

11468 PLII

DECISION



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

[Protest Alleging Awardee's Bid Was Nonresponsive]

FILE: B-195757

DATE: September 21, 1979

MATTER OF: Norfolk Shipbuilding & Drydock Corporation

DIGEST:

Bidder which submits a low combination bid for drydock and topside overhaul work may not be rejected solely for failing to bid separately for both drydock and topside work. It is recommended that in future procurements agency revise provision in solicitation requiring bid rejection in such circumstances.

Norfolk Shipbuilding & Drydock Corporation (NORSHIPCO) protests any contract award to Sun Ship Building and Dry Dock Company (Sun Ship) under invitation for bids (IFB) N62678-79-B-0067 issued by the Supervisor of Shipbuilding, Conversion and Repair, U.S. Navy, Portsmouth, Virginia (Navy) for the regular overhaul of the USS PORTLAND (LSD-37).

DL 002817-19

The protester has filed suit in the United States District Court for the Eastern District of Virginia, Norfolk Division, Civil Action No. 79-743-N, requesting the court to enjoin the Navy from awarding a contract pending a decision by the Comptroller General on its protest. The court has enjoined the Navy from making an award, and we consider the court's action to be an expression of interest in obtaining our decision. 4 C.F.R. 20.10 (1979); Dynalectron Corporation, 54 Comp. Gen. 1009 (1975), 75-1 CPD 341.

In order to maximize competition the solicitation provided for three bidding lots, respectively, for drydock work, topside work and a combination of both. This division was intended to enable smaller ship repair facilities to compete for the topside overhaul work which does not require drydock facilities normally

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possessed only by the larger firms. Bids, however, were received only from larger firms with drydock facilities and the Navy proposes to accept Sun Ship's low bid for Lot III covering all work since no combination of Lot I and Lot II bids is lower priced.

NORSHIPCO argues that Sun Ship's bid must be rejected as nonresponsive to the IFB because Sun Ship failed to bid on Lot II work, as required. For the reasons set forth herein, we deny the protest.

The solicitation provides, in part:

"15. SPLIT BIDDING. The Government reserves the right to make award to any offeror on the basis of Lot I, Lot II, or Lot III as may be in the best interests of the Government, price and other factors considered. Offers submitted for Lot III (total job) will not be considered unless accompanied by offers for both Lot I (Drydock) and Lot II (Topside)* * *."

The bids received were as follows:

<u>Bidder</u>		<u>Lot I</u>	<u>Lot II</u>	<u>Lot III</u>
Sun Ship	\$	1,750,000	No bid	\$ 9,760,000
NORSHIPCO		1,604,950	\$ 11,197,000	11,505,950
Bethlehem Steel		2,394,029	11,137,373	12,572,004
Maryland Ship- building		2,490,000	No bid	No bid

The Navy argues that because NORSHIPCO and Sun Ship are in contention for award on the basis of their Lot III prices, the failure of Sun Ship to submit a bid on Lot II may be considered an immaterial deviation from the IFB's requirement and waived by the Navy under the provisions of Defense Acquisition Regulation (DAR) 2-405 (1976 ed.).

In support of its contention, NORSHIPCO relies upon our decisions in a number of cases where we determined that a bidder which failed to include a price for

every item as required by the IFB was nonresponsive and could not be considered for award. Two of the cited decisions are Farrel Construction Company, 57 Comp. Gen. 597 (1978), 78-2 CPD 45 and Bayshore Systems Corporation, 56 Comp. Gen. 83 (1976), 76-2 CPD 395. In both cases the protester failed to submit a price for an item which was to be added to other priced items in the IFB to determine the low bidder. We held the bids to be nonresponsive because the bidders would not be contractually bound to perform the work required by the items for which bid prices had not been submitted. Therefore, the Government would not be receiving all of the work contemplated by the IFB.

However, in the case under consideration, the failure of Sun Ship to submit a bid for Lot II does not relieve Sun Ship from the obligation to perform topside work required by Lot II because its bid on Lot III covers all work required.

Generally, bids which do not conform to the requirements of a solicitation must be rejected as nonresponsive, unless the deviation is immaterial or is a matter of form rather than substance. Any deviation which affects price, quantity or quality is material and is cause for rejection. 30 Comp. Gen. 179 (1950). However, a requirement is not necessarily material simply because it is expressed in positive terms with a warning that failure to comply "may" or "will" result in rejection of the bid as nonresponsive. 39 Comp. Gen. 595 (1960).

In this connection we previously considered a similar IFB provision requiring the submission of separate bids on two portions of the work (Lot I and Lot II) if a combination bid (Lot III) was submitted and where only bidders who submitted combination bids were under consideration for award. We determined that a bidder for the combined work who failed to submit a bid for topside work only could be considered for award. B-173806, August 16, 1971. We stated that "since no small shipyard is in contention for award, the purpose sought to be achieved by lot bidding would not

be violated," and "the failure * * * to bid on Lot 2 may be regarded as an immaterial deviation."

NORSHIPCO argues that our decision in B-173806, supra, has been impliedly overruled by our decision in Coastal Drydock & Repair Corporation, B-187048, September 28, 1978, 78-2 CPD 290 wherein we stated:

"We believe that when all of the IFB's 'lot bidding' provisions quoted above are read together they require only that firms interested in bidding upon both dry dock and topside work must bid upon each type of work separately as well as a combined lot. * * *"

The protester believes that we gave effect to the requirement that bidders for combined lots be required also to bid separately. However, it was not necessary to decide what effect we would have given that provision because the successful bidder bid only on drydock work and the quoted proscription applicable only to combined lot bidders did not apply in such circumstances.

We believe that the failure of Sun Ship to submit a bid for topside work had no effect on the price, quality, quantity or time of performance of any contract to be awarded for the combination of drydock and topside work covered in the firm's bid for Lot III. Moreover, it is clear that there is no valid purpose in the circumstances for rejecting a bid for combined drydock and topside work which was not accompanied by separate bids for both portions of the work because no smaller firm with only topside capabilities submitted a bid. Cf. B-168479, December 31, 1969. Furthermore, the protester is not prejudiced by the Government's nonenforcement of its "lot bidding" requirement because the protester was not low for either Lot III or for any combination with other bidders of its Lot I and Lot II bids.

Therefore, Sun Ship may be considered for award of Lot III if proper in other respects and the protest is denied.

However, we are concerned with the IFB provision that gave rise to the problem in this case. Although we have noted the concerns expressed by and on behalf of small businesses, that to ignore or eliminate a requirement to bid separately for drydock and topside work would make comparisons between large and small businesses impossible, we believe that in the absence of a determination to set aside the topside work for small business concerns, there is no authority to award a contract for all or part of the work other than on the basis of the lowest price bid in open competition.

We also question whether, as a practical matter, bidding restrictions effectively promote awards to smaller firms for topside work only. A bidder could submit an unreasonably inflated price for any lot of unwanted work. See B-168479, supra. Moreover, the requirement that combination bids be accompanied by separate bids for drydock as well as topside work could reduce competition among larger firms which have no interest in performing only the topside work but would be willing to perform drydock work with or without the topside work. Accordingly, we are recommending to the Secretary of the Navy that future solicitations be revised to eliminate the requirement for bidding separately for both drydock and topside overhaul work where a combination bid for all work is submitted.


Deputy Comptroller General
of the United States