

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of International
Business Machines
Corporation

Under Department of
General Services (DGS)
Request for Quotation
C-4018

)
)
)
)
)
)
)

Docket No. MSBCA 1071

August 18, 1982

Bid Protest — A bid protest concerning the appropriateness of a solicitation provision which was filed nearly two months after bids were opened was considered untimely pursuant to COMAR 21.10.02.03A and was not entitled to substantive review by the Board.

Bid Protest - Timeliness — Pursuant to COMAR 21.10.02.03B, the Board refused to consider a bid protest which had been filed with the procurement officer more than 7 days after the protester knew or should have known of the procurement officer's rejection of all bids.

APPEARANCE FOR APPELLANT:

Mr. H. H. Miller, Jr.
Branch Manager
International Business Machines
Corporation
Baltimore, Maryland

APPEARANCE FOR RESPONDENT:

Edward S. Harris
Assistant Attorney General
Baltimore, Maryland

APPEARANCE FOR INTERESTED PARTY:

Fred C. Hill
Regional Manager
Facit, Inc.
Greenwich, Connecticut

OPINION BY MR. KETCHEN

This appeal has been taken from a final decision issued by a Department of General Services' (DGS) procurement officer denying Appellant's protest concerning the award of a contract for three types of single element (ball) typewriters. Appellant contends that the specifications properly should have provided for the award of separate contracts by type of machine. For this reason, Appellant requests that this Board find the single award provision contained in the captioned request for quotation to be inconsistent with the requirements of Maryland law and further determine that, as the low bidder for two of the single element typewriter items, it is entitled to the contract

awards. Respondent asserts both that Appellant's bid protest was untimely and that the solicitation clearly and properly permits award of a single contract.

FINDINGS OF FACT

1. On October 21, 1981, DGS issued Request for Quotation No. C-4013 (RFQ or original RFQ) for the purchase of a number of classes of typewriters under a requirements type of contract for calendar year 1982. This RFQ required bid submittal by 2 p.m. on December 1, 1981.

2. Award was to be made to the responsive and responsible bidder who submitted the lowest evaluated bid. The evaluation of bids was to be performed strictly in accordance with a Life Cycle Cost (LCC) formula contained in the RFQ. This formula measured the life cycle cost of a typewriter over a seven year period, taking into account such factors as the bid price, energy costs necessary for operation, maintenance cost, and residual value.

3. After bid opening on the preceding procurement, Appellant protested the method utilized by DGS to evaluate the residual value of the typewriters being bid. In particular, Appellant contended that DGS inappropriately used the actual trade-in value ascribed to an older typewriter model, no longer in production, as the projected residual value of its current model.

4. In a written final decision dated January 7, 1982, the DGS procurement officer sustained Appellant's protest stating that:

...this point, concerning using the bid model versus older and perhaps discontinued models, was not clearly understood by any of the bidding firms...

Because the DGS procurement officer could not correctly determine the residual value of the three types of single element typewriters bid without obtaining more information from the bidders, he elected to revise the residual value criteria and readvertise the procurement in order to permit competition on an equal basis. The procurement officer, however, did award contracts on the non-single element typewriter models solicited under the original RFQ.

5. On January 8, 1982, DGS issued a corrected request for quotation, RFQ C-4018 (revised RFQ), for the three types of single element typewriters that were the subject of Appellant's earlier protest. This revised RFQ added the following language to Special Condition 7 of the specifications:

Where more than one brand of typewriter is manufactured by the same organization, only one trade-in value will be used in calculating the average trade-in value.

The average trade-in value from NOMDA will be calculated on the model bid. When and/or if necessary, the amounts will be projected to 7 years. Units with less than 4 year's history will be calculated at 15% of the bid price.

6. Special Condition 8 was also added to the revised RFQ and provides that:

A single award will be made based on the lowest total LCC adjusted responsive bid for all three items. Partial bids will not be considered.

7. The revised RFQ required bid submission by 2:00 p.m. on January 22, 1982. DGS did not advertise this procurement in the Maryland Register but sent copies to those submitting bids in response to the original RFQ. The revised RFQ also did not require bid bonds. However, except for one bidder, bids in response to the revised RFQ were submitted by bidders who previously had submitted bid bonds in the appropriate amounts and whose bonds were still on file at DGS.

8. Appellant submitted its bid in response to the revised RFQ on January 21, 1982. At no time prior to this date did it protest the single award provision of that solicitation or raise the issue of its entitlement to a contract award under the original RFQ.

9. On January 22, 1982, DGS opened the bids received in response to the revised RFQ. Facit, Inc. submitted the lowest evaluated bid of \$351,519.88. Appellant submitted an evaluated bid of \$355,834.18. On two of the three typewriter models solicited, however, Appellant's evaluated bid was the lowest of those received.

10. On March 2, 1982, thirty-nine days after bid opening, Appellant's representatives met with DGS representatives and discussed the single award provision contained in the revised RFQ.

11. By letter dated March 15, 1982, Appellant challenged the single award provision of the revised RFQ by stating that the single award provision restricted competition and thus was contrary to the State's best interest. On March 22, 1982, the procurement officer wrote Appellant to explain that the revised RFQ clearly provided for the award of a single contract and that a single contract award was in the State's best interest.

12. By letter dated March 25, 1982, Appellant formally protested the single award provision of the revised RFQ.

13. In his final decision issued on April 16, 1982, the DGS procurement officer denied Appellant's protest by stating that:

This single award decision was based on a rationale that higher volumes generate lower prices. In this case, the total requirement [of] 611 single element typewriters, consisted of three unit quantities - 131, 109, and 371. Other factors which were considered that favored a single award were control of warranty and/or maintenance, continuity of supply, coordination problems, and reduction of administrative costs.

The State's best interest thus was said to be served and competition was not impaired.

14. Appellant filed a timely appeal from the procurement officer's decision on April 29, 1982.

DECISION

The initial issue raised in this appeal concerns whether Appellant timely protested to the procurement officer the RFQ provision permitting a single contract award for all models of typewriters. Resolution of this issue is governed by COMAR 21.10.02.03 which provides that:

A. Protests based upon alleged improprieties in any type of solicitations which are apparent before bid opening or the closing date for receipt of initial proposals shall be filed before bid opening or the closing date for receipt of initial proposals. In the case of negotiated procurements, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated in it shall be protested not later than the next closing date for receipt of proposals following the incorporation.

B. In cases other than those covered in section A, bid protests shall be filed not later than 7 days after the basis for protest is known or should have been known, whichever is earlier.

C. The term "filed" as used in this regulation means receipt in the procurement agency. Protesters are cautioned that protests should be transmitted or delivered in the manner which shall assure earliest receipt. Any protest received in the procurement agency after the time limits prescribed in this regulation may not be considered.

As this Board previously has stated, the language of the foregoing regulation must be strictly construed since an untimely objection to a contract award necessarily prejudices the rights and interests of the low bidder, the contracting agency and perhaps other interested parties. Kennedy Temporaries, MSBCA 1061 July 20, 1982) at p. 5.

Here Appellant's bid protest clearly concerned the appropriateness of a solicitation provision. A bid protest was not filed, however, until nearly two months after bids were opened. Pursuant to COMAR 21.10.02.03 A., therefore, the bid protest was untimely and is not entitled to any further consideration.

During the course of the hearing in this appeal, Appellant also noted, for the first time, that the original RFQ permitted contract awards to be made by typewriter class. Since Appellant had been the lowest evaluated bidder on two typewriter classes under that procurement, it alternatively argued that DGS had improperly rejected all bids and thereby wrongfully denied it two separate contracts. This contention likewise is untimely. Pursuant to COMAR 21.10.02.03 B., Appellant should have filed a bid protest within 7 days of when it actually knew or should have known of the procurement officer's rejection of all bids under the original RFQ. For this reason, Appellant's alternate grounds for appeal also may not be considered.

In accordance with the foregoing, this Board dismisses the appeal with prejudice and without consideration of the substantive issues raised.