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**DECISION**



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

FILE: B-189843

DATE: December 9, 1977

MATTER OF: Allied Asphalt Paving Co.

**DIGEST:**

Where IFB required that contractor be responsible for all work performed until completion and acceptance and bidder submitted letter with bid stating that it could not be responsible for vandalism, rejection of bid as nonresponsive was proper.

The Naval Facilities Engineering Command, Western Division (Navy), issued invitation for bids (IFB) N62474-77-B-7321 for concrete and asphalt repair work. Allied Asphalt Paving Co. (Allied) submitted the low bid. Allied's bid was accompanied by a letter stating:

"Our site survey indicates some of the concrete removal is being redone due to vandalism. We must point out to you that Allied cannot be responsible for vandalism once we leave the site. Of course, proper barricades will be in place, but that will not prevent a recurrence. Short of standing guard by military personnel with authority to prevent egress, it is likely to happen again. We look forward to working with your fine staff at Barstow and ask you to consider this provision part of our bid."  
(Emphasis added.)

The Navy was not certain whether the letter referred to vandalism that might occur at the end of each workday or after completion of the contract. In response to the Navy's request for clarification, Allied submitted letters of July 18 and 19, 1977, that make it clear that the letter accompanying the bid referred to vandalism that might occur after each workday. Since, under clause 12 of the general provisions of the contract, the contractor is responsible for all work performed until completion and acceptance of the work, the Navy determined that Allied's letter qualified the bid by attempting to limit its liability and thus prejudiced the other bidders. Consequently, the Navy rejected Allied's bid as nonresponsive pursuant to Armed Services Procurement Regulation (ASPR) § 2-404.2(d) (1976 ed.), which, in pertinent part, provides:

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"(d) Ordinarily, a bid should be rejected when the bidder attempts to impose conditions which would modify requirements of the invitation for bids or limit his liability to the Government, since to allow the bidder to impose such conditions would be prejudicial to other bidders. \* \* \*"

Allied protests this decision to our Office, arguing that the Navy misinterpreted the intent of its letter. According to Allied, during a routine prebid site inspection, it discovered that a large proportion of the concrete sections were structurally sound, but were defaced by children's initials, footprints, etc. Allied believed that since the apparent purpose of this part of the job was to restore the appearance of the concrete, there should be some provision to prevent a recurrence of the vandalism. Allied states that the letter accompanying its bid was meant only to alert the Navy to this situation so that some plan to prevent vandalism could be agreed upon. Allied also states that the letter did not affect its bid price and thus did not prejudice other bidders. Finally, Allied has since offered to retract the letter, stating that it now realizes the " \* \* \* inherent dangers of such submission."

It is our opinion that the Navy's interpretation of the intent of Allied's letter is correct. The letter qualifies a material provision of the contract--responsibility for damages to the work before it is completed and accepted. A qualification which reduces a bidder's legal liability requires rejection of the bid as nonresponsive. Infrared Industries, Inc., B-181739, November 20, 1974, 74-2 CPD 272; 37 Comp. Gen. 410 (1957) and 37 id. 110 (1957). In the latter decision, at page 117, it was stated:

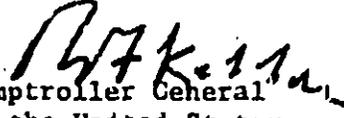
" \* \* \* it is a cardinal rule that a contract awarded to a successful bidder must be the contract offered to all bidders. Where one bidder reserves rights and immunities from responsibility not extended to all bidders by the advertised conditions and specifications, it seems manifest that a contract awarded upon the basis of the conditional bid would not be the contract offered to all prospective bidders. Informalities which properly may be waived are those that do not go to the substance of the bid so as to be prejudicial to the rights of other bidders, but material conditions imposed by a bidder may not be waived as an informality or minor irregularity. Sec 20 Comp. Gen. 4. To permit public officers to accept bids not complying in substance with the advertised specifications, or to permit bidders to vary their proposals after the bids are opened, would soon reduce to a farce the whole procedure of letting public contracts on an open competitive basis. The strict maintenance of such procedure, required by law, is infinitely more in the

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public interest than obtaining an apparently pecuniary advantage in a particular case by a violation of the rules. Cf. United States v. Brookridge, 111 F.2d 461, 464, and the opinion of the Supreme Court of Illinois in City of Chicago v. Mohr, 74 N.E. 1056."

Further, it does not matter whether the nonconforming terms were included by inadvertence or mistake. Fisher-Klosterman, Inc., B-185106, March 9, 1976, 76-1 CPD 165. Thus, Allied's bid properly was rejected as non-responsive and Allied cannot be permitted to retract the letter containing the qualifying language.

Accordingly, the protest is denied.

  
Deputy Comptroller General  
of the United States