

Protest of) Date: June 3, 1987
SOUTHWOOD BUILDERS, INC.)
Solicitation No. 419980-87-A-0019) P.S. Protest No. 87-44

DECISION

Southwood Builders, Inc. (Southwood), protests the contracting officer's rejection of its bid as nonresponsive because Southwood qualified its bid.

Invitation for Bids No. 419980-87-A-0019 (the IFB) was issued by the Facilities Service Center, Philadelphia, PA, on March 9, 1987, for the construction of a Postal Service facility in Chesterfield, VA. Seven bids received were opened as scheduled on April 8. The apparent low bidder asserted a mistake in its bid, and the contracting officer allowed it to withdraw the bid pursuant to Postal Contracting Manual (PCM) 2-406, based upon clear and convincing evidence of the mistake. Southwood thereby became the apparent low bidder with a bid of \$1,425,000, followed by A.D. Whittaker Construction Co., Inc. (Whittaker) with a bid of \$1,440,000.

Southwood's bid was rejected as nonresponsive on May 1 because it qualified its bid by including in block 8 of the bid form the statement, "WE EXCLUDE VIRGINIA POWER FEES!" On May 5, the contracting officer awarded Contract No. 419980-87-V-0403 to Whittaker, at a price of \$1,440,000. Southwood's protest against the award was received by the contracting officer on May 11.

In its protest, Southwood explains that it had not been able to obtain a firm estimate of the electrical costs for the project from Virginia Power before submitting its bid, and sought to provide the Postal Service with the most accurate bid figure it could obtain. It contends that the solicitation did not require that electrical fees be included in bids and that its statement was simply a clarification of that belief. Southwood further contends that the Postal Service should waive the exclusion of the power fees because it would be in the best interests of the Postal Service to do so; the award to Whittaker being at a price \$15,000 higher than Southwood's. The protester relies on the language in PS Form 7389, Instructions to Bidders, paragraph 10,^{1/} included in the solicitation for support of its request for waiver.

^{1/} Subparagraph 10(b) provides, "The Postal Service may, when in its interest, reject any and all bids or waive any informality or irregularity in bids received."

The contracting officer states in his report that a single, lump sum price was requested in the IFB and that there was no basis upon which a qualified bid such as Southwood's could be accepted. He further argues that relevant portions of the IFB concerning electrical power fees require the contractor to pay all electrical fees and include those costs in the bid.

Southwood's contention that electrical fees were not to be included is in direct conflict with the IFB. Several provisions of the contract regarding electrical power call for such fees to be included in the bid price: General Provision 52(b); Special Provisions 17(a) and 19(e); and Amendment No. 1, Drawing C-1 (dated March 20, 1987) General Note No. 1. The provision in Drawing C-1 is illustrative. It provides, in relevant part:

Contractor shall include all costs for all fees, permits, applications, construction by utility companies and/or outside sources, capital connections charges/user fees, taxes if applicable, and/or any other associated costs required to obtain utility connections/services, or by local county or state agencies requiring same for their services.
[Emphasis added.]

The contracting officer correctly concluded that there was nothing in any of the bid documents which called for or allowed a qualification.

To be responsive, a bid must unequivocally offer to meet the solicitation's material terms at the bid price. J. Baranello and Sons, 58 Comp. Gen. 509, 514 (1979). In Pease Management & Construction, Inc., P.S. Protest No. 86-68, October 24, 1986, the requirement to "obtain and pay for all fees and charges for connection to outside services"¹⁷ was found to be an essential or material term of the solicitation. The protester in Pease, like Southwood, attempted to exclude fees for utility connections on the face of its bid. The bid there was found to "impose conditions which modify requirements of the IFB or limit the bidder's liability" and was rejected under PCM 2-404.2 (d) as nonresponsive.

Because Southwood's bid excluded the utility fees in contravention of material requirements of the solicitation, it does not offer to perform all of the contract obligations for the price bid. The qualification had the effect of rendering Southwood's bid indeterminate and unacceptable.

Southwood further contends that the Postal Service may waive minor deficiencies in bids when such waiver would be in the best interest of the Postal Service and that, in this case, the saving of \$15,000 if Southwood's bid is accepted instead of Whittaker's is in the best interest of the Postal Service. PCM 2-405, the controlling provision, provides:

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

¹⁷ This language from the solicitation in Pease is identical to that appearing in General Provision 52(b) of the solicitation at hand.

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. . .

Southwood's bid qualification may not be considered a minor informality for several reasons. First, the irregularity in Southwood's bid is material. Southwood indicates that its inability to obtain a firm price from Virginia Power was behind its exclusion of those fees from its bid. Thus, Southwood has not shown that the potential Virginia Power fees would only have a "trivial or negligible" effect on price since it has excluded the fees altogether and presented no evidence of their amount. See Pease, supra. Southwood could have included a contingency in its bid to cover the fees, the determination of which is a risk which the fixed price solicitation passes along to all bidders.¹⁷ Second, accepting the Southwood bid cannot be said to be in the best interests of the Postal Service on financial grounds precisely because Southwood excluded the Virginia Power fees from its bid, and it is impossible to determine what, if anything, would be saved by the Postal Service if Southwood's qualified bid could be accepted and the utility fees added later. Third, granting a waiver in this case would be contrary to the spirit of the competitive bidding system, a result clearly not in the best interests of the Postal Service.

To the extent Southwood requests acceptance of its qualified bid, acquiescence would be unfair to other bidders who were required to assess and include in their bids an amount for the Virginia Power fees. To the extent Southwood requests waiver of the qualifying language and Postal Service acceptance of the bid amount as inclusive of utility fees, all other bidders would be prejudiced because Southwood would get "a second bite at the apple," and, in effect, a chance to decide after all bids have been revealed on what basis it will accept the contract. Maintaining the integrity of the competitive bidding system requires that Southwood not be allowed this second opportunity for consideration of its bid. Government Contract Services, Inc., Daly Construction, Inc., P.S. Protest No. 85-95, January 21, 1986.

The protest is denied.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[Compared to original 3/4/93 WJJ]

³⁷ The record also indicates that before bidding Southwood sought no clarification from the contracting officer as to how it should proceed, an option available to all bidders prior to bid submission. PS Form 7389, Invitation to Bidders, Paragraphs 1 and 14.