

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of FREE STATE)	
REPORTING, INC.)	
)	Docket No. MSBCA 1180
Under State Law Department)	
IFB for Temporary Reporting)	
Service)	

June 14, 1984

Evaluated Bid Price - A procurement officer only may consider prices submitted in response to the requirements of the IFB when determining the lowest evaluated bid price pursuant to COMAR 21.05.02.13. Here, however, an SLD procurement officer inappropriately evaluated pricing information which was to be considered only in the event of a tie bid. Accordingly, his evaluation was found to be unreasonable.

Responsiveness - Where the apparent low bid was subject to two reasonable interpretations, it properly was determined to be both ambiguous and nonresponsive.

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OPINION BY MR. LEVY

This is an appeal from the State Law Department's (SLD) procurement officer's final decision denying Appellant's bid protest. Appellant maintains that its bid should not have been rejected as nonresponsive since it complied in all material respects with the requirements of the Invitation For Bids (IFB). SLD, on the other hand, argues that Appellant's price for computer key word retrievals was ambiguous.

Findings of Fact

1. SLD issued an IFB dated January 23, 1984 for temporary reporting services covering the period from March 1, 1984 to February 28, 1985.
2. Section IA of the IFB provided that "[t]he responsive and responsible bidder bidding the lowest evaluated bid price will be awarded a

contract. . . . " This is followed at section IC with the criteria and formula to establish the evaluated bid price as follows:

C. Evaluated Bid Price

All bidders must submit in their bids the prices they would charge for the services listed in this Subsection. Next to each listed service is the weight which the Department will give it in determining the bidder's evaluated bid price. To calculate evaluated bid price, the bidder should multiply the weight by the proposed price and add up all the weighted prices. Each bidder should calculate the evaluated bid price and place it prominently in the bid. No bid will be accepted which has an evaluated bid price of greater than \$2.30.

The services and their weights are:

<u>Services</u>	<u>Weight</u>
(1) Basic charges for original and one copy of a transcript of a deposition taken within a 50 mile radius of Baltimore City's City Hall with:	
(a) 10-day delivery (\$/page)	.70
(b) 5-day delivery (\$/page)	.12
(c) Daily delivery (\$/page)	<u>.03</u>
Total weight for Basic Services	.85
(2) Charges for Additional Services:	
(a) Mileage charge for depositions taken outside of a 50 mile radius of Baltimore City's City Hall (\$/page)	.10
(b) Additional copies (\$/page)	<u>.05</u>
Total Weight for Additional Services	.15

3. Section ID of the IFB, subtitled Tie Bids, provided:

All bidders must submit the price they charge for computer key word retrievals. Ties will be broken by an award to the bidder with the lowest price for this service.

4. Section IB of the IFB provided eight "minimum requirements for a bidder to be responsive to this solicitation." The following are the pertinent ones for purposes of this discussion:

- 1. the bidder must provide the services listed in Subsection C;
- * * *
- 3. the bidder must submit an evaluated bid price which is less than or equal to the maximum evaluated bid price set forth in Subsection C;

4. the bidder must have the capability to provide the Department with computer key word retrieval services to be available when needed;

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5. Bids were opened on February 21, 1984 and Appellant's "evaluated bid price" of \$1.4281 per page was the apparent low bid submitted. The second lowest "evaluated bid price" was submitted by Hunt Reporting Company at \$1.57 per page. In response to Section ID of the IFB Appellant submitted the following as its price for computer key word retrievals:

Computer Key Word retrieval search will cost a minimum of \$25.00 per search or \$3.00 per page.

In addition, orders for Computer Key Word retrieval service placed in advance of the performance of the reporter service will cost an additional 65 cents/pg. for the basic transcript service and orders for

<u>1 Services</u>	<u>\$/Page</u>	<u>Weight</u>	<u>Weight\$/page</u>
1. Basic charges for original and one copy of a transcript of a deposition taken within a 50 mile radius of Baltimore City's, City Hall with			
A) 10-day delivery	1.49	.70	1.0430
B) 5-day delivery	1.98	.12	0.2388
C) Daily delivery	2.99	<u>.03</u>	<u>0.0897</u>
Total weight for Basic Service		<u>.85</u>	<u>1.3715</u>
2. Charges for additional services.			
A) Mileage charge for depositions taken outside of a 50 mile radius of Baltimore City's, City Hall.	0.22	.10	0.0220
B) Additional copies	0.69	<u>.05</u>	<u>0.0345</u>
Total weight for Additional Services		<u>.15</u>	<u>0.0565</u>
EVALUATED BID PRICE			<u>1.428</u>

Computer Key Word retrieval service placed after the performance of the reporter service will cost an additional \$2.00/pg. for the basic transcript service.

Key Word retrieval searches include key word index printouts and key word text printouts of the subject transcripts. These would be performed on one of our many microcomputer units using "Star Index" software in addition to the word processing feature.

6. On February 28, 1984, James G. Klair, Esq., Chief Counsel for Administration of SLD and the procurement officer for this procurement, notified Appellant that its bid had been declared nonresponsive and had been rejected. He advised that this action was based on the rate structure Appellant used to provide computer key word retrieval. Mr. Klair determined that Appellant's method affected the evaluated bid price for the basic reporting service because Appellant tied in the cost of computer key word retrieval availability to the evaluated bid price causing fluctuations in the pricing of the basic transcript service. He specifically held that "[y]our evaluated bid price clearly does not include computer key word retrieval. . . ." He then notified Appellant that the contract had been awarded to Hunt and three other bidders.²

7. On March 5, 1984 Appellant filed its bid protest with the procurement officer contending that its evaluated bid price did include computer key word retrieval. It also argued that computer key word retrieval is not a requirement for the evaluated bid price and that it was only required to have the capability to provide computer key word retrieval in order to be responsive. Appellant's price, therefore, allegedly was for computer key word retrieval usage of the service and not the availability of the service.

8. In response to the bid protest, Mr. Klair issued the procurement officer's final decision on March 15, 1984 denying the protest. The thrust of his position is that Appellant's price for computer key word retrieval included an additional price for availability and thus did not conform to the requirements of the IFB. He also contends that Appellant's minimum charges for key word retrievals did not satisfy the requirement that the bidder submit a price for this service. This apparently was due to Appellant's failure to express its price in terms of "per word per page" as stated in the form contract in the IFB.

9. Appellant filed a timely appeal to this Board on March 30, 1984 requesting that the SLD award it the contract and that it be paid appropriate compensation for any losses and expenses it sustained as a result of its bid being rejected.

Decision

This procurement by competitive sealed bid raises several issues relating to the evaluation of bid prices. The specific areas of our concern deal with the requirements of the IFB for computer key word retrieval

²Under the terms of the contract, the lowest responsive bidder, Hunt, is given the first opportunity to provide the contract services. If Hunt cannot perform the service on a particular occasion, it is then offered in successive order to the second, third and fourth lowest bidders.

service, the cost of this service as provided in Appellant's bid and the relationship of these costs to the criteria used to evaluate the bid and award the contract.

COMAR 21.05.02.13 is clear in its requirements for the determination of the lowest evaluated bid price under a competitive sealed bid procurement:

- A. ". . . A bid may not be evaluated for any requirement or criteria that is not disclosed in the invitation for bids."
- B. ". . . Bids shall be evaluated to determine which bidder offers the lowest cost to the State in accordance with the evaluation criteria set forth in the invitation for bids. Only objectively measurable criteria which are set forth in the invitation for bids shall be applied in determining the lowest bidder. . . ."

See also Article 21, §3-101(e); Article 21, §3-202(b); Johnson Controls, Inc., MSBCA 1155, (Sept. 21, 1983), pp. 11-12. SLD obviously had this precise language in mind when it prepared its IFB since it established a concise evaluation formula with objectively measurable criteria. (Finding of Fact No. 2). The formula requires the bidder to provide prices for an original and a copy of a transcript of a deposition taken within a 50 mile radius of Baltimore City's City Hall for three different delivery periods. Each of these prices is then multiplied against a given weight factor with the total weight for the basic services totaling 85 percent. The second part of the formula requires two different prices for additional services (mileage charge outside the 50 mile radius of Baltimore City's City Hall and additional copies) to be multiplied against given weight factors which total the remaining 15 percent.

There is no provision in the evaluation formula for considering the cost of computer key word retrievals. While the IFB at section ID expressly requires a price for this service, it is to be used only in determining the awardee in the event of a tie bid. (Finding of Fact No. 3).

Appellant did include a price for computer key word retrieval service under Attachment No. 2 to its bid. (Finding of Fact No. 5). SLD, however, maintains that the language in the second paragraph of Attachment No. 2 requires the price for basic transcript service to be adjusted upward if computer key word retrieval service is ordered. The additional 65 cents or \$2.00 per page quoted represents a charge for the availability of key word retrieval and thus is said to be contrary to the requirements of the IFB.

The cornerstone of SLD's position is that the IFB requires the contractor to have key word retrieval service continuously available. However, our examination of the IFB does not comport with this conclusion. The only statement in the IFB dealing with the requirements for computer key word retrieval service is found at Section IB 4 as follows:

The bidder must have the capability to provide the Department with computer key word retrieval services to be available when needed.
(Underscoring added)

This provision expressly requires the bidder to have the capability to provide the service. Capable is defined in Webster's New World Dictionary, Second College Edition as follows:

having ability; able to do things well; skilled; competent . . . having the ability or qualities necessary for; able or ready to

Mr. Klair, in fact, testified that Appellant is capable of providing computer key word retrieval services. (Tr. 56-57).

Respondent provided in its bid precisely what it was required to by the IFB. It gave its prices for the basic transcript services and then gave a separate price for computer key word retrieval services. It was improper for the procurement officer to take an element of Appellant's key word retrieval cost and add that to the basic services costs for evaluation. Appellant's bid, therefore, was the apparent low evaluated price.

However, before the award of this contract can be made based on the lowest evaluated bid price, there must be a determination that the bidder is both responsive and responsible. The IFB provides at section IA as follows:

The responsive and responsible bidder bidding the lowest evaluated bid price will be awarded a contract. . . .

See also Article 21, §3-202(g); COMAR 21.05.02.13A. A responsive bidder is defined as "a person who has submitted a bid under procurement by competitive sealed bidding which conforms in all material respects to the requirements contained in the invitation for bids." COMAR 21.01.02.60; Article 21, §3-101(i). We have previously held that a material deviation from an IFB's requirements occurs when the price, quantity, or quality of the goods or services is affected. Excelsior Truck Leasing Company, Inc., MSBCA 1102, (May 6, 1983) at p. 5; Quaker-Cuisine Services, MSBCA 1083 (September 7, 1982) at p. 6.

The price offered for computer key word retrieval service is a material part of this bid even though it was not to be used in the bid price evaluation. The service clearly was required and was important to SLD. It was imperative, therefore, that all bidders unequivocally offer to provide this service at a quoted price.

To be responsive a bid cannot be ambiguous. If the bid is subject to two or more reasonable interpretations, it is ambiguous and therefore should be rejected as nonresponsive. Franklin Instrument Co., Inc., Comp. Gen. Dec. B-204311 82-1 CPD ¶105 (February 8, 1982); Railway Specialties Corporation; Comp. Gen. Dec. B-212535 83-2 CPD ¶519 (October 31, 1983); Comp. Gen. Dec. B-175682 51 Comp. Gen. 831, June 28, 1972. We conclude that Appellant's price for the computer key word retrieval service is ambiguous in that it is not clear how the charges for a search will be established. The bid raises questions such as will the additional \$.65 or \$2.00 per page to be added to the basic transcript service apply to all the pages in the transcript or only to those that are searched? In the event SLD orders the service in advance of the performance of the basic transcript service, but does not order a subsequent search, would the \$.65 apply to all the transcript

pages or to none? It is also uncertain if the \$25 minimum per search or \$3.00 per page applies to the number of pages in the transcript searched or to the number of pages in the computer printout that Appellant was to submit as its search work product.

In fact, even Appellant has not been consistent in the interpretation of its own bid. In its March 30, 1984 letter to this Board at page 8 it states:

. . . Attachment 2 proposed two retrieval methods: key word text printouts or key word index printouts. In either method, FSRI's firm price is \$.65 per page of transcript serviced (or \$2.00 per page if the retrieval service is ordered after performance of the reporter service). . . (Underscoring added)

Then in its April 30, 1984 letter to this Board at pages 2-3 it states:

. . . it is clear that FSRI's Attachment 2 set forth only retrieval charges based upon two methods customary in the court reporting business—key word index printouts or key word text printouts—as to which FSRI established minimum charges of \$25 per search (key word text printouts) or \$3 per page (key word index printouts) and additionally specified the \$.65 or \$2.00 per page charge for computer key word retrieval service. . . . Attachment 2's phrase "basic transcript service" refers not to "availability" but rather to the evident fact that key word retrieval requires a search of all pages in a transcript, and hence the \$.65 or \$2.00 retrieval charge is multiplied by the number of transcript pages when the Department should order key word retrieval. (Underscoring added)

At the hearing of this appeal on May 11, 1984, Mr. David Becker testified on direct examination in response to the question what does basic transcript service mean in the second paragraph of Attachment 2 as follows:

A. Basic transcript service, when I put this together, synonymous and means identical as the same thing as the number of pages searched. It does not mean anything different than that.

Q. Mr. Becker, in your experience when you say number of pages searched, does that mean the total transcript?

A. Whatever the customer orders. (Tr. 90).

(Underscoring added)

For these reasons, therefore, Appellant's protest is denied.

