



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: F.J. Dahill Co., Inc.
File: B-235272
Date: August 3, 1989

DIGEST

Bid was properly rejected as nonresponsive where statement included in the bid imposed conditions that modified material solicitation requirements.

DECISION

F.J. Dahill Co., Inc., protests the Department of the Navy's rejection of its bid as nonresponsive under invitation for bids (IFB) No. N62472-87-B-0489, for the replacement of the roof at the Naval and Marine Corps Reserve Center, Plainville, Connecticut. The protester's bid was rejected for imposing conditions in a statement submitted with its bid which would modify material terms and conditions of the solicitation.

We deny the protest.

Dahill, the low bidder at the February 22, 1989, bid opening, included a statement with its bid that it would not assume responsibility for the structural integrity of the building and that it would not provide engineering or architectural services of any kind. The statement also provided that Dahill's scope of work did "not include the identification, detection, abatement, encapsulation or removal of asbestos or similar hazardous substances" and if such substances were encountered by Dahill or any other firm performing work at the job site, it reserved the right to discontinue its work and remove its employees from the job site until such substances were located and abated, encapsulated or removed, or it was determined that no hazard exists. Dahill also reserved the right for an extension of time and compensation for delays encountered "as a result of such situation and correction."

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On February 22, Dahill was advised by telephone that its bid which included the accompanying statement was being reviewed to determine whether it was responsive. By letter dated February 24, Dahill contended that the statement which accompanied its bid was provided as clarification and it had not taken exception to the IFB's requirements. By letter dated April 11, the contracting officer informed Dahill that its bid was rejected because it had taken exceptions to solicitation requirements. Dahill protested to our Office on April 21.

Dahill contends that it has routinely submitted the statement in question whenever submitting bids for roof replacement projects, and other federal agencies have awarded it contracts when it included the statement in its bid. Dahill maintains that its statement regarding asbestos is superfluous because it was consistent with the IFB paragraph 8.1, of specification section 01010, which provides that:

"8.1 Asbestos Material: If material is encountered which may contain asbestos and must be disturbed, do not touch the material. Notify the Contracting Officer in writing. Within 14 calendar days, the Contracting Officer will perform laboratory tests to determine if there is asbestos. If asbestos is not a danger, the Contracting Officer will direct the Contractor to proceed without change. If the additional material is asbestos and must be handled, the Contracting Officer will direct a change."

According to Dahill, the statement at issue did not reduce its obligation because the scope of work does not include asbestos abatement, and if asbestos is found, the Navy has obligated itself under paragraph 8.1 to direct a change. Dahill argues that such a change would create an entitlement to an adjustment in time and money for any delay experienced and additional work performed as a result of the presence of asbestos. Therefore concludes Dahill, it did not improperly qualify its bid.

The question of responsiveness of a bid concerns whether a bidder has unequivocally offered to provide the requested items or services in total conformance with the requirements specified in the IFB. Howard Electrical and Mechanical, Inc., B-228356, Jan. 6, 1988, 88-1 CPD ¶ 8. Because all bidders must compete for advertised contracts on a common basis, no individual bidder can reserve rights or immunities from responsibility that are not extended to all bidders by the conditions and specifications advertised in the IFB.

Free-Flow Packaging Corp., B-204482, Feb. 23, 1982, 82-1 CPD ¶ 162. Where a bidder qualifies its bid to protect itself or reserves rights which are inconsistent with a material portion of the IFB, the bid must be rejected as nonresponsive. Data Controls/North Inc., B-205726, June 21, 1982, 82-1 CPD ¶ 610, aff'd upon reconsideration, B-205726.2, Aug. 16, 1982, 82-2 CPD ¶ 131.

In our view, the contracting officer correctly rejected Dahill's bid as nonresponsive because, contrary to IFB requirements, Dahill reserved the right to stop work, leave the job site, and receive a time extension and compensation automatically if asbestos or similar hazardous substances were encountered by it or any other firm performing work at the job site. Dahill's statement submitted with its bid is inconsistent with IFB paragraph 8.1 quoted above, which vests in the contracting officer, not the contractor, the determination regarding whether there is a danger from asbestos and what steps to follow. Furthermore, paragraph 8.1 does not preclude the possibility of continuing work in other areas, as Dahill's statement does.

We agree with the Navy that Dahill's statement indicated Dahill would not follow the procedures required in paragraph 4 of IFB section 02070, which provides in part:

"If materials containing asbestos are encountered, the provisions of the Occupational Safety and Health Administration's Asbestos Standards 29 CFR 1910.1001 and 29 CFR 1926.58 must be followed. Approved barriers and warning signs shall be provided to reroute personnel around areas of dangerous work. Warning barriers shall be placed at roof perimeters and deck openings. Temporary covers over deck openings shall be clearly labeled. Removed materials shall not be thrown freely from the roof but shall be lowered to the ground in suitable containers or in a covered chute, in order to reduce the spread of dust and other debris. Care shall be taken to prevent the entrance of debris and obstructions into the building. Suitable plugs and barriers shall be provided during the entire period of the contract. The Contractor shall provide tarpaulins or other approved protective covering to accomplish this protection. . . ."

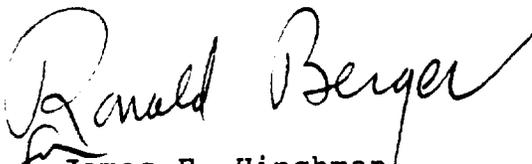
Dahill argues that the Navy did not contemplate that the successful bidder would handle asbestos, because Navy test samples of the existing roof did not indicate the presence of asbestos, and Dahill's statement simply reflected the

Navy's view of the project. The Navy, however, replies that only two samples were taken and this did not eliminate the likelihood of asbestos in a roof over 20 years old. The Navy states that roofs such as the one here frequently contain materials comprised of asbestos, and therefore it included procedures in the event asbestos were found. Though Dahill disagrees with the Navy about the likelihood of the presence of asbestos, we think it is clear that Dahill in its bid statement tried to protect itself against the contingency of the presence of asbestos by reserving rights not extended to all bidders by the IFB.

Dahill's February 24 letter stating that it had not taken exception to the IFB's requirements cannot be considered in determining the responsiveness of its bid since only material available at bid opening may be considered in making a responsiveness determination. See Vista Scientific Corp., B-233114, Jan. 24, 1989, 89-1 CPD ¶ 69. Furthermore, Dahill's argument that other federal agencies have awarded it contracts when it included the disputed statement in its bids is irrelevant since improper award in one or more procurements does not justify repetition of the same error. See Inscum Elecs. Corp., B-225858, Feb. 10, 1987, 87-1 CPD ¶ 147.

Having found Dahill's bid nonresponsive with respect to its language regarding asbestos, we need not consider whether the other language in Dahill's bid provided additional bases for the bid's rejection.

The protest is denied.


for James F. Hinchman
General Counsel