

DECISION



THE COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON, D.C. 20548

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FILE: B-182849

DATE: July 17, 1975

MATTER OF: Kem Equipment, Inc.

DIGEST:

Under brand name or equal purchase by Corps of Engineers of 3 oil-water separators, low bid offering an equal item is nonresponsive when (1) technical evaluation reveals proposed "equal" item requires numerous modifications to meet requirements of solicitation; (2) bidder failed to furnish descriptive materials indicating proposed modifications necessary to make its product equal, and (3) IFB precludes consideration of modifications proposed after bid opening.

Kem Equipment, Inc. (Kem), protests the award of a contract to Separation and Recovery Systems, Inc. (SRS), or to any other bidder under invitation (IFB) DACW57-75-B-0058, issued on November 4, 1974, by the Portland District, United States Army Corps of Engineers (Corps). The solicitation requested bids for 3 each oil-water separators Keene Model 2100 or an approved "equal" meeting salient characteristics set forth in the IFB.

Four bids were received at the November 22, 1974, bid opening date and ranged in price from \$30,600 to \$49,167. The Government cost estimate was \$54,000. The second and fourth low bids were found to be nonresponsive. Kem submitted the low third bid in the total amount of \$48,862.19. No award has been made as of this date.

The low bid in the total amount of \$30,600 was submitted by SRS which offered as an "equal" product its "Sarex 10 GPM Oil-Water Separator" with infrared analyzer and recorder. A cover letter dated November 15, 1974, (included with the bid) stated that "By adding a pump and motor, sensors and other components as required, you can determine that this system will qualify." However, its enclosure to the bid entitled: Instruction Manual, SRS, 10 GPM Oil-Water Separator, was not annotated to show the proposed necessary modifications if any, to make the product "equal" as required by the brand name or equal clause of the solicitation.

After bid opening, Corps technical personnel recommended that award be made to SRS after it had advised the Corps that galvanized pipe as required by the specifications would be used rather than black iron pipe specified in the instruction manual submitted as descriptive material with the SRS bid. In addition, by letter of November 26, 1974, SRS affirmed that its bid was in "total conformance with the requirements of the contract." Subsequently, Kem advised the Corps that the SRS unit was not an equal to the brand name product and that its unit did not meet the requirements of the specifications.

Thereafter, by letter of December 18, the contracting officer advised SRS that Corps technical evaluators determined that modifications would have to be made to the SRS equipment in order to meet specifications. The modifications deemed necessary were related to the control panel (paragraph 7 of the technical provisions); the feed pump (paragraph 3); and the effluent monitor (paragraph 5). Not only did the modifications require changes to the proposed SRS equipment but also the furnishing of parts and accessories not included in the SRS equal offer.

Under the solicitation terms, SRS was obliged, as an "or equal" bidder, to furnish with its bid a "clear description of such proposed modifications * * *" and "clearly mark any descriptive material to show the proposed modifications." This SRS did not do insofar as its bid submission was concerned. Moreover, SRS was permitted to change its bid after all bids were opened by substituting a unit which presumably is equal to the brand name unit for the nonconforming unit it offered in its bid.

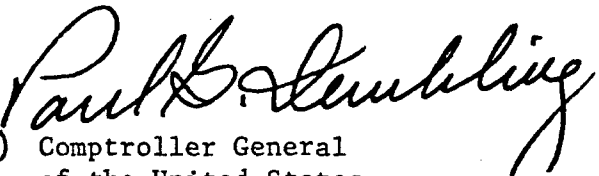
In S. Livingston & Son, Inc., B-181905, January 16, 1975, 54 Comp. Gen._____, we stated:

"* * *Further, it is a fundamental rule of advertised bidding that a bidder may not be permitted to change its bid after bids are opened. B-178090, April 27, 1973. To permit public officers to allow bidders to vary their proposals after bids are opened would soon reduce to a farce the whole procedure of letting contracts on an open competitive basis. 50 Comp. Gen. 42, 44 (1970). In City of Chicago v. Mohr, 74 N.E. 1056, 1058 (1905), it was said:

'* * * where a bid is permitted to be changed [after bid opening] it is no longer the sealed bid submitted in the first instance, and, to say the least, is favoritism, if not fraud--a direct violation of law--and cannot be too strongly condemned.'"

Thus, the contracting officer could not permit SRS to revise its bid after opening to make its otherwise nonresponsive bid responsive to the brand name or equal clause.

Accordingly, the bid of SRS may not be considered for award.


(for) Comptroller General
of the United States