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DECISION



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

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FILE: B-193446

DATE: March 16, 1979

MATTER OF: Moody Tools Inc. *DLG 01216*

DIGEST:

[Protest of Determination that Bid was Nonresponsive]

Where invitation provided for contractor liability for damage/loss of goods during transit to destination, bid submitted on "FOB, Factory, Freight Allowed" basis was properly determined to be nonresponsive, since latter terms shifted risk of loss during transit to Government.

Moody Tools Inc. protests the rejection of its low bid on item Nos. 10-22 under Federal Supply Service, General Services Administration (GSA), invitation for bids No. FTAN-G4-10104-A-9/11/78, wherein estimated requirements for various GSA Supply Distribution Facilities were solicited. The bid was rejected as nonresponsive to the following invitation paragraph:

"DELIVERY-DESTINATION PRICES: Prices cover delivery to any destination within the forty-eight contiguous States and the District of Columbia.

"Supplies shall be delivered to the named destination consignee's warehouse unloading platform or receiving dock at the expense of the Contractor. The Government shall not be liable for any delivery, storage, demurrage, detention, accessorial or other charges involved prior to the actual delivery (or 'constructive placement' as defined in the carrier tariffs) of the supplies to the destination, unless such charges are caused by an act or order of the Government acting in its contractual

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capacity. If rail carrier is used, supplies will be delivered to the specified unloading platform of the consignee. If motor carrier (including 'piggyback') is used, the Contractor shall provide tailgate deliveries of all articles except those defined as 'heavy or bulky freight' in Item 568 of the National Motor Freight Classification. If the Contractor uses rail carrier or freight forwarder for less than carload shipments, he shall assure that the carrier will furnish tailgate delivery (except for heavy or bulky freight) if transfer to truck is required to complete delivery to the consignee."

In its bid, Moody deleted the words "cover delivery" in the first sentence of the above-quoted paragraph and added the words "FOB, Factory, Freight Allowed."

It is the position of GSA that the above-quoted paragraph required delivery on an F.O.B. destination basis, that, by changing the requirement in the manner it did, Moody relieved itself from the liability accepted by the other bidders for any damage to or loss of the goods during transport by the common carrier prior to their receipt at destination by the Government, and that under section 1-2.404-2(a) and (b) of the Federal Procurement Regulations (1964 ed. amend. 121) the Moody bid was properly rejected since the insertion took exception to the delivery requirements and gave Moody a competitive advantage over the other bidders. That Moody received an award previously from GSA on a bid in which Moody had inserted the same language is believed to be irrelevant, since the prior award would have been erroneously made and would not be controlling in making subsequent awards.

Moody contends that the rejection of its bid was improper since the above-quoted paragraph was directed toward price. In a letter to the contracting officer after bid opening, it explained that it bid "FOB, Factory, Freight Allowed" rather than F.O.B. destination because it intended to limit its liability for shortages that occur after it ships the goods.

With regard to the award made previously by GSA to Moody, should that award have been improperly made, that cannot estop the Government from refusing to make another improper award. Kemp Industries, Inc., B-192301, October 2, 1978, 78-2 CPD 248.

With regard to the merits of the protest, even if the "DELIVERY-DESTINATION PRICES" paragraph is viewed as pertaining to price as Moody contends, paragraph 27 of GSA Form 1424C, GSA Supplemental Provisions (General Provisions), incorporated by reference into the invitation and therefore to be adhered to by the bidders in submitting their bids on this procurement, imposed upon the contractor liability for damage/loss up until receipt by the Government of the goods. In that regard, paragraph 27, quoted in part, is as follows:

"RESPONSIBILITY FOR SUPPLIES

"(a) Except as otherwise provided in this contract,

"(i) the Contractor shall be responsible for the supplies covered by this contract until they are delivered at the designated delivery point, regardless of the point of inspection; * * *"

An offer "F.O.B. [origin], Freight allowed to Destination" shifts the risk of loss during transit to the Government. In Hart Metals, Inc., B-186833, September 24, 1976, 76-2 CPD 280, we held that the shift of liability renders the bid nonresponsive. Accordingly, since Moody bid in a manner that would have shifted the liability for damage/loss to the Government at the time the goods would be delivered to the common carrier instead of accepting contractor liability for damage/loss until the goods were received by the Government at their destination, the Moody bid was properly determined to be nonresponsive.

Therefore, the protest is denied.


Deputy Comptroller General
of the United States