



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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December 11, 1973

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Attorneys at Law
1701 Pennsylvania Avenue, NW.
Washington, D. C. 20006

Attention: Myron Solter, Esquire

Gentlemen:

We refer to your letter of September 28, 1973, and prior correspondence, on behalf of Maryland Bionic Systems, Incorporated (Bionic), in which you protest the award of a contract to any other firm under invitation for bids (IFB) No. WA5M-3-7239B1, issued on May 15, 1973, by the Federal Aviation Administration (FAA), United States Department of Transportation.

The solicitation is for 41 instrument landing system marker beacons and related literature and equipment. The IFB listed seven numbered items and requested prices on five of them. Item 4 provided as set forth below:

- "4. Spare Parts-Peculiar for Item 1 and Item 2 in accordance with Specification FAA-G-1375, dated May 1, 1962 and FAA Parts-Peculiar Replacement Table Issue No. 3 dated September 15, 1972. 1 Lot \$ _____"

The IFB also contained the following provision:

"ARTICLE IV. AWARD. Award will be made on the basis of the lowest aggregate bid received for the items and quantities ordered; for a bid to be considered responsive it shall contain quotations for all items and quantities. Bidders must quote prices for each quantity listed for each item."

Five bids were received and opened on June 28, 1973. The bids were as follows:

Scanwell Laboratories, Inc.	\$222,285
Maryland Bionic Systems, Inc.	\$276,521
Wilcox Electric, Inc.	\$397,621
Wood-Ivey Systems Corp.	\$447,334
Sparton Electronics Division	\$460,871

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Scanwell was determined nonresponsive and thus eliminated. Bionic failed to quote a price on Item 4 and was determined nonresponsive. We have been advised that, pursuant to Federal Procurement Regulations (FPR) 1-2.407-8(b), FAA has made a determination of urgency and is making the award to Wilcox. However, apparently the award has not yet been made.

Your protest generally alleges that the determination of non-responsiveness was improper. Your letter of August 27, 1973, sets forth the specific grounds as follows:

- "1. The Invitation To Bid contains a significant number of ambiguities, which makes it difficult or even impossible reasonably to respond to the price quotation called for in Item No. 4, Spare Parts Peculiar.
- "2. The omission to quote a price for Item No. 4 is in any event a minor informality, with no effect on aggregate price.
- "3. Since the IFB states that award would be made on the basis of the lowest aggregate bid price, it is not in the public interest to deem a bid non-responsive for failure to quote a price on a minor item included in the aggregate price.
- "4. Since the bid price of the next lowest bidder is some 43 percent higher than protestor's price, and since allowing modification of protestor's bid to insert the intended 'no charge' marking in line No. 4 would not result in a change in bidders' positions, late modification of the bid should be permitted in accordance with FPR §1-2.305."

Regarding your contention that the IFB was ambiguous, you specify, inter alia, the following as examples of alleged ambiguity: there is no FAA Parts-Peculiar Replacement Table dated September 15, 1972, the most recent issue being dated September 15, 1967; one of the parts-peculiar, an RF module, cannot be accurately identified on the Replacement Table; the unit "lot" as used in Item 4 is not defined in the IFB.

4 CFR 20.2(a) (GAO Interim Bid Protest Procedures and Standards) provides in part as follows:

"Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening * * * shall be filed prior to bid opening or the closing date for receipt of proposals. In other cases, bid protests shall be filed not later than 5 days after the basis for protest is known or should have been known, whichever is earlier * * *."

As the alleged ambiguities you cite should clearly have been apparent to Bionic prior to the submission of its bid, and as Bionic did not protest until after the bids were opened, we must decline to rule on the merits of this portion of the protest as untimely.

Your remaining contentions are closely related and will be considered together. You argue that the price of the parts required under Item 4 could not have exceeded \$1,500, approximately one-half of 1 percent of Bionic's aggregate bid price, and that the omission therefore should be treated as a "minor informality." You further state that Bionic's intent had been to enter the words "no charge" in the space opposite Item 4, and to support this contention you submitted a copy of the work sheet from which the bid was purportedly prepared showing a dash opposite Item 4. Since the IFB provided that award would be based on total aggregate price, and in light of the wide price range between bids, you state that the omission should not render Bionic's bid non-responsive as modification of the bid to indicate "no charge" for Item 4 would not affect the relative standing of the bidders. Finally, you contend that, since a "part peculiar is useless except as an integral part of a marker beacon, the Government would have no cause to procure a part peculiar except to replace a defective part" and Bionic would be obligated in that event to furnish a replacement part without charge.

While it may be true that the omission of a price for Item 4 was insignificant in terms of total aggregate price, we are unable to conclude that it was a "minor informality." See Federal Procurement Regulation (FPR) 1-2.405 which provides that a defect in a bid which

affects price, quantity, quality, or delivery may be waived as immaterial only if such effect is "trivial or negligible." The agency has stated that the spare parts referred to in Item 4 were necessary to have on hand because failure of a part-peculiar could result in extended outage of a marker beacon and create a potentially hazardous condition. To assure having these parts on hand, the agency included Item 4 in the IFB and integrated its delivery with delivery of the marker beacons. Bionic's failure to insert either a price or a "no charge" notation for Item 4 meant that its bid did not include that item. In this connection, we stated in B-176254, September 1, 1972:

"A unit price omission * * * would give the bidder an option to explain after the opening of bids and the exposure of bid prices whether his intent was to perform or not to perform the contract work for which no prices were quoted. In this circumstance, our Office has consistently taken the position that the preservation of the integrity of the competitive bidding system requires the rejection of such a bid as non-responsive and that evidence extraneous to the bid itself may not be considered to determine the bidder's intent."

Even if we assume that, under some circumstances, Bionic would be obligated to furnish replacement parts without charge, the reason for the inclusion of Item 4 remains nonetheless valid--to have a particular quantity of spare parts immediately available in case needed. Moreover, situations could arise where the contractor would be under no obligation to furnish a replacement part without charge, e.g., if a part was damaged as a result of the negligence of a Government employee.

We are aware that the agency reserved the right in the IFB to acquire an additional lot of spare parts-peculiar. Item 6 of the schedule provided as follows:

- "6. Spare Parts Peculiar for Items 1 and 2 in addition to those required by Items 4 and 5, in accordance with Article II, Provisioning of Spare Parts.
*NOTE: Bidders shall not quote a price for this item. An estimated price will be established by the Government at the time of award."

While it thus appears that the Government could have obtained the lot of spare parts by the alternate method specified in Item 6, there are nevertheless two differences between the provisions of Items 4 and 5

which we believe significant. First, a bid on Item 4 would have established a firm price for the spare parts. Under Item 6 the price would be set at a post-award provisioning conference, with any disagreement to be resolved under the "Disputes" clause of the contract. The agency has stated that it included Item 4 in the IFB in order to obtain the spare parts in the competitive market at the best possible price. The second difference concerns delivery. A bid on Item 4 would have bound the bidder to a specific delivery schedule set forth in paragraph 5.4.4 of Specification FAA-G-1375. Delivery terms under Item 6 would be established at the provisioning conference and, while they must be "fair and reasonable," would nevertheless be subject to negotiation. Therefore, Bionic's obligation under Item 6 cannot be viewed as curing its failure to insert a price for Item 4. For this reason the cases you cite are not applicable here.

In light of the foregoing, we are of the opinion that Bionic's failure to quote a price on Item 4 constituted a material deviation from the requirements of the IFB and that the contracting officer's determination of nonresponsiveness was therefore proper. Accordingly, your protest against the rejection of Bionic's bid is denied.

However, an invitation may be cancelled after bid opening but prior to award when the contracting officer determines that cancellation is in the best interest of the Government, such as for example, where "all otherwise acceptable bids received are at unreasonable prices." FPR 1-2.404-1(b)(5). In view of the substantial difference between Bionic's aggregate bid price and that of the next lowest bidder, we are advising the agency of our view that consideration should be given to cancellation of the IFB and resolicitation of the items required.

Sincerely yours,

Paul G. Dembling

For the

Comptroller General
of the United States