



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Ellicott Engineering, Inc.

File: B-282382

Date: June 23, 1999

Harry R. Silver, Esq., Ober, Kaler, Grimes & Shriver, for the protester.
Willie J. Williams, Esq., U.S. Army Corps of Engineers, for the agency.
James Spangenberg, Esq., and Willie Commons III, Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Agency properly determined bid containing statements modifying material specification requirements was nonresponsive.

DECISION

Ellicott Engineering, Inc. protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DACW69-99-B-0003, issued by the U.S. Army Corps of Engineers, Huntington, West Virginia, for the fabrication, assembly, and delivery of two lengths of leaf chain for dam gate hoists.

We deny the protest.

The IFB required the work to conform to Contract Drawing 023-L1-54/8A, which specified the type of material to be used as "Forged Steel: ASTM A668-93, Class K" for items 17, 19 and 24 of the chain. IFB § H-1.1., at H-1. The IFB also stated:

Flame cutting of material shall be subject to approval, and where proposed, shall be indicated on the shop drawings submitted to the Contracting Officer.

IFB § C-6, at C-2. The IFB also provides for contracting officer approval of the use of any equipment or material used, including a requirement that the contractor submit evidence satisfactory to the contracting officer that such material conforms to the specification requirements. IFB § C-5, at C-2.

Ellicott submitted the low bid of \$158,500. In a cover letter attached to its bid, Ellicott stated:

Enclosed is Ellicott Engineering's quotation for the above referenced Solicitation. Please note the following considerations taken in our bid:

1. All Links will be flame cut from 1 1/16" (ASTM A514) material with allowance to machine finish the bores only.
2. Items 13 and 14 (rings) will be flame cut from 1 1/16" (ASTM A514) material with allowance to finish bores only.
3. Items 17, 19 and 24 will be made from 4140/4142 tubing in lieu of ASTM A668.

Agency Report, Tab E. The agency found that the foregoing conditions attached to Ellicott's bid rendered it nonresponsive because 4140/4142 tubing did not satisfy the ASTM A668 requirements and the proposed flame cutting was unapproved and unacceptable. Contracting Officer's Statement at 6th-14th unnumbered pages; Agency Report, Tabs F, G, H, and L. After rejecting Ellicott's bid, award was made to the next low bidder, E.S.G. Company, Inc. in the amount of \$179,844. This protest followed.

Ellicott maintains that the agency improperly determined its bid was nonresponsive because the IFB essentially contained a performance specification and the agency made no determination that the alternates offered by Ellicott could not meet the performance specifications. In this regard, Ellicott maintains that 4140/4142 tubing is superior in quality to ASTM A668. Moreover, Ellicott argues that the IFB contemplated deviations from the specification requirements. Protest at 1-2; Protester's Comments at 2.

A bid must be responsive to be considered for award, which means that the bid submitted must offer to perform, without exception, the exact thing called for in the IFB, and, upon acceptance, will bind the contractor to perform in accordance with all material terms and conditions of the IFB. Southwest Marine, Inc., B-247639, May 12, 1992, 92-1 CPD ¶ 442 at 3. If in its bid a bidder attempts to impose conditions that would modify material requirements of the invitation, limit its liability to the government, or limit rights of the government under any contract clause, then the bid must be rejected. Bishop Contractors, Inc., B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555 at 2.

Here, the effect of the conditions attached to Ellicott's bid was that the bid was premised on modifying material requirements of the IFB. In this regard, it is not disputed that the requirements for a particular grade of forged steel and for approval of flame cutting are material, since they relate to the quality of the project. While the protester notes that the IFB provided for acceptance of alternate material or flame cutting, the cited provisions pertain to contract performance by the successful contractor and cannot be relied upon by bidders to condition their bids, as Ellicott appeared to do here, on receiving approval of material other than that required by the

IFB. See Pavel Enters., Inc., B-249332, Nov. 9, 1992, 92-2 CPD ¶ 330 at 4-5. Even if we assume, for the purpose of the argument, that the solicitation was not clear about the permissibility of submitting a bid based on flame cutting, we view the protester's substitution of 4140/4142 tubing for the ASTM A668 forged steel required by the IFB to be so clearly material that it, standing alone, rendered the bid nonresponsive.

With regard to Ellicott's argument that its substituted material would satisfy the performance requirements of the specification, the cited provisions put the burden on the contractor (not the government) to provide sufficient evidence that the proposed substituted material was acceptable. The information submitted with Ellicott's bid provided no support for its contention that the conditions attached to its bid were consistent with the specification requirements and the agency's needs, so there is no basis to find Ellicott's bid responsive.¹

The protest is denied.

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¹The responsiveness of a bid must be ascertained from the bid documents themselves, not from clarifications provided by the bidder after bid opening; to permit explanations after bid opening would be tantamount to granting an opportunity to submit a new bid that could be responsive or nonresponsive at the bidder's option based on information available to the bidder after bid opening. Orbit Advanced Techs. Ltd., B-224603.2, Mar. 11, 1987, 87-1 CPD ¶ 273 at 3.