

Protest of) Date: May 6, 1987
ARCON CORPORATION)
Solicitation No. 479984-87-A-D064) P.S. Protest No. 87-22

DECISION

Arcon Corporation protests rejection of its bid on solicitation number 479984-87-A-D064 and award of the contract to any party other than itself. The contracting officer rejected Arcon's bid as nonresponsive because it contained a conditional deduction typewritten on the envelope containing the bid. Absent that deduction, Arcon's bid was the second lowest bid.

Invitation for Bids (IFB) \$ No. 479984-87-A-D064 for construction of a post office at Ridgeland, MS, was issued by the Memphis Facilities Service Center (FSC) with bid opening on March 12, 1987. The bid opening official determined, based on examination of the bids received, that Mayrant Company's bid of \$1,046,946 was apparently the lowest and that Arcon's bid of \$1,056,691 was apparently the second lowest. However, the envelope transmitting Arcon's bid contained the following typewritten statement:

Bid includes 26,870.00 for building permit and fees. Deduct this amount if not required.

If this amount is deducted from Arcon's bid, it becomes low.

Following the announcement of Mayrant's bid as low, by letters of March 12 from its president and of March 13 from its attorney, Arcon protested to the contracting officer the failure to find Arcon low bidder. Arcon claimed that it had attempted to determine whether permit fees were applicable to property constructed for the Postal Service's ownership and use, but was unable to obtain a definite answer.^{1/} Faced with the

^{1/}Arcon's attempts to resolve the building permits issue included consulting the Postal Service's architect and attempting to question the Postal Service bid opening official, Mr.Sartain, on bid opening day just prior to the bid opening. The architect did not know the answer and MrSartain refused to consider matters relating to the bids immediately prior to bid opening. Arcon did not request in writing clarification of the permit fees issue, the procedure set forth in paragraph 1 of the IFB Instructions to Bidders for

dilemma, Arcon calculated its bid including an estimate of \$26,870 for building permit fees. According to Arcon's bid protest, it drafted the statement on the outside of the envelope requesting that this building permit estimate be deducted from the bid price if such building permits are not required. Arcon seeks either the acceptance of its bid with the fees deducted or a determination of whether or not these fees were applicable and a rebidding of the contract on those terms.

On March 19, the contracting officer rejected Arcon's bid on the grounds that Arcon had qualified its bid, and hence its bid was nonresponsive, and denied Arcon's protest as obviously without merit pursuant to the Postal Contracting Manual (PCM) 2-407.8 (e). Arcon then timely protested to this office.

Arcon argues that the law is unclear whether building permit fees may be collected by municipalities from contractors constructing buildings on Postal Service land for the Postal Service's ownership and use. Arcon claims that the Postal Service should resolve this ambiguity; if the Postal Service declares the fees not applicable, then it should either accept Arcon's envelope deduction, making it low bidder, or reject all bids, issue a new solicitation clarifying the building permit issue and accept new bids.

The low bidder, Mayrant, submitted a comment arguing that accepting Arcon's bid unfairly gives Arcon two opportunities to become low bidder. Another losing bidder, Bounds Construction Co., Inc., also submitted a comment seeking a new round of solicitations and bids.

The PCM provides for the rejection of qualified bids:

Ordinarily, a bid should be rejected when the bidder attempts to impose conditions which would modify requirements of the invitation for bids or limit his

obtaining the contracting officer's interpretation.

liability, since to allow the bidder to impose such conditions would be prejudicial to other bidders.

PCM 2-404.2(d).

We believe that Arcon's conditional deduction of building permit fees is an attempt to limit its liability.^{1/} The invitation for bids placed the responsibility "for obtaining any necessary licenses and permits, and for complying with any applicable Federal, State, and municipal laws, codes, and regulations" upon the contractor. IFB, General Provision 31. Although General Provision 52 of the IFB expressed the Postal Service's belief that "State and local building codes and regulations do not apply as a matter of law to work inside the property lines of Postal Service owned properties but generally do apply to Postal Service leased properties," this statement merely describes a legal defense to imposition of municipal building permit fees.^{1/} Under General Provision 31 of the solicitation, the contractor would have the responsibility to raise this defense or pay fees requested by a municipality. Arcon states in its protest that the municipality of Ridgefield has expressed its intention to seek collection of the building fee. By its conditional deduc-

^{2/}We also note that by writing its intended bid modification on the outside of the envelope containing its sealed bid, Arcon may have intended to achieve an advantage over other bidders. Bid modification should follow the procedures described in the IFB, that is, they should follow the formalities of the original bid, or, where appropriate, be issued by telegram. IFB Instructions to Bidders & 6, 7. When these procedures are followed a bidder's intention to modify its bid is apparent to the bid opening officer. This is not true when a bid modification appears on the face of the envelope. If Arcon's bid without the envelope deduction had been the low bid, Arcon could have simply allowed the contracting officer to ignore the deduction and been awarded the contract at a higher price. If, as occurred Arcon required the deduction to become low bidder, Arcon could point out the envelope deduction and, if it was accepted, become low bidder. This method of modification gives the bidder an impermissible second opportunity to become low bidder. See Central Mechanical Construction, Inc., Comp. Gen. Dec. B-220594, December 31, 1985, 85-2 CPD & 730.

^{3/}Arcon argues that it could not determine how to address building permit fees from its reading of these two contract clauses. If Arcon believed the interaction of General Provisions 31 and 52 produced an ambiguous result, then it should have made a written request for clarification (see fn. 1) or protested these solicitation terms on or before the date and time set for the receipt of offers (PCM 2-407.8 d(l)).

tion, Arcon seeks to relieve itself of liability for raising the legal defense to the municipality's intended action or paying the charges if the legal defense should fail. Such attempts by a bidder to relieve itself of the liabilities placed upon it by the solicitation render the bid nonresponsive. See Quality Roofing Co. Inc., P.S. Protest No. 85-97, March 20, 1986, p. 10-11; E. Trailer Maintenance Ltd., P.S. Protest No. 85-13, May 8, 1985; C.A. Adkins Construction Co., P.S. Protest No. 82-59, November 1, 1982; Stockton Service Station Equipment Co., Inc., P.S. Protest No. 80-9, April 7, 1980.

The protest is denied.

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Office of Contracts and Property Law

[Compared to original 2/23/93]