

Cooper



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: L. B. Foster Company

File: B-222593

Date: August 18, 1986

DIGEST

Where a bidder submits a bid offering alternative items that meet the specifications, the government is not precluded from evaluating and accepting the bid.

DECISION

L. B. Foster Company protests the award of a contract to National Pipe & Piling, Inc., under invitation for bids (IFB) No. DACW85-86-B-0011, issued by the Army Corps of Engineers, Alaska District, on April 4, 1986. The solicitation called for steel sheet piling and accompanying fittings to be used in the repair of retaining walls of the entrance channel to the Nome, Alaska, harbor. L. B. Foster contends that the Army improperly refused to consider the alternative bids it offered. We sustain the protest.

Although the solicitation did not contain a brand name or equal clause, it did provide for considering bids of "equal products" that met the salient characteristics listed in the IFB. The solicitation also required delivery of the sheet piling by July 15, 1986, in order to assure repair of the retaining walls of the harbor channel by the end of the Alaska summer construction season.

The Army received two bids. National Pipe offered an equal product for item 1, steel sheet piling CZ114, rather than the PZ 27 sheet piling specified, as well as equal products for all other items. Its total bid was \$232,347.50. Foster offered the specified PZ 27 sheet piling, but offered substitute products for all other items. Its total bid price was \$265,044.72. Foster also submitted alternative bids, varying the type of sheet piling as well as two other items, at lower prices than National Pipe's offer. The Army did not consider any of Foster's alternative bids and awarded National Pipe a contract on May 12. Foster protested to our Office on May 22; the Army suspended performance of the contract on May 23.

Foster argues that if the Army had evaluated its alternative bids, it would have been entitled to award, since the substitute sheet piling in

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one of its alternative bids was structurally equivalent or superior to the CZ114 sheet piling offered by National Pipe, and the bid was \$26,560 lower. Foster also asserts that, if substitutes for the PZ 27 sheet piling were not acceptable, then National Pipe's bid was nonresponsive and, as the only bidder offering PZ 27 sheet piling, it should have received award.

In its report to our Office on Foster's protest, the Army acknowledges that it erred in not evaluating Foster's alternative bids. We agree with the Army's admission of error. Our Office consistently has held that even where a solicitation does not provide for alternative bidding, but a bidder nevertheless submits a bid offering alternatives that meet the specifications, the government is not precluded from accepting one of the alternative bids that meets the solicitation's requirements. P&N Construction Co., Inc., 56 Comp. Gen. 328 (1977), 77-1 C.P.D. ¶ 88; Sidings Unlimited, B-220820, Dec. 18, 1985, 85-2 C.P.D. ¶ 686. Clearly, since the Army accepted National Pipe's offer of substitute sheet piling, it had an obligation to consider Foster's alternative bids, with substitute sheet piling, as well. We therefore sustain Foster's protest.

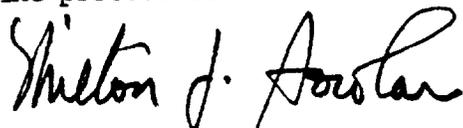
Although the Army suspended performance of National Pipe's contract on May 23, the supplies purchased under the contract had already been shipped by the awardee and were warehoused in Seattle, Washington, on that date awaiting shipment to Alaska by barge. The Army maintains that in order to meet the July 15 deadline for delivery, the supplies had to be transported by barge leaving no later than July 5, since barge is the only means available for transporting the sheet piling to Nome, Alaska, and barge transport time is 3 weeks.

As a result of this conclusion, the Army terminated National Pipe's contract on July 3, and took possession that same day of the sheet piling warehoused in Seattle as termination inventory in order to meet the loading deadline for the barge leaving July 7, due to arrive in Alaska July 27. The Army asserts that if it had terminated National Pipe's contract, evaluated Foster's alternative bids, and awarded a contract to Foster, Foster would not have been able to acquire the necessary supplies and transport them to Nome in time for repairs to be completed within the Alaska construction season. The Army further maintains that, in light of its recognition of error, suspension of performance of the contract, the emergency nature of the repairs, time constraints of the barge schedule, and Foster's inability to deliver at or near the required date, the decision to terminate National Pipe's contract and take possession of the supplies as termination inventory was reasonable.

Foster argues that there were barges still available as of July 9 that would meet the July 15 delivery date and, therefore, it could have performed within the time specified if awarded the contract. However, Foster does not present any evidence to verify this assertion. In addition, Foster asserts that the Army had not yet awarded the construction contract to repair the retaining wall so that the actual work could not proceed on time regardless of when the steel piling would be delivered.

In view of our finding on the merits of the protest, Foster would have had a substantial chance for award. Foster is therefore entitled to its bid preparation costs and protest prosecution costs, and it should submit a claim, documented as to amount, to the Army. See 4 C.F.R. § 21.6(e) (1986). We are advising the Secretary of the Army of our determination by separate letter.

The protest is sustained.

for 
Comptroller General
of the United States