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DECISION

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

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FILE: B-212530.2 **DATE:** December 13, 1983

MATTER OF: Fletcher & Sons, Inc.

DIGEST:

Even where a solicitation appears to require a bidder to bid on the base and all additive items, a bid which fails to include prices for some items should not be rejected if evaluation and award are not based upon the items that were not bid.

The Superior Court of the District of Columbia has requested that this Office consider the protest of Fletcher & Sons, Inc. against the award of a contract under District of Columbia invitation for bids No. 0491-AA-02-0-3-CC. After filing a protest with this Office, Fletcher & Sons sought temporary and permanent injunctive relief from the court. Fletcher & Sons, Inc. v. District of Columbia (Civil Action No. 9144-83). Although we dismissed the protest because the court had not requested or expressed its interest in an opinion from this Office (B-212530, September 30, 1983, 83-2 CPD 397), the court now has requested our opinion in conjunction with the suit for permanent relief (the court previously having dismissed the motions for temporary relief).

The protest is without merit.

The basic issue is whether the awardee's bid was nonresponsive for failure to bid on several additive items where the invitation expressly advised bidders that an award would be made to one bidder on the basis of the amount bid for the basic item, "plus none, part or all" of the additive items, and also incorporated language requiring a price for all items and warning that the failure to bid on all items may result in the bid being rejected.

The invitation solicited bids for the modernization of and additions to Coolidge Senior High School,

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and included specifications for one "base" item and eleven additive "alternates." The invitation's Schedule of Prices provided a separate line item and a space for submitting a price for the basic item and each additive item. Article 18 of the Instructions to Bidders explained as follows:

> "MANNER OF AWARD: An award will be made for lump sum to one (1) bidder on the basis of the amount stated in the Form of Bid, plus none, part or all of the Additive Alternates, as totaled by the Contracting Officer."

In addition, the solicitation's Supplemental Instructions to Bidders referenced a booklet of the District's Standard Contract Provisions for use with specifications for construction projects, and called the bidder's attention to the booklet's Instruction to Bidders, General Provisions, and Labor Provisions. Article 18 of those instructions stated:

> "Each Bidder shall submit a bid on all items in the Price Schedule; failure to bid on all items may result in bid rejection."

The protester bid $10,390,585 for the basic item and offered a price for each additive item, while the eventual awardee, Sherman R. Smoot Company, Inc. (Smoot), bid $9,423,000 for the basic item but entered "No Bid" next to three of the additives.

Based on the available funding, the District of Columbia awarded a contract to Smoot for the basic item only. The purpose of the solicitation's format was to permit the District to solicit bids for the minimum modernization necessary (the basic item) plus whatever further improvements were within the District's funding limitations at the offered prices. Prior to bid opening, the contracting officer had determined that the amount of funds available for the project was $9,977,000, an amount exceeded by Fletcher & Son's offered price for the basic item and met only by Smoot's offered basic item price plus one additive priced at $39,900. (There was one other bidder whose basic item bid price exceeded the protester's.) The District therefore made an award for the basic item only because it thought there would be insufficient funds for any additives.

In arguing that Smoot's bid was nonresponsive for failing to offer a price for all items, the protester contends that certain additives contained high risks and affected the performance and thus the price of the basic item and other items. The protester suggests that any firm that did not bid on the high risk additives therefore had an advantage in computing the rest of its bid prices. Fletcher & Sons also argues that the invitation was fatally deficient for failure to include a clause required by the District of Columbia Bureau of Material Management Manual advising offerors of the method for determining the low bid in this type of situation. Basically, the clause tells bidders that additives will be selected in the listed order of priority if funds are available; if there is not sufficient money for an additive, it is skipped and the next in order selected.

Initially, we note that the District challenges the protester's "standing" to protest.[1] Our Bid Protest Procedures require that a protester be an "interested party," 4 C.F.R. § 21.1(a) (1983), and this Office, in applying that requirement, does not utilize the courts' doctrine of standing per se. See Rosendin Electric, Inc., 60 Comp. Gen. 271 (1981), 81-1 CPD 119. In any event, the District's standing argument is wrongly premised. The District bases its argument on the fact that Fletcher & Sons' basic bid price exceeded the available funds and the mistaken assumption that the bid therefore was ineligible for any award. If Smoot's bid were determined to be nonresponsive, however, Fletcher & Sons' bid would be eligible for an award in the event sufficient funds became available after bid opening. See Martin J. Simko Construction, Inc., 60 Comp. Gen. 327 (1981), 81-1 CPD 209.

The test of a responsive bid is whether the bid as submitted is an offer to perform the exact thing called for in the invitation so that acceptance will bind the contractor to perform in accordance with all the invitation's material terms and conditions. See C. T. Bone, Inc., B-194436, September 12, 1979, 79-2 CPD 190. Smoot's failure to bid on additives ultimately was irrelevant to the firm's obligation under the contract that was awarded. As we held in Stroh Corporation, B-209470, February 8, 1983, 83-1 CPD 143, even though the invitation states that the

[1]The District also contends that Fletcher & Sons failed to file a timely protest under our Bid Protest Procedures, 4 C.F.R. § 21.2. It is our policy, however, to consider the merits of a protest issue when a court expresses interest. See Craft Machine Works, Inc., B-202257, May 3, 1982, 82-1 CPD 407.

failure to bid on every item will cause the rejection of the bid, when a bidder does not bid on certain additive items the firm runs the risk that its bid will be eliminated from consideration as nonresponsive only if the evaluation process dictates acceptance of the items not bid. See also Sterling Engineering and Construction Company, Inc., 55 Comp. Gen. 443 (1975), 75-2 CPD 293; Mitchell Brothers General Contractors, B-192428, August 31, 1978, 78-2 CPD 163. Bids must be evaluated on the basis of the work actually awarded; any evaluation which incorporates more (or less) than the work that will be awarded fails to obtain for the government the benefits of full competition on the work that will be performed, which is one of the primary purposes of the public procurement laws and regulations. Sterling Engineering and Construction Company, supra; Castle Construction Company, Inc., B-197466, July 7, 1980, 80-2 CPD 14. The failure to bid on an item not included in the evaluation and award thus is immaterial and does not affect the responsiveness of the bid. See 44 Comp. Gen. 386 (1965).

In this regard, we find no legal merit to the protester's argument that since the additives for which Smoot submitted no bids were high risk items having a significant impact on the performance of the basic item and other additives, Smoot gained an unfair advantage over the protester. The District's invitation expressly advised bidders that award could be made for the basic item plus none, part or all of the additive items, so that Fletcher & Sons was on clear notice of the fact that it could be competing for the basic item alone or with any possible combination of additives. Thus, each bidder competed against the other bidders on the same basis, and we have no reason to conclude that any bidder was unfairly prejudiced by another's failure to submit a price for a particular combination if that combination was not selected for award. See H. M. Byars Construction Company, 54 Comp. Gen. 320 (1974), 74-2 CPD 233.

Therefore, Smoot's failure to bid on the items not awarded was immaterial, and did not require rejection of the bid.

The last issue is whether the solicitation is fatally defective for failure to include a clause establishing the selection priority as required by the Manual. We believe

the District's failure to include the type of clause required by the Manual is, in this case, a procedural defect that does not affect the validity of the award.

First, regarding procurements pursuant to the Federal Procurement Regulations, which do not require a clause setting forth a selection priority in situations like the one here, we have held that the failure to include a clause detailing a priority for a particular procurement does not provide a proper basis to challenge an evaluation and award made on the basis of the items the government actually needed and for which there was funding available. H. M. Byars Construction, Company, supra. We have urged, however, that a pre-established priority be utilized in future procurements, not because bidders necessarily are prejudiced otherwise, but to avoid any appearance that the procuring activity could determine the low bidder by manipulating the selection of additive items for evaluation. Id.; see Park Construction Company, B-190191, July 18, 1978, 78-2 CPD 42. In this procurement, the District did in fact adhere to the pre-established priority set forth in the Manual.

Second, the purpose of a clause establishing a selection priority is to advise bidders of the basis for evaluation and to insure that all bidders will have an equal opportunity for award. No bidder was prejudiced here by the omission of the clause required by the Manual since, as previously discussed: 1) the invitation did notify bidders that an award could be made on none, part or all of the additives, in addition to the base item so that all bidders had the same opportunities with respect to formulating their bids; and 2) the District in fact adhered to the Manual's policy in this procurement.

Finally, we point out that since the invitation did notify bidders that the District could award none, part or all of the additives, the protester had the opportunity, before it entered the competition, to seek clarification as to the evaluation method to be utilized, if the protester in fact did not appreciate how the awardee would be determined and was unaware that the Manual's procedure was applicable. In this regard, we specifically have held that an invitation's failure to express the selection priority for additive items involves an alleged solicitation

impropriety apparent prior to bid opening, which under our Bid Protest Procedures should be protested prior to bid opening. Colton Construction Co., Inc., B-191575, July 6, 1978, 78-2 CPD 12.

The protest is denied.

for Comptroller General
of the United States