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United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Tel-Instrument Electronics Corporation

File: B-291309; B-291309.2

Date: November 20, 2002

Lars E. Anderson, Esq., and Thomas J. Madden, Esq., Venable, Baetjer & Howard, for the protester.

Joshua A. Kranzberg, Esq., and E. Rita Eady, Esq., U.S. Army Materiel Command, for the agency.

Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly rejected protester's bid as nonresponsive is denied where bid included statement that bidder would require certain government-furnished equipment that the solicitation did not obligate the agency to provide and thus materially altered the rights and obligations of the bidder and contracting agency.

DECISION

Tel-Instrument Electronics Corporation (TIC) protests the rejection, as nonresponsive, of the bid it submitted in response to invitation for bids (IFB) No. DAAH01-01-B-0004, issued by the Department of the Army for a portable radar test set.

We deny the protest.

The IFB, conducted as a two-step, sealed bid procurement, contemplated the award of a fixed-priced, indefinite-quantity, indefinite-delivery contract, for a period of 5 years. During step I, bidders were required to submit a bid sample that was tested for electrical performance and facility of use. Those firms that passed the step I performance test would be requested to submit a sealed bid under step II. The Army received three acceptable bids under step I, including TIC's. TIC then submitted the low bid under step II, but its bid was rejected as nonresponsive on the basis that the cover letter to the bid conditioned TIC's offer on the use of specified government-furnished equipment (GFE), while the solicitation did not contain any provision

allowing for the use of GFE. Specifically, the cover letter included the following statement:

TIC will require the following GFE for the life of the production contract to support PVT (Product Verification Testing) and production GSI (Government Source Inspection):

Qty 2-Mode S capable military transponders
Qty 2-KIR/1C Crypto Computers
Qty 2- KIT/1C Crypto Computers
Qty 2- Maintenance tapes and suitable loading devices for
above Crypto Computers
Qty 1 An-PPX-3 Interrogator with associated antenna,
cables and loader

TIC maintains that its bid should not be found nonresponsive because the value of the items it requested--approximately \$150,000--is negligible compared to the overall value of the contract (\$28.7 million).¹

All bidders must compete for sealed bid contracts on a common basis. No individual bidder can reserve rights or immunities that are not extended to all bidders by the conditions and specifications advertised in the IFB. Interstate Constr., Inc., B-281465, Feb. 10, 1999, 99-1 CPD ¶ 31 at 2. Therefore, in order to be responsive and considered for award, a bid must contain an unequivocal offer to perform, without exception, the exact thing called for in the IFB, in total conformance to the material terms of the solicitation. If in its bid a bidder attempts to impose conditions that would modify material requirements of the IFB, limit its liability to the government, or limit the rights of the government under any contract clause, then the bid must be rejected. Id. Further, a bid that is nonresponsive on its face may not be made into a responsive bid by post-bid-opening clarifications or corrections. In this regard, we have specifically held that, where a bidder conditions its bid upon the use of

¹ TIC also argues that the condition should be waived because the equipment it requested is not commercially available, making it implicit that the government would furnish it to all bidders, and because it allegedly was told during step I testing that certain tests were to be performed using equipment in the Army's TMDE (Test Measurement and Diagnostic Equipment) activity inventory. Comments at 8-11 and 13. These arguments are without merit. Notwithstanding what TIC may have assumed or been told, the solicitation did not provide for use of the GFE that TIC requested (or any other GFE); the qualifying language in TIC's bid cover letter indicates that TIC was aware of this fact. If TIC believed the agency should structure the requirement to provide that the requested GFE would be provided, it was required to protest this alleged solicitation impropriety prior to the time set for the receipt of bids. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2002).

government facilities not specifically made available in the IFB, the bidder has availed itself of benefits not extended to other bidders by the advertised specifications and rendered its bid nonresponsive. Walashek Indus. & Marine, B-281577, Jan. 29, 1999, 99-1 CPD ¶ 30 at 3.

The conditions set forth in TIC's bid cover letter concerning the provision of transponders, computers, an interrogator, and associated equipment altered the rights of the agency by conditioning TIC's obligation to perform on the agency's guaranteeing that it would make this equipment available for the life of the contract. While TIC argues that the condition is not material, and thus should be waived because the value of the required GFE is small compared to the value of the overall contract, price is not the only consideration in determining whether a condition placed on a bid is material.² Here, the condition is material because, essentially, it provided that TIC would not assume the obligation to perform the contract unless the agency agreed to furnish the requested equipment. Thus, the condition affected the rights and liabilities of the contractor and the agency. Walashek Indus. & Marine, supra. The bid condition also extended benefits to TIC that were not available to any other bidder. Id. In this regard, TIC itself asserts that the equipment is not commercially available; assuming that this is true, a bidder's ability to compete could have been affected by its ability to obtain the equipment. Under these circumstances, TIC's bid was properly rejected as nonresponsive.³

TIC argues that the awardee's bid also contained conditions not part of the solicitation, and therefore should have been rejected as nonresponsive. However, since TIC's bid was properly found nonresponsive, and there is another bidder besides the awardee eligible for award, TIC is not an interested party to raise this argument. 4 C.F.R. § 21.1(a); see TRS Research, B-283342, Nov. 4, 1999, 99-2 CPD ¶ 85 at 4.

The protest is denied.

Anthony H. Gamboa
General Counsel

² We do not reach the question of whether the value of the requested GFE (estimated by TIC as \$150,000) is sufficient to render the qualification material.

³ The agency also found that TIC's bid was nonresponsive because TIC took exception to the warranty requirements established by the solicitation, a conclusion that TIC disputes. As we have found that TIC's bid is otherwise nonresponsive, we need not reach this issue.