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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: SOS International, Ltd.

File: B-295533.2; B-295533.3

Date: July 1, 2005

Jessica C. Abrahams, Esq., Alison L. Doyle, Esq., and Jason N. Workmaster, Esq., McKenna Long & Aldridge LLP, for the protester.

Kristen A. Bennett, Esq., Moore & Lee, LLP, for McNeil Technologies, Inc., an intervenor.

Sheryl A. Butler, Esq., U.S. Department of Justice, Drug Enforcement Administration, for the agency.

Monica P. Anatalio, Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Bid that included tiered pricing where solicitation did not contemplate bidding on such a basis is nonetheless responsive where record shows that awardee's pricing scheme did not condition the bid in any way, and bid is low using any of the tiered prices.
2. Where solicitation provided for award of contract on indefinite quantity basis, bid that offered larger quantity than maximum specified in solicitation is responsive, where bid did not limit government's right to purchase only up to the maximum quantity specified in the solicitation or otherwise condition the firm's pricing or performance on the government's buying the larger quantity.

DECISION

SOS International Ltd. protests the award of a contract to McNeil Technologies, Inc. under Drug Enforcement Agency (DEA) request for proposals (RFP) No. DEA-04-R-0012, for linguistic services in support of law enforcement efforts at DEA's San Diego Field Division. SOS contends that DEA should have rejected McNeil's bid as nonresponsive.

We deny the protest.

The solicitation contemplated the award of an indefinite-delivery, indefinite-quantity (IDIQ) contract for a base year, with four 1-year options, to provide law enforcement support services, including interception, monitoring, translation and transcription. The RFP was issued as a two-step sealed bid acquisition under Federal Acquisition Regulation (FAR) § 14.5. During the first step, interested firms submitted technical proposals that were evaluated to determine their acceptability. During the second step, a formal invitation for bids (IFB) was issued to those firms found to have submitted acceptable technical proposals. See id.

During the course of the acquisition, the agency issued a number of amendments to the solicitation. Relevant here, contract line item number (CLIN) 0003 erroneously listed a maximum of 66,000 hours instead of the agency's actual requirement, which was for 50,000 hours. Consequently, DEA amended the solicitation to reflect the 50,000 hour figure.

The agency received 10 technical proposals, seven of which were found to be technically acceptable. The seven firms submitting the technically acceptable proposals were thereafter requested to submit bids. At bid opening, McNeil's was the apparent low bid. After reviewing McNeil's bid, the agency initially determined that it was nonresponsive because McNeil had used tiered pricing in CLIN 0003, 0004, 0005, 0006 and 0009. More specifically, while the solicitation called for a single unit price for each CLIN, McNeil's bid included more than one price for each CLIN, with the price varying depending upon the quantity ordered (for example, under CLIN 0004, McNeil bid \$26.93 per hour for the first 400 hours, and \$24.03 for all hours in excess of 400 hours, up to the specified maximum quantity of 15,000 hours). In addition, McNeil's bid sheet showed the original 66,000 hour maximum quantity for CLIN 0003, rather than the amended 50,000 hour figure. Finally, for CLIN 0002, McNeil's bid schedule included the title "team leader" rather than the term "shift supervisor," as provided for in the solicitation. Based on these perceived deficiencies, the contracting officer advised McNeil that its bid had been found nonresponsive.

McNeil protested the agency's decision to our Office. In response to that protest, the agency advised us that it intended to reconsider the McNeil bid, and we dismissed McNeil's protest as academic. (B-295533, Jan. 10, 2005). Thereafter, McNeil and the agency engaged in several rounds of correspondence. As a result of that correspondence, McNeil was permitted to substitute the correct 50,000 hour maximum quantity for CLIN 0003 (replacing the 66,000 hour figure), to correct minor mathematical errors in its overtime rates, and to substitute the term "shift supervisor" for "team leader" in its bid schedule. The seven technically acceptable bids then were reevaluated, and it was determined that McNeil's revised bid of \$12,252,065 was low; SOS's bid of \$13,889,265 was next low. Consequently, the contract was awarded to McNeil on that date, and this protest followed.

TIERED PRICING

SOS asserts that the agency's initial position that McNeil's bid was nonresponsive was correct. Specifically, the protester contends that McNeil's bid should have been rejected as nonresponsive based on its tiered pricing, which was inconsistent with the IFB's pricing scheme calling for a single price for each CLIN. SOS cites in support of its position our decision in Valix Fed. P'ship I, B-250686, Feb. 1, 1993, 93-1 CPD ¶ 84, which, it claims, stands for the proposition that a bid that offers tiered pricing where it is not contemplated by the solicitation is nonresponsive and must be rejected, where the tiered pricing scheme enables the bidder to offer more favorable pricing. The protester maintains that it may well have been able to offer more favorable pricing had it known that tiered pricing was permissible.

To be responsive, a bid as submitted must represent an unequivocal offer to comply with the IFB's material terms, which includes the requirement for a firm, fixed price. VSA Int'l Corp., B-270204, Feb. 16, 1996, 96-1 CPD ¶ 101 at 2. A bid is nonresponsive, and must be rejected, if it is ambiguous as to price and is low only under one interpretation. Southern Atl. Servs., Inc., B-252419, June 2, 1993, 93-1 CPD ¶ 418 at 3.

McNeil's bid was responsive. In this regard, the record shows that McNeil's bid was low under all possible calculations, including where only the firm's higher hourly rates are applied.¹ In addition, McNeil's tiered pricing neither expressly nor implicitly limits the firm's obligation to perform in exact accordance with the requirements of the solicitation. Rather, the only effect of McNeil's tiered pricing would be to reduce the cost of performance as larger quantities are ordered. Under these circumstances, McNeil's bid's deviation from the pricing scheme called for by the IFB was immaterial and therefore did not render its bid nonresponsive. See RR Donnelley, Inc. B-294395, Sep. 15, 2004, 2004 CPD ¶ 199 (bid based on two different shipping weights rather than the single weight called for by IFB is responsive where bid would be low applying either of the two weights, and deviation did not operate to qualify bidder's obligation to perform in accordance with IFB requirements).

¹ McNeil's original bid, using tiered pricing and the erroneous maximum number of 66,000 hours for CLIN 0003 (bid prices were calculated using the CLIN maximum hours), was \$13,714,599.65. AR, exh. 5. Its bid calculated using the higher of McNeil's hourly rates and correcting the maximum number of hours for CLIN 0003 to 50,000 hours was \$12,252,065, AR, exh. 6. Its actual revised bid--that is, the bid that corrected the number of hours in CLIN 0003 but included McNeil's tiered pricing--was \$11,792,199.65. AR, exh. 5. These various figures are in comparison to SOS's bid of \$13,889,265, which is higher than any of the figures calculated for McNeil. AR, exh. 4.

Our decision in Valix is distinguishable from the situation here. While not discussed in the decision, the record there shows that, unlike McNeil's bid here, the bid in question would not have been low under all circumstances (specifically, if only the minimum quantities were ordered). It is this consideration that supports the conclusion there that the tiered pricing rendered the bid nonresponsive, not the mere fact that tiered pricing was offered. Since, in contrast, McNeil's bid would be low under all circumstances, McNeil's bid is responsive. See also Copy Duplicating Prods., Inc., B-245381, Dec. 30, 1991, 92-1 CPD ¶ 15, cited in Valix (where, using the higher of the offered tiered prices, a bid was not low for the base year of the contract, the bid was properly rejected as nonresponsive). Accordingly, we find nothing in McNeil's use of a tiered pricing scheme that afforded it an improper advantage over the other bidders.

OVERSTATED MAXIMUM QUANTITY

SOS argues that McNeil's bid was nonresponsive because it was based on an incorrect maximum number of hours for CLIN 0003. However, a bid based on a larger quantity than is required by the solicitation is nevertheless responsive, so long as it is not conditioned on the government's award of a quantity larger than that called for under the solicitation, and the solicitation does not preclude award of a quantity smaller than the maximum quantity specified. Charles V. Clark Co., Inc., B-196712, Mar. 12, 1980, 80-1 CPD ¶ 194 at 2-3.

Here, as noted, this is an IDIQ contract under which the government is obligated to order only the minimum guaranteed quantities, but may order additional quantities, up to the maximum specified in the solicitation. Thus, the agency is obligated to purchase the 1,000 hour minimum quantity under CLIN 0003, but may elect to purchase a larger quantity up to the specified maximum of 50,000 hours. As McNeil's bid did not condition its obligation to perform on the government's ordering the erroneous maximum quantity (66,000 hours), it follows that the agency could order any quantity up to the correct lower maximum of 50,000 hours without changing McNeil's performance obligation, and would not be obligated to order the additional 16,000 hours specified in McNeil's bid. McNeil's bid's inclusion of the incorrect maximum quantity for CLIN 0003 therefore was immaterial and did not render the bid nonresponsive.²

² Both the agency and SOS have characterized this issue as one relating to the propriety of the agency's permitting correction of a mistake in McNeil's bid. This is a mischaracterization of the issue. Since the bid was responsive as submitted, the agency was not required to obtain a corrected version of the McNeil bid schedule in order to make award to the firm. Consequently, the agency's action in permitting McNeil to correct the quantity had no effect on the propriety of the award.

POSITION TITLE

SOS argues that the McNeil bid was nonresponsive because it referred to the position of “team leader” rather than “shift supervisor,” as stated in the bid schedule. SOS maintains that this rendered the bid nonresponsive because it was unclear what type of employee McNeil was offering, and because a shift supervisor is exempt from the requirements of the Service Contract Act, whereas a team leader might not be exempt.

This argument is without merit. While SOS is correct that McNeil’s bid used the incorrect term “team leader” in the bid schedule, the bid schedule also includes an explicit reference to section C.6.2 of the statement of work, which is entitled “shift supervisor” and specifically states that the employee in question is not subject to the Service Contract Act. (Subsequent subsections of the statement of work outline the duties and responsibilities of the shift supervisor.) Consequently, although McNeil used an incorrect term in its bid schedule, we find that it was sufficiently clear that the firm was offering what the IFB required, such that there was no ambiguity as to what the firm would be obligated to provide during performance. This discrepancy therefore did not render the bid nonresponsive.³

The protest is denied.

Anthony H. Gamboa
General Counsel

³ SOS also argues that the agency improperly allowed McNeil to change its overtime pricing after bid opening. However, the overtime prices were not evaluated to determine the low bidder; these changes to the McNeil bid therefore had no effect on the competition, and did not prejudice SOS.