

DECISION



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

FILE: B-211313

DATE: July 8, 1983

MATTER OF: Harnischfeger Corporation

DIGEST:

1. Bid was responsive to a standard commercial product certification requirement where the bidder specified a crane model which it stated would meet specification requirements.
2. Where (1) the specification states that a certified standard product may be modified to meet the technical requirements of the specification; (2) the IFB does not limit the number or type of changes allowed; and (3) it appears that the agency did not intend to consider proposed modifications in determining the responsiveness of bids, the performance capability of the product furnished by the bidder is for consideration by the agency as part of its determination of bidder responsibility, not bid responsiveness.
3. Protest challenging responsibility of awardee is dismissed because GAO does not review affirmative determinations of responsibility, except in circumstances not applicable here.

Harnischfeger Corporation (Harnischfeger) protests the proposed award of a contract to Koehring Company (Koehring) under invitation for bids (IFB) DLA700-83-B-0428 issued by the Defense Logistics Agency (DLA) for two 25-ton, truck-mounted hydraulic cranes.

Koehring was the low bidder. Harnischfeger protests that Koehring's bid was nonresponsive because Koehring's standard commercial crane, the model Lorain MCH300, will not satisfy the performance criteria under the IFB specifications.

We deny the protest.

The IFB contained a standard commercial product (SCP) clause, which provided :

"[t]he crane shall, as a minimum, be in accordance with the requirement of this specification and shall be the manufacturer's standard commercial product with any added features needed to comply with the requirement."

Also, under this IFB, the bidder was asked to specify its make/model of the item bid and to certify that the make/model identified is the bidder's standard commercial item which fully complies with the requirements of the above-quoted standard commercial clause. Koehring certified that its Lorain MCH300 model would comply with the specifications.

Harnischfeger contends that, according to Koehring's commercial literature, the Lorain model fails to meet the specification for lifting capacity and the bid therefore is nonresponsive. DLA asserts that although the SCP clause is a matter of responsiveness, the SCP clause, when read with the bidder's certification that its commercial product can meet the military specification, shows the bidder's capability to perform the contract requirements and, thus, whether the model ultimately performs to specifications is a matter of responsibility. DLA further explains that the SCP clause shows the Government that the bidder is in the business of manufacturing or dealing in items of the type solicited, thereby establishing the bidder's past performance, history and capability. DLA states that the bidder's certification assures the Government that the commercial product can and will be modified to meet the special requirements of the specification, again showing the bidder's performance capability and responsibility. DLA points out that in a similar situation, Schreck Industries Inc., Raymond Corporation (Schreck), B-204050, B-204094, July 6, 1982, 82-2 CPD 14, our Office held that designation of a model, agreement to the SCP clause which required a standard design, which with the bidder's certification that the model identified would comply with the specifications, which permitted modifications from the manufacturer's standards as required to conform to the

specifications, constituted a responsive bid, and that whether the model was of a standard design and could be modified to meet the specification was a judgment to be made by the contracting officer in determining the bidder's responsibility.

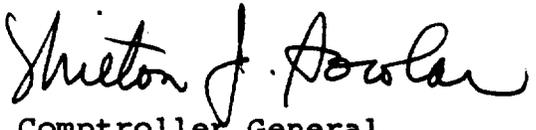
A bid is responsive if it unequivocally offers the exact thing called for in the IFB so that upon acceptance, it will bind the contractor to deliver an item in accordance with all the material terms and conditions of the IFB. Redeye Enterprises; Standard Equipment Company, B-204814, B-204814.2, March 25, 1982, 82-1 CPD 283. We interpreted similar clause requirements in Schreck, supra. Here, as in Schreck, the plain language of the certification clause requires a bidder to specify a make or model number which it certifies to be a standard commercial product meeting all terms of the specification. The SCP clause lends flexibility to this clause by permitting modification of the specified standard product where necessary to satisfy the technical requirements of the specification. Read together, the clauses require bidders to offer a standard crane which could be modified, if necessary, to satisfy those technical requirements. Neither the certification clause nor the specification set forth any limitation on the number or type of modifications allowed other than a requirement that components be the products of an established manufacturer.

Thus, the IFB asked for a standard commercial product and a promise that the model with modifications, if necessary, would comply with the IFB specifications. Koehring offered this; thus, we find Koehring's bid responsive. We note that the other cases cited by Harnischfeger are not controlling, since none contain the IFB language involved here which permits a bidder to offer a modified standard product.

Furthermore, the IFB contained no requirement that bids be accompanied by technical information indicating the extent of intended modifications, and the certification clause did not state that bids not conforming to its terms would be rejected as nonresponsive. As in Schreck, these factors indicate that DLA intends to consider the performance capability of the item specified by the bidder as part of its determination of bidder responsibility, that is, whether the bidder could in fact produce the required equipment. Thus, whether Koehring's crane was of standard

design and could be modified to meet the specification was a judgment to be made by the contracting officer as part of his determination of Koehring's responsibility. See World Wide Diesel, Inc., B-205599, May 6, 1982, 82-1 CPD 433; Tex-La Cable T.V., Inc., B-201558, April 5, 1982, 82-1 CPD 300.

Before awarding a contract to Koehring, the contracting officer must determine that the company is a responsible prospective contractor. Because such determination is essentially a business judgment, our Office does not review affirmative determinations of responsibility unless there is a showing of possible fraud on the part of the procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Janke & Company, Inc., B-210756, February 22, 1983, 83-1 CPD 183. Neither exception applies here.

for 
Comptroller General
of the United States