

DECISION



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

Protest of Bid Rejection as Non responsive

FILE: B-197812

DATE: August 6, 1980

MATTER OF: Hutchison Brothers Excavating Co., Inc.

DIGEST:

Bid listing both brand name and proposed "equal" equipment was properly rejected as nonresponsive to solicitation where agency determined that proffered non-brand-name product failed to meet solicitation specifications, rendering offer of both conforming and nonconforming products at best ambiguous and requiring that bid be rejected.

Hutchison Brothers Excavating Co., Inc. (Hutchison), protests the rejection of its bid for the rental of certain construction equipment under invitation for bids (IFB) No. 0144-AA-38-0-0-MW issued by the District of Columbia (D.C.) Government. Hutchison also filed a complaint in the Superior Court of the District of Columbia (Hutchison Brothers Excavating Co., Inc. v. Harvey, Civil Action No. 4775-80) to enjoin performance of the contract awarded and the court has requested our decision on the protest. See 4 C.F.R. § 20.10 (1980).

The IFB sought bids for two groups of equipment on a brand name or equal basis and provided that Award Group I (items 1-4 and 6-8) was to be awarded in the aggregate. The IFB description for item 2 upon which the protest centers called for a wheel tractor scraper, model TS-18 or equal, with 18-cubic-yard capacity. The bid form required bidders to offer unit transportation, operator labor and machine rental prices. The IFB also included an equipment list which provided that the "[b]idder shall submit with his bid a listing of equipment he intends to furnish by Item Number." (Emphasis added.) The D.C. Government found the protester's bid nonresponsive on the basis of the make and model designation, "TS-18 (Cat 627)," for item 2 of Award Group I set forth in Hutchison's

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equipment list because the model Cat 627 scraper has a 14-cubic-yard capacity rather than the 18-cubic-yard capacity required by the IFB.

Hutchison asserts that it bid on the brand name TS-18 scraper and alternatively offered the Cat 627 as an "equal" pursuant to the IFB equipment list requirement. The protester contends that the D.C. Government should have accepted its bid on the TS-18, notwithstanding the fact that the agency determined that the Cat 627 did not constitute an equal product and that, therefore, its low bid was improperly rejected as nonresponsive.

We do not consider the protest to have merit.

As indicated by the IFB brand name or equal clause, the purpose of the equipment list in the instant IFB was to allow the procuring activity to determine before award whether the bidder intended to furnish equipment in full compliance with the brand name or equal specifications. By listing both pieces of equipment, the protester reserved the right to furnish either the TS-18 or the Cat 627 for the item 2 scraper and the D.C. Government could not be sure which scraper it would be binding itself to rent. Moreover, Hutchison does not dispute the D.C. Government's determination that the model Cat 627 is not an "equal" product. Had the D.C. Government accepted Hutchison's bid, the protester would have been in the position to argue that the agency was entitled to rent only the Cat 627 regardless of the fact that it does not meet the cubic-yard capacity specified for the item 2 scraper. 49 Comp. Gen. 764, 768 (1970). Because one of the scrapers offered met the agency's specifications and one did not, Hutchison's bid on item 2 was at best ambiguous and, therefore, properly rejected as nonresponsive. Virginia Refrigeration, Inc., B-194495, August 17, 1979, 79-2 CPD 129.

Hutchison further argues that because the firm did not limit its bid on item 2 solely to a purportedly "equal" product, paragraph "B" of the IFB brand name or equal clause requires that the bid be considered as offering the brand name product referred to in the IFB.

That construction is required to be applied to a bid, "[u]nless the bidder clearly indicates in his bid that he is offering an 'equal' product * * *." (Emphasis added.) In our opinion, the parenthetical equipment list entry of model Cat 627 was a sufficiently clear indication in Hutchison's bid that the firm was offering a proposed equal product.

Finally, Hutchison contends that the conduct of the D.C. Government in allowing F.E. Gregory & Sons, Inc. (Gregory), to supply a nonconforming dozer for item 8, Award Group I, after the award of the contract supports Hutchison's interpretation of the IFB that it could offer a nonconforming "equal" without affecting its commitment to provide the specified brand name. Gregory responds that the dozer was provided at the D.C. Government's request on a temporary basis as backup equipment in addition to the conforming on-line equipment required in the IFB and that Hutchison's protest in this regard concerns a matter of contract administration not for consideration under our Bid Protest Procedures, citing Logicon, Inc., B-196105, March 25, 1980, 80-1 CPD 218. However, the rule in Logicon is not for application here because Hutchison is not protesting the D.C. Government's conduct with respect to Gregory, but is citing it only in support for what Hutchison did under the IFB.

In our view, the Gregory situation and the Hutchison situation are different. As Hutchison acknowledges, Gregory listed the specified brand name and nothing more. Therefore, Gregory was responsive and was eligible for award on that basis. The validity of the award is determined from the responsiveness of the bid and not from the performance under the contract. See Tracor Marine, Inc., B-197260, June 23, 1980, 80-1 CPD 439. Hutchison, on the other hand, bid differently than Gregory. By listing the specified brand name and a nonconforming item, Hutchison's bid was nonresponsive for the reasons indicated above and, therefore, Hutchison was not entitled to award.

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Accordingly, the Hutchison protest is denied.

Milton J. Fowler

For the Comptroller General
of the United States