

6-7-79

DECISION



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

FILE: B-209430

DATE: January 25, 1983

MATTER OF: J & W Welding and Fabrication

DIGEST:

Contracting officer properly rejected as nonresponsive bid which included a handwritten notation adjacent to the bid price, "Plus 5% sales tax if it is applicable," when the IFB required that bid prices include "all applicable" taxes. The record shows that the tax may apply to at least some of the contract effort, and the bidder's failure to specify the amount of tax excluded thus precluded comparison with other, tax-included, bids.

J & W Welding and Fabrication protests the rejection of its bid submitted in response to Air Force invitation for bids (IFB) No. F08637-82-B-0081 to modify the jet engine shop monorail at Tyndall Air Force Base, Florida. Although J & W's bid was the low bid submitted, it was rejected as nonresponsive by the Air Force contracting officer because J & W's bid price was modified with the handwritten notation, "Plus 5% sales tax if it is applicable." The Air Force contends that J & W's bid was nonresponsive because it conflicted with the IFB requirement that bid prices include all applicable taxes, and because J & W's actual bid price could not be definitely determined for comparison with other bids. J & W contends that its bid was not ambiguous and, because the Air Force allegedly has admitted that the sales tax is not applicable, its bid was not affected by the inclusion of the handwritten notation concerning sales tax. We deny the protest.

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The IFB required the bidder to include in its bid price "all applicable Federal, State, and local taxes and duties." The clause constitutes notice to all bidders that bids will be evaluated on a tax-included basis, and places the burden on the bidder to ascertain whether any taxes apply and to include the amount of such taxes in its bid price. NASCO Products Company--Reconsideration, B-192116, February 16, 1979, 79-1 CPD 116. The reason this burden is on the bidders is that contractors generally are more familiar with the application of state and local taxes than is the contracting officer. Nearly all of the states and numerous localities impose taxes, and the applicability of state and local taxes varies from state to state and from one locality to another--some jurisdictions impose the tax on the vendor, while others impose the tax on the purchaser. Trail Equipment Company, B-206975, April 20, 1982, 82-1 CPD 366. Additionally, contracting agencies generally are not sufficiently familiar with the bidders' operations to arrive at definite conclusions concerning applicability of taxes to the contract, and it would be inappropriate to impose on them the burden of examining the tax situation of each bidder who may elect to submit a bid on a tax-excluded basis. 41 Comp. Gen. 289 (1961).

J & W contends that the Air Force has effectively admitted that state sales tax does not apply to this contract, so that the firm's bid price indeed includes all "applicable" taxes and the handwritten notation on the bid thus is inconsequential. J & W points to our statement in NASCO Products Company--Reconsideration, *supra*, cited by the Air Force in its protest report, that since "state and local governments may not impose a tax on the Federal Government, taxes levied on the purchaser are not for payment by the Federal Government."

The quoted statement merely reflects the long-standing constitutional immunity of the Federal Government from direct taxation by the states. McCulloch v. Maryland, 4 Wheat. (17 U.S.) 316 (1819). This immunity does not necessarily extend to private companies performing Federal Government contracts. See, e.g., Alabama v. King & Boozer, 314 U.S. 1 (1941). In the instant case, there is no indication that sales tax would not apply to J & W's purchase of at least a portion of the supplies, materials and equipment

necessary to perform the contract. In fact, the second low bidder indicates in a submission to this Office that it included \$3,495 in taxes in its bid.

At best, the tax in issue is of doubtful applicability--the Air Force makes no conclusion about the tax's applicability, and J & W's bidding notation certainly indicates that, in the firm's own judgment, sales tax may be assessed. Therefore, in this case, a bid excluding such a tax could be considered only if the class and amount of the tax were specified in the bid, so that the bid could be evaluated on an equal basis with tax-included bids and so that the limit of the Government's liability under the contract if the bid is accepted would be defined. Trail Equipment Company, supra. J & W, however, did not identify the amount of tax excluded; although the firm did specify the sales tax rate, the contracting officer could not know exactly what portion of J & W's performance costs would be subject to tax. This made it impossible to calculate an effective J & W bid price in order to compare J & W's bid to other, tax-included, bids. In this respect, we point out that J & W's bid price was \$99,744, only \$55 less than the second low bid, and thus if only a small portion of J & W's costs was ultimately subject to tax, J & W would be displaced as low bidder.

Accordingly, J & W's failure to bid a price that included all taxes which ultimately might be payable rendered the bid nonresponsive. The protest against the rejection of the bid therefore is denied.

Milton F. Fowler
for Comptroller General
of the United States