



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Weber Construction

File: B-233848

Date: March 27, 1989

DIGEST

Bid omitting standard form 1442, "Solicitation, Offer and Award," which contains several material provisions, is nonresponsive since the bid does not incorporate by reference these provisions, such that the bidder, upon acceptance of the bid by the agency, clearly would be bound.

DECISION

Weber Construction protests the rejection of its bid under invitation for bids (IFB) No. 8-SI-10-04140 issued by the Bureau of Reclamation, Department of the Interior, for restoration of a river bank at the Bureau of Reclamation's Columbia Basin Project. Interior rejected Weber's low bid as nonresponsive because Weber failed to execute and return standard form (SF) 1442, "Solicitation, Offer, and Award," of the IFB which contained several material requirements.

We deny the protest.

Weber contends that it did execute and submit an SF-1442 with its bid package, which it submitted to the Bureau of Reclamation by the November 3, 1988, bid opening. In this regard, Weber offers supporting affidavits from Weber's owner and his wife. In his affidavit, the owner states that he is sure he included the SF-1442 in the bid envelope, since he checked each document as he put it in the bid envelope, which he then sealed. His wife then hand-carried the bid to the Bureau of Reclamation office, at Grand Coulee, and stayed through the bid opening.

In response, Interior submitted affidavits from its five Board of Engineers representatives at the bid opening, who state that the absence of the SF-1442 from the Weber bid package was immediately noted, and they carefully checked and rechecked the bid package and confirmed the SF-1442 was missing. The record also shows that the agency officials

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present at bid opening (none of whom were contracting officials) made no representation regarding the omission because they believed that only the contracting officer, who was not at bid opening, had the authority to determine the significance of the omission.

On December 1, 1988, Interior rejected Weber's bid as nonresponsive because the protester did not expressly bind itself to comply with the material terms and conditions of the solicitation provided in the SF-1442.

Weber insists that it did include the SF-1442 in its bid envelope as a part of its bid package. The record is clear, however, that an SF-1442 was not included in the bid package when it was opened by agency officials in the bid opening room. Moreover, the Board of Engineers' report of the bid opening, dated November 4, 1988, which was prepared immediately following bid opening, noted that the Weber bid failed to include SF-1442.

Where a bidder fails to return with its bid all of the documents which were part of the IFB, the bid must be submitted in such a form that acceptance would create a valid and binding contract requiring the bidder to perform in accordance with all the material terms and conditions of the IFB. Jones Floor Covering, Inc., B-213565, Mar. 16, 1984, 84-1 CPD ¶ 319; Union City Plumbing, B-208500, June 7, 1983, 83-1 CPD ¶ 614. If a bidder incorporates by reference the material provisions of the missing pages of the solicitation in the documents that it does submit, this may be sufficient to bind the bidder to those material provisions, and make its bid responsive. International Signal & Control Corp; Stewart Warner Corp; 55 Comp. Gen. 894 (1976), 76-1 CPD ¶ 180.

The SF-1442, omitted from the bid, contains provisions which require the bidder to begin performance within 30 days and complete it within 390 days after receiving notice to proceed, to hold its bid open for 60 days, to furnish performance and payment bonds, and to perform the work in strict accordance with the terms of the solicitation. The foregoing are all material provisions not contained in other documents submitted by Weber with its bid.

Weber's bid included a bid bond, the bid schedule, representations and certifications, and copies of the first page of the four amendments that were issued to the IFB. Weber signed all these documents. Weber argues that the SF-1442 was incorporated by each of the amendments signed and returned by Weber because each referenced the solicitation by number and provided that "except as changed by the

amendment, all terms and conditions of the IFB remain unchanged and in full force and effect." Weber also notes that it executed the bid bond which specifically referenced the 60-day minimum bid acceptance period. Weber also executed the bid schedule which referenced the solicitation by number and which states its prices for all items of contract work. Weber argues that this documentation clearly showed that it intended to perform in accordance with all material provisions of the IFB, including those on the SF-1442.

We disagree. We believe that the facts in Weber's case are substantially identical to those in Union City Plumbing, B-208500, supra. In that case, the protester submitted with its bid a bid bond, a bid schedule, representations and certifications and an amendment, all of which it executed, but it did not include the SF-21, "Bid Form," which contained basically the same material provisions as the SF-1442.^{1/} As stated in Union City Plumbing, the language in the acknowledged amendments that the previously stated terms and conditions remain unchanged and in full force and effect is not sufficient to incorporate the material provisions contained in the SF-21 or SF-1442.^{2/} Also, as stated in that decision, the bid package's inclusion of the bid bond, which commits the surety to the government, is not sufficient to clearly bind the bidder to the bid acceptance period, even though this period is referenced on the bid bond, or to perform "strictly in accordance with the terms of the solicitation." Consequently, we found that the contracting officer reasonably could view the bid as one that at best was ambiguous with respect to whether it unalterably committed the bidder to all the material terms and conditions of the IFB.

1/ The SF-1442 was adopted in the Federal Acquisition Regulations (FAR) and combined the solicitation, offer and award documents into one form. The SF-21 "Bid Form" was one of several pre-FAR forms whose terms and conditions were essentially included in the SF-1442.

2/ In Union City Plumbing, we said that acknowledging an amendment, which contained the same language as here, that terms and conditions were otherwise not changed, does not establish what the unchanged terms and conditions were nor does it include a commitment by the bidder to perform in accordance with the terms and conditions of the solicitation. See also Jones Floor Covering, Inc., B-213565, supra.

Weber argues that Union City Plumbing, involving the failure to submit an SF-21 "Bid Form," is distinguishable from the present situation involving an SF-1442, "Solicitation, Offer and Award." Weber explains that since its bid expressly referenced the "solicitation" by its number No. 8-51-10-04140 on each of the four amendments, bid bond and bid schedule, it committed itself to the material terms contained on the form entitled "Solicitation."

We do not agree that Union City Plumbing is so distinguishable. Although the forms have changed, the fact that the material terms are now under the heading of "solicitation" and the mere reference to the solicitation number in the submitted bid does not incorporate the unacknowledged material provisions contained in the SF-1442 into the bid, since there is no specific reference in the submitted documents incorporating the SF-1442 itself or the material terms thereof. See Werres Corp., B-211870, Aug. 23, 1983, 83-2 CPD ¶ 243.

Finally, Weber cites, in support of its argument that its bid is responsive, our decision in Johnson Auto Parts, B-182102, Sept. 10, 1974, 74-2 CPD ¶ 157, in which we held that acknowledging an amendment was sufficient to make responsive a bid submitted without including the standard bid form. However, the solicitation in that case had a specific provision--not present in this case--which permitted bids to be submitted on other than the standard bid form. Moreover, we did not follow the reasoning of that case in Union City Plumbing or Jones Floor Covering, which are more analogous to the present situation. Consequently, we do not find Johnson Auto Parts to be controlling here.

Consequently, the contracting officer reasonably found that Weber's bid was at best ambiguous with respect to whether Weber was committed to all the material terms and conditions of the solicitation.

Accordingly, the protest is denied.


James F. Hinchman
General Counsel