

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-185609

DATE: July 6, 1976

MATTER OF: Transport Engineering Company, Inc.

DIGEST:

1. Notwithstanding protester's assertion that its bid took no exception to specifications, rejection of its bid was proper where grantee's technical committee concluded that bidder had not made adequate arrangements for servicing of vehicles as required by IFB and that bidder's supplier manufactured a vehicle lift which had exposed grease areas contrary to specification requirement.
2. Bid which conditions delivery of first vehicle 15 days after receipt of chassis from manufacturer under invitation requiring delivery of first vehicle within 12 weeks of receipt of purchase order, is nonresponsive because bidder imposed condition modifying requirements of IFB, regardless of fact that bidder agreed to comply with required delivery schedule once it was in receipt of chassis.
3. Where bidder proposes to cover sub-floor of vehicles with material of lesser quality than IFB's stated requirements, rejection of bid as nonresponsive was proper notwithstanding bidder's post-bid opening assurance that required flooring would be utilized, since responsiveness of bid is determined from face of bid itself at time of bid opening and to allow bidder an opportunity to alter or modify bid in order to make it responsive is tantamount to permitting submission of second bid.
4. Bid offering grantee option of purchasing vehicles with an alternator of less amperage than required by IFB is not nonresponsive where bidder alternately proposes to furnish vehicle with specified alternator. The submission of unconditional alternate bids does not constitute a deviation from material IFB requirement notwithstanding fact that bid price ultimately accepted was on back of bid form rather than in space provided on bid form since bid as submitted created valid and binding contract requiring bidder to perform in accordance with terms and conditions of IFB.

5. Unsupported suspicion of protester that handwritten insertion on successful bid was added after bid opening will not cause GAO to question propriety of bid for award where GAO is assured by grantee that once bid documents were submitted they were under its control and were not altered in any manner.

Transport Engineering Company, Inc. (Transport) protests the rejection of its bid and the award of a contract to Whittemore Truck Sales, Inc. (Whittemore) by the Massachusetts Executive Office of Transportation and Construction (EOTC) under Urban Mass Transportation Administration (UMTA), Department of Transportation Project No. MA-16-0001.

Pursuant to a capital grant contract between UMTA and EOTC executed on August 25, 1975, UMTA agreed to provide a grant under section 16(b) of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. § 1612(b) (2)), to EOTC in order for it to assist 27 private nonprofit organizations in providing transportation services meeting the special needs of elderly and handicapped persons. Eighty percent of the funding for the cost and operation of the special transportation vehicles is to be provided by the Federal government with the remaining 20 percent of the project being funded by the private nonprofit organizations.

Subsequently, EOTC issued an invitation for bids (IFB) for the purchase of 47 vehicles (Categories I through VII). Only the award of a contract for the vehicles listed under categories I and II are in issue in the instant protest.

The seven bids received for the categories I and II vehicles were forwarded to a Technical Committee made up of representatives of the local nonprofit organizations and EOTC for evaluation against the invitation's requirements and specifications. Transport submitted alternate bids for the vehicles in the two categories: one based on the use of Chevrolet chassis and the other based on the use of a Dodge chassis. The Technical Committee voted to reject the four low bids, including the two alternate bids submitted by Transport (for the reasons discussed below) as nonresponsive and recommended awarding the contract for the category I and II vehicles to Whittemore, the fifth low bidder. Shortly thereafter, award was made to Whittemore at which time Transport protested

to EOTC regarding the rejection of its bid based on the use of the Dodge chassis (the rejection of its Chevrolet chassis bid was never challenged and therefore will not be discussed). Upon denial by EOTC, Transport then filed its protest here.

At the outset, we point out that this case does not involve a direct Federal procurement. However, the grant contract between UMTA and its grantee under the section 16(b) (2) program requires that all purchases be in accordance with applicable State procurement procedures and with the standards set forth in Federal Management Circular 74-7, Attachment 0. The latter requires that procurements by grantees be conducted " * * * so as to provide maximum open and free competition." We recognize that under contracts made by grantees of Federal funds, the Federal government is not a party to the resulting contract. It is the responsibility, however, of the cognizant Federal agency, such as UMTA, to determine whether there has been compliance with the applicable statutory requirements, agency regulations, and grant terms, including the requirement for competitive bidding. O. C. Holmes Corporation, 55 Comp. Gen. 262 (1975), 75-2 CPD 174. Our role in a case such as this is to advise the Federal grantor agency whether the requirements for competitive bidding have been met. Thomas Construction Company, Inc., 55 Comp. Gen. 139 (1975), 75-2 CPD 101; 52 Comp. Gen. 874 (1973).

Transport argues that since it met or exceeded all EOTC specifications and proposed lower prices for the categories I and II vehicles than the bid submitted by Whittemore, the rejection of its bid and the award to Whittemore was improper. However, based on our review of the record, in particular, the EOTC Technical Committee memorandum of November 24, 1975, which set forth in detail the specific reasons for the rejection of Transport's bid, we find no basis to question EOTC's determination that Transport's bid was nonresponsive.

The first reason advanced by EOTC for rejecting Transport was the bidder's failure to comply with section C-4 of the "Notice To Bidders" which required that each bidder designate " * * * a local representative in Massachusetts who is located within an hour from the PNP [private nonprofit organization], who will provide full parts and service responsibility for any or all items of the equipment * * *." Transport asserts it can testify that it had in fact contacted its designated dealers and that it has the experience necessary to carry out the required service. However, EOTC reports, as

evidenced by a telephone conversation with two designated dealers by a member of the Technical Committee, that at the time of its evaluation of Transport's bid, Transport had not formally contacted such dealers to assure that a service arrangement was possible. Transport's failure to make adequate service arrangements was seen as affecting the responsiveness of its bid. Since Transport took no exception to the IFB in this regard, we are inclined to view the deficiency as going to Transport's responsibility. However, in either event, we think the record contains adequate justification for the rejection of Transport's bid.

Furthermore, the absence in the memorandum transcribing the events of the November 6, 1974 meeting of the Technical Committee regarding any contact with Whittemore's designated service representatives or the fact that one such representative must be trained in the upkeep of the vehicles' lift, does not indicate that Whittemore's bid was not as thoroughly evaluated as Transport's, especially in view of the fact that the Technical Committee's subsequent evaluation report indicates that EOTC was satisfied that Whittemore complied with section C-4 of the "Notice To Bidders." Mere allegations and unsupported suspicions as the above are not enough to cast doubt on EOTC's evaluation of the bids or cause our Office to question whether all bidders were competing on an equal basis.

Secondly, Transport takes issue with EOTC's finding that its proposed vehicle lift is designed so that there are exposed Vaseline areas in contravention to the specifications' requirement that "all sliding surfaces and load bearing pivot points * * * be free of exposed grease * * *." Transport asserts that it took no exception to the specifications and that EOTC's negative finding is not substantiated since it was based on an examination of a Transport vehicle not proposed for use in the instant procurement. A memorandum of a second Technical Committee meeting (November 25, 1975) confirms Transport's position to the limited extent that the vehicle examined was not the actual vehicle but one close to the type of vehicle specified. The memorandum, however, clearly indicates that Transport responded affirmatively when questioned if its proposed lift had exposed grease areas. Furthermore, the memorandum states that when he was asked by a Technical Committee member if the exposed grease on the lift could be eliminated when the lift was in the down position, Transport's proposed supplier replied that he "didn't really see how that could be done but supposed a flap could be placed on each side where the exposed area existed* * *." This equivocal response was consistent with

the information available to the technical committee members who stated in their bid evaluation memorandum of November 24, 1975, that to their knowledge, Transport's proposed lift manufacturer had never produced a lift free of exposed grease areas. Under these circumstances, we do not believe the grantee abused its discretion in determining that Transport had not provided adequate assurance that its lift would meet the specifications.

Thirdly, Transport protests the rejection of its bid for failure to comply with the invitation's delivery schedule. Section B-5 of the "Notice To Bidders" states:

"The first vehicle unit produced by a successful bidder must be delivered within 12 weeks of the receipt of a purchase order by the successful bidder from PNP [Private Nonprofit Organization]. All vehicles must be delivered within six months after receipt of purchase order."

Transport, in its bid on the "Bidders Proposal Form" inserted the following in the blank space provided for the insertion by bidders of their proposed commencing date for delivery of the vehicles in question:

"15 days after receipt of chassis per schedule outlined by EOTC."

Transport contends that its proposed commencement date was not a deviation from EOTC's required delivery schedule but was an attempt to impart to EOTC that the vehicles would be promptly modified and delivered in accordance with the invitation's requirements.

Concerning the rejection of Transport's bid for failure to comply with the delivery schedule, our Office has held many times that in formal advertising the contract awarded to one bidder must be the contract offered to all bidders and that any bid which fails to conform to the essential requirements of the IFB must be rejected as nonresponsive. Ordinarily, a bid must be rejected where the bidder imposes conditions which would modify requirements of the IFB or limit rights of the Government under any clause or limit its liability to the Government so as to give such bidder an advantage over other bidders. S. Livingston & Son, B-183820, September 24, 1975, 75-2 CPD 179.

In the instant case, EOTC advertised for bids on the basis that the first vehicle would be delivered within 12 weeks after receipt of a purchase order with the remaining vehicles delivered within 6 months. While Transport apparently agreed to follow the delivery

schedule once it was in receipt of the chassis for its proposed vehicles, under the delivery schedule in its bid Transport would not be obligated to deliver a vehicle until 15 days after it had received the chassis. This could well have been later than the IFB schedule. See Kipp Construction Co., B-181588, January 16, 1975, 75-1 CPD 20.

Fourthly, Transport's bid was rejected because it proposed to cover the sub-floor of the vehicles with indoor-outdoor carpeting rather than with "RCA transit floor, hard rubber, vinyl or approved equal matting" as required by the invitation's specifications. While EOTC acknowledges that following bid opening it received assurance from Transport (via a letter) that the required flooring would be utilized, nevertheless, rejection of Transport's bid was proper. Even though Transport may well have actually intended to be bound by all the terms and conditions of the solicitation, the determining factor is not whether the bidder intends to be bound, but whether this intention is apparent from the bid as submitted. Sheffield Building Company Inc., B-181242, August 19, 1974, 74-2 CPD 108. It has been the consistent position of this Office that the responsiveness of a bid, that is, the bidder's intention to comply with all IFB specifications, must be determined from the face of the bid itself. To allow a bidder an opportunity to clarify or alter his bid in order to make it responsive would be tantamount to permitting the submission of a second bid. 40 Comp. Gen. 432 (1961). While we have held that deviations which are immaterial and do not go to the substance of the bid so as to prejudice the rights of other bidders may be waived, deviations affecting price, quality, quantity or delivery go to the substance of the procurement and may not be waived. Edmund Leising Building Contractor, Inc., B-184405, October 29, 1975, 75-2 CPD 263. As Transport offered flooring of a lesser quality than required by the specifications, its bid was nonresponsive and properly rejected by EOTC.

Transport also maintains that Whittemore's bid was nonresponsive and should have been rejected because it deviated from the specifications by proposing a 72 ampere alternator instead of the 90 ampere alternator required by the invitation. This allegation is based on the following statement inserted by Whittemore in the blank space, entitled "General Statement", provided for bidders on the reverse side of the bidder proposal form under the title "Bidders Comments On Specifications:"

"* * * We are bidding according to all specifications with exception of the 90 amp alternator. We are bidding a 72 amp alt. as it is more than adequate. If the EOTC feels it has to have the 90 amp alternator it will be an additional cost of \$593.00 as it is a very specialized item."

As stated previously, our Office has upheld the rejection of bids as nonresponsive which are predicated upon conditions which constitute a material deviation from the terms of the solicitation. However, in the instant case, Whittemore, rather than qualifying its bid, offered EOTC a choice of alternators to be furnished with the vehicles in question. While Whittemore's bid questioned the need for a 90 ampere alternator by quoting EOTC a lower price on the face of its bid based on the use of a 72 ampere alternator, it nevertheless quoted a firm fixed price for the vehicles with a 90 ampere alternator. (The record indicates that Whittemore subsequently agreed to provide the vehicles with the 90 amp alternator at the price quoted for those same vehicles based on the use of a 72 amp alternator. Whittemore was the low bidder irrespective of whether \$593.00 was added to its unit price.) Under the circumstances, we do not regard Whittemore as having submitted a bid upon a condition which deviated from a material requirement of the IFB. Rather, we think Whittemore submitted alternate bids, which were not prohibited by the solicitation, one of which was in compliance with the terms of the solicitation. See B-178888, October 26, 1973.

Furthermore, the fact that Whittemore's bid for the vehicles with the 90 ampere alternator appeared on the reverse side of the "Bidders Proposal Form" rather than in the space provided thereon for such prices, did not preclude EOTC's consideration of the bid for award. In this regard, the rule in cases where a bidder has submitted its bid in the form of a letter or other document, rather than on the standard form provided, has been that the document submitted will be considered to be responsive to the IFB if acceptance of the bid as submitted will create a valid and binding contract requiring the bidder to perform in accordance with the terms and conditions of the IFB. Johnson Auto Parts, B-182102, September 10, 1972, 74-2 CPD 157. In the present case, since a bid is presumed to be responsive to the terms and conditions of the IFB unless clearly qualified by the bidder, and as stated above, there is nothing in the Whittemore offer qualifying the IFB and Whittemore has offered to perform as required by the IFB, the offer was properly for consideration for award.

Finally, Transport questions the origin of the handwritten insertion of the vehicle weight information on the reverse side of Whittemore's bid documents, specifically in regard as to whether or not such information was added after bid opening. We have been assured that once the bid documents were submitted, they remained under the control of a member of the EOTC Technical Committee and were not altered in any manner. Therefore, in the absence of any probative evidence to the contrary, such an unsupported suspicion based on the fact that the information was not typewritten or allegedly in the handwriting of the individual who signed the bid, is not enough to cause our Office to doubt the propriety of any bid under consideration for award.

Accordingly, we concur with UMTA that award to Whittemore is not precluded by the competitive bidding requirements of the grant.



Deputy Comptroller General
of the United States