

Bob Link, Director
Division of General Services
and Supply
Department of Administration

December 17, 1991

663-92-0277

465-3600

Procurement of modular
furniture (Bid #13214)

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You have requested our review of the bidding process and the resulting bids submitted in response to Invitation to Bid (ITB) #13214. ITB #13214 is a procurement of systems modular furniture. In particular, you seek our opinion as to whether the procurement should be resolicited by Department of Administration (DOA) under AS 36.30 and 2 AAC 12.

In brief, it is our opinion that certain portions of the ITB, even after several amendments were issued thereto, were capable of more than one interpretation and, ultimately, resulted in bidders providing bid prices based upon misinterpretations of the ITB instructions. Therefore, this office recommends that ITB #13214 be cancelled and the procurement be resolicited as provided for under AS 36.30.160(b), 2 AAC 12.190, and 2 AAC 12.860.

FACTS

The facts as we know them are as follows: On July 26, 1991, the division of general services and supply (GS&S) sent out ITB #13214 for bids on systems modular furniture to be installed in four different state office locations in Juneau. Several amendments with respect to the solicitation were sent out to prospective bidders after questions were raised by bidders. 1/

1/ Amendment #1, dated August 20, 1991, suspended the opening of ITB #13214 until further notice. Amendment #2, dated September 9, 1991, set a new bid opening date and made numerous amendments to the original ITB in response to questions from bidders. Of particular note are the amendments to bid price calculations and air quality testing compliance and the bid schedule. Amendment #3, dated September 19, 1991, suspended the September 20 bid opening date. Amendment #4, dated September 23, 1991, was a complete reissuance of the ITB, containing amendments based upon questions from bidders including air quality testing requirements. Finally, Amendment #5, dated October 7, 1991, set a new opening bid date of October 24, 1991, and amended the air

Bids were received from four businesses: (1) Don's Business Supplies; (2) Bower's Office Products, Inc.; (3) The Office Place; and (4) Capital Office Supply. Each of these bidders responded to the original ITB #13214 and had received the five amendments to the ITB noted above.

The bids were opened on October 24, 1991. The original bid prices submitted were as follows:

\$ 24,513.63	Don's Business Supplies
40,370.52	Bowers Office Products
70,988.52	The Office Place
144,882.50	Capital Office Supply

There is an obvious, large price discrepancy in the bids. During the review and evaluation process, the contracting officer, Joe Ver, contacted the bidders with respect to this discrepancy and discovered that there was confusion amongst the bidders as to what was expected to be included in the bid price.

For example, Don's Business Supplies bid the same brand and model of systems furniture as The Office Place; however, the bid prices differed by nearly \$30,000. Don's explained that, page 2 of Amendment #5 requested that components be included in the calculation for each group specification to be priced on page 5 of the amendment. However, Don's pointed out that there was no place for a price or reference to the component listing on page 5. Don's Business Supply then interpreted this section as allowing an omission of the components in the overall bid price.

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Upon further review and evaluation of the bids, it became apparent to Mr. Ver that three of the four bidders were confused by the instructions for compiling the bid price as set out in ITB #13214 and its amendments: 1) Capital Office Supplies' bid was nearly four times greater than necessary due to an misinterpretation of Amendment #5's bid schedule, page 2; 2) Bower's Office Products also left off several components from its bid price due to an apparent misreading of the ITB's instructions; it also

(..continued)

quality compliance list of furniture previously tested and approved.

2/ Don's Business Supplies' amended bid price, after the bids were opened and clarification requested by the division, was \$45,886.

misinterpreted the indoor air quality compliance section of Amendment #4 as to when DOA must be notified that a previously untested brand of furniture was "undergoing" air quality testing; and 3) Don's Business Supplies omitted components, as noted in the preceding paragraph.

The Office Place was the only bidder that apparently did not need further interpretation of the bid specifications after all amendments were made to ITB # 13214. The Office Place submitted the highest bid price (with the exception of Capital Office, which mistakenly quadrupled certain portions of its bid).

After review of the bids, your office asked for our assistance in determining whether the bid should be cancelled and resolicited.

LEGAL ANALYSIS

AS 36.30.160(b) provides:

Correction or withdrawal of inadvertently erroneous bids before or after bid opening, or cancellation of awards or contracts based on bid mistakes may be permitted in accordance with regulations adopted by the commissioner. After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the state or fair competition may not be permitted.

When only one responsive bid to an ITB is received, the state may award the bid to that bidder if the bidder is deemed responsible and

if the procurement officer finds that the price submitted is fair and reasonable and that either other prospective bidders had reasonable opportunity to respond or there is not adequate time for resolicitation. Otherwise the bid may be rejected and (1) new bids or offers may be solicited.

2 AAC 12.190 (emphasis added).

Under 2 AAC 12.860, all bids may be rejected in whole or in part if "(7) the award is not in the best interests of the state."

Finally, the determination by a public agency of the responsiveness of a bid is within the agency's discretion. State v. Bowers Office Products, 621 P.2d 11, 13 (Alaska 1980).

In the present case, it became apparent to the contracting officer that three of the four bidders, all of whom are experienced bidders under the state procurement process, were confused as to the ITB's specifications. Not only did one bidder bid too low, another bidder nearly quadrupled its bid. ^{3/} The third bidder who failed to include all components in his price bid also misunderstood the instructions with respect to the deadline for testing of furniture for indoor air quality. According to Amendment 4 of ITB #13214, page 7:

Contractors who supply [furniture] brands other than those mentioned above must provide a certified letter, with the bid or within ten (10) days after a request by the Division of General Services, from Air Quality Sciences, Inc., in Atlanta, Georgia, which states that their systems furniture is now undergoing the testing and that the test results will be forwarded to the Division of General Services as soon as the test is completed. If the lowest responsive and responsible bidder is a contractor that is having their systems tested, final award will not be made pending receipt of testing results from Air Quality Services, Inc.

(Emphasis added.) Bowers Office Products (Bowers) is the only bidder that offered a brand of furniture that was untested for air quality. Bowers did not submit a letter with its bid that the furniture was undergoing testing. However, in response to a request from the contracting officer on November 13, 1991, for such verification, Bowers submitted a copy of a letter from Air Quality Services, Inc. that stated that the furniture was accepted for testing, with the tests to begin December 9, 1991. The division received this letter on November 19, 1991, well within the 10-day requirement of the ITB. The division, however,

^{3/} While bidding low is certainly the purpose behind competitive bidding, the low bid in this case was low by nearly \$30,000. As for the high bid of Capitol Office, it certainly is not the norm to overbid the price to a degree that the bidder loses all competitive advantage. Bidding a price that is nearly four times higher than necessary adds credence to our belief that the ITB specifications were confusing.

believed that Bowers' letter of November 19, 1991, was nonresponsive to the request because the furniture was not "undergoing" testing at the time but had merely been "accepted" for testing. We disagree that this made the bid nonresponsive as to this factor. We believe that it is a reasonable interpretation of the provision on page 7 of Amendment 4 to ITB #13214 that the furniture was accepted for testing with a date certain for tests to be completed. The ITB speaks only to the division being notified of the test results when the tests are completed; no deadline is mentioned in the ITB as to when the testing must be completed.

CONCLUSION

Based upon AS 36.30.160(b), 2 AAC 12.190(1), and 2 AAC 12.860(7), it is our opinion that the Department of Administration has the authority to reject all the bids, including the one responsive bid from The Office Place, and solicit new bids. We believe that to award the contract to The Office Place would be competitively unfair to the other three bidders whose bids were based upon reasonable but erroneous readings of the specifications intended in ITB #13214 that ultimately affected bid prices to their detriment.

It would also be competitively unfair to The Office Place to recalculate the other three bidders' prices by either adding or subtracting various components from their bid prices based upon the manufacturer's current published suggested retail list price, because it is unknown whether a bidder would have chosen a certain-priced item out of a field of many. Given that Don's Business Supplies and The Office Place bid the same brand of systems furniture, the process could be tainted because the contracting officer may select certain priced components that could ultimately put one bidder at an obvious competitive advantage or disadvantage over the other.

If this case concerned a minor technical defect or irregularity or a minor recalculation that would not affect the substance of a bid or give one bidder a competitive advantage over another, then it may be appropriate for the division to correct an inadvertent error. See Chris Berg, Inc. v. State, 680 P.2d 93, 94 (Alaska 1984). However, that is clearly not the case here. The division would have to completely reconstruct three of the four bids, which undoubtedly involves more than minor recalculations and, in our opinion, goes beyond the Alaska Supreme Court's ruling in Chris Berg, Inc.

Please contact us if you need further assistance.

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cc: Joe Ver, Contracting Officer
Department of Administration