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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: C. Lawrence Construction Company, Inc.

File: B-290709

Date: September 20, 2002

Charles A. Lawrence, Jr., for the protester.
Frank P. Buckley, Esq., Department of Labor, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the
General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of invitation for bid's terms is sustained where protester reasonably interpreted specification governing interior signs to be installed as requiring named manufacturer's signs and there is no evidence in the record that only named manufacturer's signs will satisfy the agency's needs.

DECISION

C. Lawrence Construction Company, Inc. protests the terms of invitation for bids (IFB) No. IFB-02-DCS-32-JC, issued by the Department of Labor, Employment and Training Administration, for construction of educational and vocational buildings at the Turner Job Corps Center in Albany, Georgia. Lawrence contends that the specification governing signs to be installed in the buildings is unduly restrictive of competition.¹

¹ In a subsequent submission to our Office, filed after bid opening, the protester argued that other specifications in the IFB were also restrictive of competition. These arguments are untimely because they were not raised prior to bid opening; accordingly, we will not consider them. Our Bid Protest Regulations require that protests based upon alleged improprieties in a solicitation that are apparent prior to bid opening be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (2002). To the extent that the protester argues that it did raise the matters in its initial protest by stating that "there are other problems related to semiproprietary specification requirements paragraph 2.01.5.2, which we do not have time to address," Protest at 2, this was not a sufficiently detailed allegation.

We sustain the protest.

The IFB, which contemplated the award of a fixed-price contract, requested lump-sum prices on a base item and four additive alternate items. The base item encompassed the construction of two new buildings with complete mechanical, electrical, and plumbing systems and interior and exterior finishes, as well as site improvement work. A number of the specifications describing the work to be performed identified acceptable products and/or acceptable manufacturers. In some cases, the specifications indicated that products equal to those identified would be permissible,² while other specifications made no allowance for equal products.³ With specific relevance to this protest, the specification governing interior modular and interchangeable signs identified as “[a]cceptable [m]anufacturers” of the signs to be furnished “ASI Sign Systems . . . [o]r pre-approved manufacturer with an equal product.” The specification also identified “ASI INTERIOR 20 Series” as an acceptable product and furnished a detailed description of the characteristics of the ASI Interior 20 signs. IFB§ 10447, ¶¶ 2.01 and 2.02.

In addition to the above specification describing the signs to be furnished, the IFB contained a more general Materials and Equipment specification, which provided as follows:

Procedures governing product selection include the following:

1. Proprietary Specification Requirements: Where Specifications name only a single product or manufacturer, provide the product indicated. No substitutions will be permitted.
2. Semiproprietary Specification Requirements: Where Specifications name 2 or more products or manufacturers, provide 1 of the products indicated. No substitutions will be permitted.
 - a) Where Specifications specify products or manufacturers by name, accompanied by the term “or equal” or “or approved equal,” comply with the Contract Document provisions concerning “substitutions” to obtain approval for use of an unnamed product.
3. Nonproprietary Specifications: When Specifications list products or manufacturers that are available and may be incorporated in the Work, but do not restrict the Contractor to use of these products only, the Contractor may propose any available product that complies with Contract requirements. Comply with Contract

² For example, ¶ 2.01 of section 10810 provided that “Toilet [a]ccessories [s]pecified shall be equal to products listed herein”

³ See, e.g., ¶ 2.06 of section 08710.

Document provisions concerning “substitutions” to obtain approval for use of an unnamed product.

IFB at § 01600, ¶ 2.01(B)(2).⁴

The IFB also contained the following guidance:

References in the specifications to any article, device, product, materials, fixture, form or type of construction by name, make, or catalog number, shall be interpreted as establishing a standard of quality, and not as limiting competition. The Contractor may make substitutions equal to the items specified if approved prior to the bid opening through the issuance of addenda. If approval is requested after the award of the contract, substitutions may or may not be approved. Approval will be granted for any substitution which is in the Government’s interest. The Contractor bears the risk in the event a substitution proposed after award is not approved.

Attach. B, Additional Instructions to Bidders.

Lawrence filed its protest with our Office on June 12, prior to the time set for bid opening. Despite the protest, the agency proceeded with bid opening. Twelve bids

⁴ Section 01631 summarized the procedures for obtaining approval of a substitution. Paragraph 1.04 of the section required the contractor requesting the substitution to provide the following information, as appropriate:

- coordination information
- a detailed comparison of significant qualities of the proposed substitution with those of the item specified
- product data
- samples
- a statement indicating the substitution’s effect on the construction schedule
- cost information, including a proposal of the net change, if any, in the contract sum
- the contractor’s certification that the proposed substitution conforms to requirements in the contract documents
- the contractor’s waiver of rights to additional payment or time that may subsequently become necessary because of the failure of the substitution to perform adequately.

The section further stated that acceptance of the substitution would be in the form of a change order.

were received. Lawrence did not submit a bid. The agency has withheld award pending our decision.

Lawrence argues that the sign specification is restrictive of competition because it requires the contractor to furnish ASI signs despite the fact that equivalent signs manufactured by other companies will also meet the agency's needs. In this regard, the protester notes that while the specification permits equal products of other "pre-approved" manufacturers, no other manufacturer had been approved as of the date of bid opening, leaving ASI as the single named manufacturer for purposes of section 01600, which prohibits substitutions where the specifications name only a single product or manufacturer and do not contain the words "or equal" or "or approved equal."

The agency argues in response that the sign specification does not require ASI signs, but rather permits the contractor to use the product of another manufacturer so long as the product is equal to ASI's and approved by the agency.⁵ The agency contends that even assuming that the signage specification itself is ambiguous, the Additional Instructions to Bidders "make[] it clear that the reference to a product in the specifications is not intended to restrict competition but merely to establish a standard of quality," and that a bidder desiring to provide an equal product had two options open to it: the bidder could seek approval from the agency of an equal product prior to bid opening, which, if approved, would be included in an amendment to the solicitation, or the bidder could seek approval of an equal product after award, in which case the contractor would bear the risk that the proposed substitution might not be approved. Agency Report at 5-6. The agency further argues that the cost of the signs is in any event de minimis when compared with the overall value of the contract.

The initial question for our consideration is whether the IFB is reasonably susceptible of the interpretation advanced by the protester. We think that it is. In our view, Lawrence and other bidders could reasonably have understood the requirement that the signs be manufactured by either ASI or "a pre-approved manufacturer with an equal product" as a requirement that any manufacturer other than ASI have been approved prior to bid opening. The use of the prefix "pre-" in "pre-approved" implies that the approval was required to have been obtained prior to some other event, and in this context it clearly is reasonable to interpret that event as bid opening. In this regard, the interpretation of "pre-approved" as signifying approval prior to bid opening is consistent with the distinction drawn in the Additional Instructions to Bidders between pre- and post-bid opening requests for approval of substitutions.

⁵ In this regard, the agency has not argued that only ASI signs will meet its needs; its argument is that the IFB does not restrict the contractor to furnishing ASI signs.

Further, regarding the agency's argument that the Additional Instructions to Bidders made it clear that the substitution of items equivalent to those named in the specification would be permitted, the Additional Instructions in fact placed bidders on notice that substitutions of equal items requested after award of the contract might not be approved and that the contractor bore the risk of non-approval. Moreover, to the extent that the Additional Instructions appear to provide for post-award substitutions found to be in the government's interest even where specifications are proprietary, they are in conflict with the provisions of the Materials and Equipment specification, which strictly prohibits substitutions where the specifications name specific products or products, unaccompanied by the words "or equal" or "or approved equal."

In our view, the provisions of this IFB were at best ambiguous and could reasonably have been interpreted by bidders such as Lawrence as requiring them to furnish ASI signs since no manufacturers other than ASI had been approved prior to bid opening. Given that the agency has not argued that only ASI signs will meet its needs, not only is this interpretation contrary to the statutory requirement that solicitations include specifications that permit full and open competition and contain restrictive provisions only to the extent necessary to satisfy the needs of the agency, 41 U.S.C. § 253a(a)(2) (2000), National Customer Eng'g, B-231135, Mar. 11, 1993, 93-1 CPD ¶ 225 at 4, and potentially prejudicial to bidders who reasonably believed themselves to be precluded from using lower-priced quotations from other sign manufacturers in formulating their bid prices, see Pavel Enters., B-249382, Nov. 9, 1992, 92-2 CPD ¶ 330 at 5, but it apparently is not what the agency intended.

We find unpersuasive the agency's argument that because the cost of the signs is de minimis when compared with the overall value of the contract, any defect in the specification does not give rise to prejudice. The record reveals that despite the considerable overall value of the work solicited, some of the bids were tightly grouped. For example, the third lowest bid was only \$2,300 lower than the fourth lowest bid. The record also shows that ASI's quoted price for the signs of \$12,535.14, Protester's Comments, July 2, 2002, at 2, exceeded the agency estimate of \$4,329 by over \$8,000, suggesting that a bidder such as Lawrence might well have been able to reduce its overall price by up to \$8,000 by obtaining quotations from sign manufacturers other than ASI. Given these two factors, we are not persuaded that the cost of the signs was de minimis in the sense the agency argues, since it is not unreasonable to conclude that the difference in bids on that item could affect the bidders' competitive standing.

Because bidders could reasonably have interpreted the IFB's terms in a manner restrictive of competition, we sustain the protest.

Since the agency's position in this protest appears to be that it in fact intended to request the signage systems on a brand name or equal basis, we recommend that it revise the specifications to reflect this intent and solicit new bids. We also recommend that the agency reimburse the protester for its costs of filing and

pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2002). In accordance with section 21.8(f) of our Regulations, Lawrence's claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days of receipt of the decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel