratio of 4.11. In addition, the IFB specified that all air tanks in the brake system should have a capacity of 1,970 cubic inches, but Gillig originally offered an auxiliary air reservoir capacity of only 1,114 cubic inches. In response to TANK's April 26 inquiry, Gillig stated that it would comply with the IFB's stated rear axle ratio of 5-3/8, but offered a brake system air tank capacity of only 1,913 cubic inches instead of the original IFB-specified capacity of 1,970 cubic inches. TANK's technical personnel decided that Gillig's proposed buses were technically acceptable, and TANK's Board of Directors voted unanimously, on May 12, 1982, to accept Gillig's proposal even though Bus Industries' price was \$76,790 less than Gillig's price for all ten buses.

We cannot fault TANK for its actions in this case. After receipt of only two technically deficient offers, it negotiated with both offerors. Bus Industries' offer remained technically deficient in a number of areas, as enumerated above, while Gillig's offer was viewed as having been cured with regard to any previous technical deficiencies. The sum total of the Bus Industries' deficiencies justified TANK's decision to reject the

Bus Industries proposal. See Center for Employment Training, B-203555, March 17, 1982, 82-1 CPD 252. On the other hand, Gillig, the only other offeror, offered buses which were viewed by TANK as meeting all of its minimum needs even though the brake system air reservoir capacity offered (1,913 cubic inches) was slightly less than the 1,970 cubic inch capacity TANK had originally requested. Even assuming that Gillig's proposal ultimately failed in this one respect (even though TANK did not view the air reservoir capacity as a problem), in view of the fact that Gillig was the only offeror which sufficiently met the IFB's specifications, TANK's acceptance of Gillig's offer was reasonable in these circumstances even though Gillig's offer was higher priced than Bus Industries' offer. See American Coalition of Citizens with Disabilities, Inc., B-205191, April 6, 1982, 82-1 CPD 318.

The complaint is denied.

for 
Comptroller General
of the United States