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DECISION



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

[Protest of Bid Rejection as Nonresponsive]

FILE:

B-200049

DATE: November 5, 1980

MATTER OF:

Hughes-Henry Equipment Co.

DIGEST:

1. Intent of bid is determined from its entirety, including any unsolicited literature. Where contracting officer could reasonably have concluded that unsolicited literature was intended to depict the product offered, and that literature evidenced non-compliance with specifications, bid must be rejected as nonresponsive.
2. Contracting officer may not allow a bidder the opportunity to explain its bid in order to make it responsive. Onus of compliance with solicitation requirements is upon bidder.

Hughes-Henry Equipment Co. (Hughes) protests the rejection of its bid submitted in response to invitation for bids (IFB) R8-F-80-46 issued by the United States Department of Agriculture, Forest Service, Jackson, Mississippi (Forest Service).

The IFB was for furnishing and delivery of double drum and single drum brush choppers. The contracting officer found the Hughes bid, which was the lowest in price, to be nonresponsive because of information contained in unsolicited literature submitted with the bid. The unsolicited material, a brochure published by Rockland (a chopper manufacturer), was found to have created an ambiguity in Hughes' offer for the following reasons.

First, the Forest Service states that the Rockland literature did not conform to the IFB specifications in three respects: (1) the Rockland chopper did not have the required type of blade assembly; (2) the drums

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of the double drum chopper were not separated at a 20-degree angle; and (3) the literature did not specify which model was being offered, making blade size and weight of the model impossible to evaluate. Secondly, the warranty in the manufacturer's literature was found to be non-conforming because it was for a period of one year from the "date of purchase," whereas the IFB specified one year after "final acceptance by the Forest Service."

Hughes argues that it did not intend the sales literature to be considered a part of the bid. Rather, Hughes argues, it was included "merely to illustrate the fact that Rockland Manufacturing Company was in the business of manufacturing brush choppers, both on a stock and custom order basis." Hughes also claims that upon learning of the contracting officer's concerns, it arranged for Rockland to submit "working drawings of the bid units" upon Forest Service request, but no such request was ever made. The protester believes that, given the opportunity, it could have resolved the agency's doubts as to the acceptability of its offer. Finally, Hughes contends that since it does not consider a purchase to be complete until final acceptance, its warranty meets the IFB requirement.

Based upon our review of the record and the applicable principles of law, the protest is denied.

Federal Procurement Regulations (FPR) § 1-2.301(a) (amend. 178 June 1977) requires that a bid must comply in all material respects with the IFB to be considered for award. The test to be applied in determining the responsiveness of a bid, however, is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the IFB. 49 Comp. Gen. 553, 556 (1970). When unsolicited descriptive literature is included in a bid, the question arises as to whether it should be considered or disregarded in determining responsiveness.

In the seminal decision in this area, we held that inclusion of unsolicited literature does not automatically mandate rejection of a bid. 49 Comp. Gen. 851 (1970). Conversely, it may not simply be disregarded:

" * * * [T]he intent of the bid must be determined from a reasonable construction of its entire contents including any unsolicited literature. If the circumstances are reasonably susceptible of a conclusion that the literature was intended to qualify the bid or if inclusion of the literature creates an ambiguity as to what the bidder intended to offer, then the bid must be rejected as nonresponsive to the invitation for bids. * * * " Id. at 852.

In this case, the Hughes submission consisted merely of the bid forms and the Rockland brochure. No reference to the Rockland literature was made in the bid itself. In the absence of a statement in the bid to the contrary, it was reasonable for the contracting officer to assume that the literature was intended to depict the product offered. Since it was reasonably considered to be part of the bid, the literature was subject to close scrutiny to determine its compliance with the IFB specifications. Dominion Road Machinery Corporation, 56 Comp. Gen. 334 (1977), 77-1 CPD 89.

The Bid Schedule contained spaces in which bidders were to supply information as to the manufacturer's name and the brand name and model numbers of the items being furnished. Hughes indicated it was supplying "Rockland" brand choppers manufactured by Rockland Manufacturing Company, but no model numbers were given. The Rockland brochure attached to Hughes' bid appears to describe the manufacturer's entire line of choppers, which vary substantially in size and weight. However, none of the models listed has certain features required by the IFB specifications such as an alternating high-low blade arrangement or the appropriate angle between double drum units. In addition, one feature required by the specifications -- reversible, bolt-on blades -- is listed in the brochure as "optional."

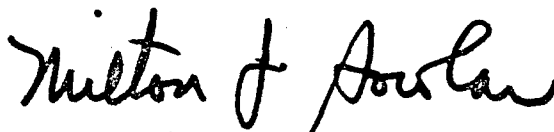
Under these circumstances, we believe the inclusion of the brochure with the bid created uncertainty as to which model chopper was being offered and considerable doubt as to whether some of the specified features would be included, since they either were not mentioned in the brochure or were described as "optional." We must therefore

agree with the contracting officer's determination of non-responsiveness. See Mars Data Systems, B-198812, June 4, 1980, 80-1 CPD 385.

Hughes' contention that it should have been given the opportunity to clarify its bid is without merit. A contracting officer may not allow a bidder the opportunity to explain the actual meaning of its bid in order to alter its responsiveness. See B-166284, April 14, 1969. The contracting officer correctly decided not to request more information from Hughes; the burden of compliance with bid specifications is clearly upon the bidder.

Having found the determination of nonresponsiveness to have been reasonable for the reasons stated above, we need not decide the effect of the warranty contained in Rockland's literature.

The protest is denied.

A handwritten signature in black ink, reading "Milton J. Fowler". The signature is written in a cursive, flowing style.

For the Comptroller General
of the United States