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

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DECISION

FILE: B-192909

DATE: January 25, 1979

MATTER OF: Toms River Plumbing Supply Company,  
Incorporated

715

DIGEST:

Even though unsolicited descriptive literature, submitted with bid, describes various changes which could be made to ice machine with optional equipment, two of which satisfy Government requirements, it does not list prices for optional equipment; therefore, firm-fixed bid is construed as reflecting price for satisfying requirements specified by Government and bid was improperly rejected as nonresponsive.

DLG 715

Toms River Plumbing Supply Company, Incorporated (Toms River), protests the rejection of its bid as nonresponsive to invitation for bids (IFB) No. 460-41-78, issued by the Veterans Administration (VA). Toms River contends that its bid fully complied with or exceeded the IFB specification requirements.

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The IFB solicited bids for ice making and dispensing machines in accordance with VA Specification X-704e, dated November 10, 1972, and amendment No. 2, dated June 20, 1973. The solicitation advised that "Ice makers [were] to be used in restricted ceiling area of 96 inches maximum height." Further, VA Specification X-704e, paragraph 3.9.3, provides:

" \* \* \* The dispensing area shall be set back from the front of the machine at least 6 inches, be not less than 12 inches high and 12 inches wide. The area shall serve as a work space or counter and be not less than 26 inches or more than 40 inches from the floor when the machine is leg or toe type base mounted."

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~~Protest of IFB Awarded on the basis that bid complied with IFB requirements~~  
The REJECTION of Bid as Nonresponsive on

~~752~~  
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The apparent low bid, submitted by McQuay-Perfex, Inc., was found to be nonresponsive since the "ice dispensing activator was attached to the ice dispenser spout." Toms River's bid, which included descriptive literature, was second low "and was considered nonresponsive because the unit bid upon exceeds the maximum height restriction." Award was made to NJCT Corporation (NJCT), the third low bidder. We have been advised that NJCT has completed the contract.

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The VA's report included the contracting officer's review of Toms River's bid which provided:

"Initial specification compliance evaluation of the descriptive literature leads one to believe that the ice machine is 97-1/4" tall. However, further review reveals the 15" of the 97-1/4" is an optional stand. The machine without the stand is 82-1/4" high. However, without the optional stand, the area to serve as work space or counter, as specified in paragraph 3.9.3 of VA Specification X-704e, would be less than 26" from the floor. For the purpose of clarification, we decided that the drain top rather than ice dispensing spout was the work space or counter. With the optional stand, the height restriction specified was exceeded; without the optional stand, the specifications were not met. Therefore, the bid of the Toms River Plumbing Supply Company, Inc., was considered nonresponsive."

The solicitation included a note to the effect that descriptive literature submitted on models must state energy efficiency in accordance with 42 U.S.C. § 6296 (1976), where applicable. However, the solicitation did not include the provision required by Federal Procurement Regulations § 1-2.202-5 (1964 ed. amend. 13) where descriptive literature is required to determine the acceptability of the product. While descriptive literature was not required to determine acceptability, unsolicited descriptive literature may not be disregarded where it clearly modifies the bid. Dominion Road Machinery Corporation, B-186737, February 4, 1977, 77-1 CPD 89. For the reasons that follow, we do not believe the data submitted by Toms modified its bid.

The Toms River bid included a 1977 bulletin, number KD LIT07707, which described the ice machine offered pursuant to the instant IFB. As noted below, the height of the ice machine without legs or stands was 76-1/4 inches. Under those circumstances, the area to serve as work space or a counter, the bottom of the ice dispensing compartment, was approximately 14 inches from the base of the ice machine. The total ice dispensing compartment was 12 inches by 16 inches. Contained within the bulletin were the following specifications:

"Base

"N.S.F. approved adjustable legs are standard. Optional 15" (38.1cm) or 9" (22.9cm) stand available, which can be used with or without the 6" (15.2cm) N.S.F. approved legs.

\* \* \* \* \*

"General

\* \* \* \* \*

"3. Height is 76-1/4" (193.7cm)  
 82-1/4" (208.9cm) with N.S.F. legs  
 85-1/4" (216.5cm) with 9" (22.9cm) stand  
 91-1/4" (231.8cm) with 15" (38.1cm)  
 stand  
 97-1/4" (247.0cm) with 15" (38.1cm)  
 stand and N.S.F. legs

\* \* \* \* \*

"Special Optional Extra Equipment.

\* \* \* \* \*

"9" (22.9cm) or 15" (38.1cm) Stand"

A review of the bulletin submitted by Toms River discloses that there are two combinations, the ice machine with 6-inch legs and 9-inch stand or 15-inch stand and no legs, that will satisfy the specification requirements. Further, there were no prices quoted for any of the special optional extra equipment listed in the bulletin nor the ice machine itself.

It is our view that the bulletin only indicates the various changes which could be made to the ice machine with respect to its height and operation. If, as here, a bidder submits a firm-fixed bid, this normally is the price intended for satisfying the requirements specified by the Government, absent a specific contrary reservation or an allegation and proof of mistake by the bidder. Spectrolab, Inc., B-189947, December 7, 1977, 77-2 CPD 438. We note that Toms River did not take any exception to the specification requirements and the descriptive literature did not qualify its bid.

Therefore, Toms River's bid was responsive to the IFB and acceptance would have obligated Toms River to supply the requisite number of ice machines, at the price specified in its bid, and those machines would have had to comply with the specifications listed in the IFB. Spectrolab, Inc., supra.

Accordingly, Toms River's protest is sustained.

We cannot recommend corrective action for the instant procurement since the contract has been completed. However, by letter of today to the VA Administrator we are recommending that appropriate procurement personnel be apprised of our decision with a view toward attempting to preclude a repetition of similar difficulties in future procurements.

*R. F. Killian*  
Deputy Comptroller General  
of the United States