

Protest of)
) Date: December 11, 1987
 TOLEDO SCALE CORPORATION)
)
 Solicitation No. 169990-87-A-0056) P.S. Protest No. 87-127

DECISION

Toledo Scale Corporation (Toledo) protests the contracting officer's rejection of its bid as nonresponsive because it qualified its bid.

Invitation for Bids No. 16990-87-A-0056 was issued on October 9, 1987, by the Central Procurement & Materiel Management Service Center, Chicago, IL, for 2442 electronic scales with an option for an additional 1272 units. The offer due date of October 7, 1987, was extended to November 4, 1987, by Amendment A02. Eight bids were received. Toledo was the apparent low bidder, with a bid aggregating \$730,133.58; the next low bid was that of System 10 in the aggregate amount of \$778,998.00.

By letter of November 6, 1987, the contracting officer informed the protester that its bid was rejected as nonresponsive, in accordance with Postal Contracting Manual (PCM) 2-404.2 (a). The basis for the rejection was that Toledo qualified its bid on page 9 of 30, Item A1, as follows: "NOTE: Pricing does not include Federal, State, and Local Taxes."^{1/} In the letter of November 6, the contracting officer advised the protester that its offer failed to conform to the essential requirement of the invitation for bids "by conditioning the prices subject to governmental taxes. ..." The contract was awarded to System 10, the second low bidder. Toledo's protest against the award was received by the contracting officer on November 18, 1987.

The protester asserts that by its letter dated November 12, 1987, clarification was made of its intent to incur all taxes, if any, including federal, state and local taxes. Toledo also claims that if all units (2442) were shipped to "one of the three known taxable states at a tax rate of five percent", the additional tax burden would be \$36,506; since

^{1/}The solicitation, at General Provision 25(a) of P.S. Form 7332, states that:

Except as may be otherwise provided in this contract, the contract price includes all applicable Federal, State, and local taxes and duties.

the bid of the protester was \$48,864 lower than the next lowest bid, even with the payment of the taxes the Postal Service would still realize a savings of \$12,358.

In addition, Toledo asserts that the rejection of its bid was improper because it did not fail to conform with "essential" requirements of the solicitation. Toledo proposes that consideration should be given to PCM 2-405 (Minor Informalities or Irregularities in Bids) and PCM 2-406.3 (Other Mistakes Discovered Before Award) since, it is claimed, that the protester's bid would be advantageous to the Postal Service.

The contracting officer states that the protester's notation excluding taxes is clear in its intent and not subject to misunderstanding. He points out that if the intent of the protester was to comply with the requirement of the solicitation, the notation excluding taxes was unnecessary. Moreover, the contracting officer asserts that Section J2 b of the solicitation indicates where inquiries should be directed.

To be responsive, a bid must unequivocally offer to meet the solicitation's material terms at the bid price. Southwood Builders, Inc., P.S. Protest No. 87-44, June 3, 1987; Pease Management and Construction, Inc., P.S. Protest No. 86-68, October 24, 1986; J. Baranello and Sons, 58 Comp. Gen. 509 (1979). Here, the clause requiring the inclusion of all taxes in the bid price was clear, and the requirement that it be included in all advertised contracts necessitates the determination that this clause is a material one. Cf. Pease, supra. Since the protester's bid excluded taxes in contravention of a material requirement of the solicitation, an offer to perform all of the contract obligations for the bid price was not made. The qualification of the protester's bid rendered the bid indeterminate and unacceptable.

Concerning the protester's contention that the Postal Service may waive minor deficiencies in bid, the protester's bid qualification is not a minor informality under PCM 2-405.^{1/} As stated above, the informality or irregularity is material. To the extent that the protester attempts to quantify the amount of taxes which were excluded from its bid, the amount which it states is approximately five percent (5%) of the bid price. This cannot be considered either trivial or negligible. See, e.g., Jerry Ganz, Inc., P.S. Protest No. 86-73, December 12, 1986; Quality Roofing Co., Inc., P.S. Protest No. 85-97, March 20, 1986.

The protester also asserts that a mistake in its bid occurred. In order to grant relief pursuant to PCM 2-406.3, a "mistake" must have been made by the protester. The intent of the qualification of its bid is clearly to exclude taxes and cannot be deemed a mistake. Cf. Quality Roofing Co., Inc., supra. As such, relief under PCM 2-406.3 may not be granted.

^{2/}PCM 2-405 provides as follows:

A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids, having no effect or merely a trivial or negligible effect on price, quality, quantity or . . . performance of the services being procured, and the correction or waiver of which would not affect the relative standing of, or be otherwise prejudicial to, bidders. . . .

Acceptance of the protester's bid with the claimed exclusion would be unfair to the other bidders who were required to include the amount of taxes in their bids. These other bidders would be prejudiced because the protester would have an chance to determine after all the bids have been revealed on what basis it will accept the contract. To maintain the integrity of the competitive bidding system, the protester should not be granted a second opportunity for consideration of its bid. Southwood Builders, Inc., supra; Government Contract Services, Inc.; Daly Construction, Inc., P.S. Protest No. 85-95, January 21, 1986.

The protest is denied.

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[checked against original JLS 3/22/93]