



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Construcciones Jose Carro, Inc.

File: B-236117

Date: November 6, 1989

DIGEST

Bidder's failure to inspect material from core borings in procurement for excavation work, even where the solicitation so requires, provides no basis to reject an otherwise responsive bid that takes no exception to solicitation requirements.

DECISION

Construcciones Jose Carro, Inc. (Carro), protests the award of a contract to Longo Puerto Rico, Inc. under invitation for bids (IFB) No. DACW17-89-B-0014, issued by the Army Corps of Engineers for the excavation of the Portugues Debris Basin, Puerto Rico, the excavation of two river entrance channels, and additional construction work. Carro contends that Longo's bid should have been rejected as nonresponsive.

We deny the protest.

The IFB was issued on February 1, 1989, and bid opening was scheduled on March 28. The IFB contained drawings and specifications indicating the physical condition of the work sites as revealed by agency surveys and core borings. The IFB cautioned bidders that while the borings were representative of subsurface conditions at their respective locations, variations of subsurface materials should be expected and that "the material recovered from the core borings is available for inspection by prospective bidders." Bidders were "strongly urged" to examine the core borings; bidders were also required to record their core examination visit in a record book at the inspection site. The IFB's instructions to bidders stated that "[f]ailure of a bidder to perform and record his core examination visit shall cause rejection of his bid." The IFB also contained clause No. 48, entitled "Differing Site Conditions" (Federal Acquisition Regulation (FAR) § 52.236-2 (FAC 84-45)), which

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entitles the successful contractor to an equitable adjustment if subsurface conditions at the site differ materially from those indicated in the contract. Finally, the IFB contained clause No. 49, entitled "Site Investigation and Conditions Affecting the Work" (FAR § 52.236-3 (FAC 84-45)), which we discuss below.

At bid opening, Longo was the low bidder with a base bid price of \$6,096,703 and \$103,000 for an additive. Carro, second low, submitted a base bid price of \$6,120,000 and \$91,000 for the additive. Carro thoroughly inspected the core borings prior to submitting its bid; Longo failed to do so. The Corps ultimately determined that Longo had nevertheless submitted the low, responsive bid and made award to the firm. This protest followed.

Carro argues that the IFB requirement that all prospective bidders inspect the results of the core borings was material and mandatory, requiring rejection of Longo's bid. Carro argues that under the terms of clause No. 48, "Differing Site Conditions," the bidder does not assume the risk of subsurface conditions which materially differ from those indicated in the contract; rather, the government retains the risk of differing subsurface site conditions. The net effect of the failure to inspect the borings is to permit a bidder to submit a lower bid while remaining protected by possible recourse to a differing site conditions claim. According to Carro, claims on adjoining sites by other contractors based on differing site conditions support its view. Carro emphasizes (with supporting affidavits) that physical examination of the borings was absolutely essential to formulating a bid (e.g., to know the location, quantity and hardness of the rock on job sites). In this regard, Carro contends that its bid was increased by \$24,000 as a result of its examination of the core borings. Carro further argues that, in contrast, by not examining the core borings, Longo (not having actual knowledge of subsurface conditions) could submit a differing site conditions claim based on conditions that would have been revealed by the core borings--something which Carro could not do. In short, Carro argues that the contracting officer did not have the authority to waive this provision and should have rejected the Longo bid as nonresponsive. We are not persuaded by these arguments.

First, Carro has never alleged that Longo, on the face of its bid, took any exception to IFB requirements. Rather, Carro's protest concerns only acts or omissions by Longo in a context outside the bid documents submitted by that firm. The test for responsiveness is whether a bid as submitted represents an unequivocal offer to provide the requested

supplies or services. Unless something on the face of the bid either limits, reduces or modifies the obligation of the prospective contractor to perform in accordance with the terms of the invitation, the bid is responsive. Coastal Industries, Inc., B-230226.2, June 7, 1988, 88-1 CPD ¶ 538. The determination as to whether a bid is responsive must be based solely on the bid documents themselves as they appear at the time of bid opening. See Hydro-Dredge Corp., B-214408, Apr. 9, 1984, 84-1 CPD ¶ 400. Longo's bid, taking no exception to IFB requirements, was therefore responsive. In this regard, we have generally held that the failure of a bidder to conduct a pre-bid site inspection, even when one is required by the solicitation, is not a basis for rejecting an otherwise responsive bid since that failure does not limit the obligation undertaken by the bidder by its submission of an unqualified bid. See, e.g., Edw. Kocharian & Co., Inc., B-193045, Jan. 15, 1979, 79-1 CPD ¶ 20.

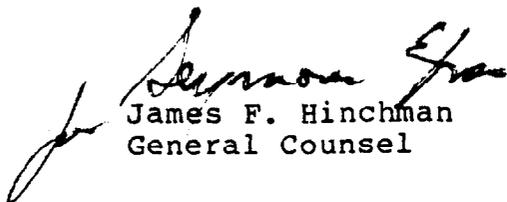
Second, clause No. 49 of the IFB, "Site Investigation and Conditions Affecting the Work," stated as follows:

"The Contractor also acknowledges that it has satisfied itself as to the character, quality and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government."

Carro argues that this clause is inapplicable because "exploratory work done by the Government" refers to work present at the inspection site during site investigation by the bidders while the core borings were located off-site in secured buildings and were not part of the site inspection. We reject this argument. The IFB here specifically informed all bidders, including Longo, of the existence of the core borings (subsurface materials). We think that clause No. 49 states a general rule which is applicable whether or not the core borings were present during surface site inspection by the bidders. Specifically, we think that the agency could

reasonably determine that a bidder, who is aware of the existence of borings that are material to its bid and who knowingly decides not to inspect such borings, thereby assumes the risk of differing site conditions that such an inspection would have revealed.^{1/} Accordingly, we think the government is adequately protected under the circumstances here despite Longo's failure to inspect the borings.

The protest is denied.


James F. Hinchman
General Counsel

^{1/} We note in passing that Longo's subcontractor for excavation work inspected at least some of the borings 2 years ago in connection with another project.