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DECISION



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

U.S.
[Protest of Corps of Engineers Contract Award]

FILE: B-195001

DATE June 11, 1980

MATTER OF: Schottel of America, Inc.

W. Gooty

DIGEST:

1. Where descriptive information with bid and other information available to contracting activity failed to show that "equal" product offered in low bid met IFB-listed salient characteristic of brand name, contracting agency acted improperly in not rejecting bid as nonresponsive. Low bidder had been denied certificate of competency based on fact that bidder would not meet that salient characteristic. Agency should not have requested preaward survey or referred matter to SBA because protester's bid was nonresponsive. Recommendation is made to Secretary of Army to take appropriate action to avoid recurrence of situation.
2. Recovery of bid preparation costs is denied since record discloses that protester's bid should have been rejected as nonresponsive and even if protester is correct concerning alleged undue restrictiveness of specifications, remedy would be resolicitation rather than award to protester.

Schottel of America, Inc. (Schottel), a small business, protests the award of a contract to M&T Harbormaster Div., Mathewson Corporation (M&T), under invitation for bids (IFB) DACW69-79-B-0045, issued by the Huntington District Office, United States Corps of Engineers (Corps).

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The IFB solicited two 50 H.P. and one 75 H.P. Murray Tregurtha (M&T) model 4DM242, or equal, out-board marine propulsion units and listed various salient design and performance characteristics. The IFB contained a "Brand Name or Equal" clause which states in part:

"(a) * * * Bids offering 'equal' products including products of the brand name manufacturer other than the one described by brand name will be considered for award if such products are clearly identified in the bids and are determined by the Government to meet fully the salient characteristics requirements referenced in the Invitation for Bids.

* * * * *

"(c)(1) * * * The evaluation of bids and the determination as to the equality of the product offered shall be the responsibility of the Government and will be based on the information furnished by the bidder or identified in his bid, as well as other information reasonably available to the purchasing activity. CAUTION TO BIDDERS. * * * to insure that sufficient information is available, the bidder must furnish as a part of his bid all descriptive material (such as cuts, illustrations, drawings, or other information) necessary for the purchasing activity to (i) determine whether the product offered meets the salient characteristics requirements of the Invitation for Bids and (ii) establish exactly what the bidder proposes to furnish and what the Government would be binding itself to purchase by making an award.
* * *"

Schottel's low bid proposed to furnish two of its models as equal to the brand name. After receiving a recommendation of "no award" to Schottel following a preaward survey and the refusal of the Small Business Administration (SBA), without explanation, to issue a certificate of competency (COC), an award was made to M&T, the only other bidder.

Schottel protests that it was wrongfully denied a contract because the SBA exceeded its authority in determining not to issue a COC based solely upon Schottel's alleged nonresponsiveness. The SBA determined that Schottel's 75 H.P. unit would not comply with the specification requirement that the propeller have an approximate diameter of 38 inches. Schottel's supplier had proposed a propeller with a 30-inch diameter. This construction of the specifications by SBA also led Schottel to protest the undue restrictiveness of the specifications which allegedly precluded competition. As the contract was completed simultaneously with the protester's filing of comments on the Corps' report, Schottel requests relief in the form of bid preparation costs.

In connection with the protest, the SBA states:

"* * * that the subject COC involves an element of responsiveness rather than responsibility. * * * we feel the determination made by our field office was in error. * * * since this matter involves an issue of responsiveness, it is for determination by the [Corps] and should not have been referred to SBA."

The Corps agrees with Schottel's allegation of wrongful contract denial due to SBA's actions. Moreover, the Corps contends that the matter was properly referred to SBA since "there was no actual finding that Schottel was nonresponsive"; there was no reason to question and the Corps was constrained to accept SBA's determination because of SBA's conclusive jurisdiction. In a recent report, the Corps states: "the discussion regarding the existence or validity of any responsiveness determination by the Contracting Officer, however, is at this point irrelevant."

We conclude (1) the Schottel bid was nonresponsive and the Corps should not have requested a preaward survey or referred the question of the protester's responsibility to the SBA; (2) whether or not the specifications are unduly restrictive is academic at this time; and (3) the claim for bid preparation costs is denied.

With respect to responsiveness, which we consider not only relevant but dispositive of this case, the contracting officer reports that the descriptive literature furnished by Schottel with its bid and literature furnished by Schottel on a previous invitation "were not sufficient to make a determination of responsiveness." Rather than reject Schottel's bid as nonresponsive, the Corps requested a preaward survey on Schottel with particular emphasis to be given to compliance with the brand name or equal requirement. The preaward survey noted that Schottel advised that its model deviated from the propeller size requirement. Despite the fact that the preaward survey conditioned Schottel's ability to meet the delivery schedule on the "buying activity's acceptance of the propeller diameter * * *," the contracting officer did not subsequently determine affirmatively that the Schottel bid was responsive. When queried about the deviation by the preaward survey team and the SBA, Schottel responded that performance of its unit would not be affected. In any event, as discussed below, the bid is clearly nonresponsive and should have been rejected without a preaward survey or referral to the SBA.

Where, as here, the contracting agency in a "brand name or equal" solicitation goes beyond the make and model of the brand name and specifies particular features, we have held that such features must be presumed to have been regarded as material and essential to the needs of the Government. See S. Livingston and Son, Inc., B-183820, September 24, 1975, 75-2 CPD 179. The responsiveness of an "equal" bid submitted in response to the above-quoted clause is dependent on the completeness and sufficiency of the descriptive information submitted with the bid, previously submitted information, or information otherwise available to the purchasing activity. See

Championship Sports Floors, Inc., B-193178, March 7, 1979, 79-1 CPD 161. Further, we have held that "equal" products must conform to the salient characteristics listed in the IFB in order to be regarded as responsive even if the offered item functions as well as the brand name unit and satisfies the intent of the specifications. See Ohio Medical Products, B-192317, October 23, 1978, 78-2 CPD 295; Environmental Conditioners, Inc., B-188633, August 31, 1977, 77-2 CPD 166; General Hydraulics Corporation, B-181537, August 30, 1974, 74-2 CPD 133; 49 Comp. Gen. 195, 198, 199 (1969).

The descriptive information contained in the Schottel bid and previously submitted information gave no dimensions for the propellers. Since the information failed to show compliance with a salient characteristic, the procuring activity acted improperly in failing to reject the bid as nonresponsive. Furthermore, the descriptive information with the Schottel bid and other information available to the activity appear to cast doubt on the Schottel product's compliance with other listed salient characteristics, primarily due to the general nature of the information.

Because of this, by letter of today to the Secretary of the Army, we are recommending that appropriate action be taken to avoid a recurrence of the deficiencies noted.

Concerning Schottel's contention that the IFB was unduly restrictive, the Corps argues that this contention is untimely as based upon alleged improprieties in an IFB which should have been but was not filed prior to bid opening, citing 4 C.F.R. § 20.2(b)(1) (1980). While we agree with Schottel that the protest was timely filed because the protestable action was SBA's denial of the COC because of the specifications, the Corps has not directly responded to the allegation. Because the contract has been performed, remedial action is impracticable even if Schottel is correct. However, our letter to the Secretary of the Army also requests an evaluation of the Schottel complaint for future procurements.

Based on the foregoing, the protest is denied.

Our Office has allowed recovery of bid preparation costs where the agency's actions were arbitrary and capricious and deprived the claimant of an award to which it was otherwise entitled. Blazer Industries, Inc., B-194188, June 19, 1979, 79-1 CPD 440. In this case, it is clear that Schottel's bid should have been rejected as nonresponsive. Moreover, even if the specifications were restrictive, the remedy would be resolicitation rather than award to Schottel. Therefore, the claim for bid preparation costs is denied.



For the Comptroller General
of the United States