



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Walashek Industrial & Marine

File: B-281577

Date: January 29, 1999

Ronald R. Leaders, Esq., Buckley & Leaders, for the protester.
Timothy A. Chenault, Esq., United States Coast Guard, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly rejected as nonresponsive a bid that included statements by the bidder that the government would provide various utilities, which materially altered the rights and obligations of the bidder and contracting agency.

DECISION

Walashek Industrial & Marine protests the rejection of its bid submitted in response to invitation for bids (IFB) No. DTCG85-98-B-625M48, issued by the United States Coast Guard for boiler repairs to the icebreaker Polar Star.

We deny the protest.

The IFB (at 2) required bidders to submit a lump-sum price for supplying all labor, materials, and equipment (except certain specified government-furnished material) to perform the boiler repair work dockside on the Polar Star, and a composite labor hour rate for an estimated 656 hours of labor applicable to potential contract changes. The IFB (at 32) stated that each bidder's total price would be calculated by multiplying the composite labor rate by the estimated hours, and adding that amount to the bid's lump-sum price for the repair work.

The agency received bids from Walashek and Fraser Inc. by the bid opening date of October 28, 1998. Agency Report, Tab 14, Abstract of Offers. Walashek submitted the apparent low bid of \$153,712, and Fraser submitted the next low bid of

\$213,084. Id. Walashek's bid was accompanied by a short cover letter, stating among other things that:

Contractor will need the following support services from the ship:
Electricity 110 and 440
Compressed Air
Fresh Water Source
Steam Supply
(Contractor would tie in to steam piping)

Agency Report, Tab 16. The agency determined that these conditions rendered Walashek's bid nonresponsive and awarded the contract to Fraser. Walashek filed a timely protest with the Coast Guard, which was denied on November 12. Agency Report, Tab 5. This protest followed.

According to Walashek, the Coast Guard "has developed a standard practice . . . of providing access to ship's utility services under ship repair contracts, if the ship's utility services are operable," and that because of this, its notation regarding the agency's provision of utilities for contract performance cannot be considered as a modification of the material requirements of the solicitation. Protest at 2. Walashek adds that based upon its "observations" the repair work on the Polar Star is currently being performed by Fraser using the ship's utility services, and argues that this constitutes the "best evidence that the provision of utilities is immaterial." Protest at 6.

Generally, to be responsive, a bid must be an unequivocal offer to perform, without exception, the exact thing called for in a solicitation so that acceptance of the bid will bind the contractor to perform in accordance with all of the IFB's material terms and conditions. New Dimension Masonry, Inc., B-258876, Feb. 21, 1995, 95-1 CPD ¶ 102 at 2. If, in its bid, a bidder attempts to impose conditions that would modify the material requirements of the IFB, limit the bidder's liability to the government, or limit the rights of the government under any contract clause, then the bid must be rejected. Federal Acquisition Regulation § 14.404-2(d); NR Vessel Corp., B-250925, Feb. 11, 1993, 93-1 CPD ¶ 128 at 2-3.

The Coast Guard states that, while its practice is "to reasonably cooperate with its contractors and this may include allowing ship repair contractors access to operational shipboard utilities," it does not guarantee contractor access to any shipboard utilities. Agency Report, Tab 2, Statement of Lieutenant Commander Brad J. Suchanek. The agency explains that it could not guarantee in the IFB the availability or adequacy of shipboard utilities to contractors because such utilities are "finite" and must first be available to meet the needs of the ship and its crew, and in any event, the availability of such utilities was unknown when the IFB was drafted. Id. The agency adds that it does not guarantee the availability or adequacy of shipboard utilities to ship repair contractors because of the risk of delay in

contract performance and potential liability of the agency, should the shipboard utilities prove to be unavailable to the contractor or otherwise inadequate. Id. The agency finally points out that, contrary to Walashek's claim, the Polar Star provided some utilities to Fraser, while Fraser provided others; specifically, Fraser brought in its own boiler for steam and provided electricity for its welders, while the ship provided compressed air, electricity for other tools, and several thousand gallons of water for the testing of the boiler. Agency Report, Tab 1, Contracting Officer's Statement at 2.

The conditions set forth in Walashek's cover letter concerning the provision of utilities altered the rights of the agency so as to require that the agency guarantee the availability of utilities. We have held that where a bidder conditions its bid upon the use of government facilities not specifically made available in the IFB, the bidder has availed itself of benefits not extended to other bidders by the advertised specifications and rendered its bid nonresponsive. New Dimension Masonry, Inc., supra, at 4; Cloyd Dake Gull and Assocs., Inc., B-192095, Dec. 4, 1978, 78-2 CPD ¶ 382 at 5. Walashek's attachment of conditions regarding the availability of utilities is material because of their effect on the rights and liabilities of the contractor and agency, and because the conditions would extend benefits to Walashek that were not available to the other bidder. Walashek's bid was thus properly rejected by the agency as nonresponsive.

The protest is denied.

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