



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Gardner Zemke Company

File: B-238334

Date: April 5, 1990

Linda Zemke, for the protester.
Justin P. Patterson, Esq., Office of the Solicitor,
Department of Interior, for the agency.
Stephen J. Gary, Esq., and John M. Melody, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Failure of bidders to identify a product they were bidding under qualified products requirement does not render bids nonresponsive where the bidders took no exception to solicitation requirement that products be qualified.
2. Where solicitation clause provides that qualification of product may be completed up to time of award, compliance with clause is matter of responsibility, not responsiveness, and detailed information on product qualification, if needed, may be provided to agency any time before award.

DECISION

Gardner Zemke Company protests the award of a contract to any other bidder under invitation for bids (IFB) No. 9-SI-40-08820/DC-7809, issued by the Department of the Interior (DOI) for the construction of the McPhee powerplant in Colorado. Gardner, the third low bidder, asserts that because the two lower bidders both failed to identify in their bids a corrosion-preventive compound for which the IFB included a qualification requirement, their bids must be rejected as nonresponsive.

We deny the protest.

The IFB provided that all machine-finished surfaces of ferrous metalwork that would be exposed during shipment and while awaiting installation were to be coated with a

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corrosion-preventive compound; the compound also was to be used on hydraulic cylinder bores and interior hydraulic cylinder parts. The specifications further provided that the compound was to be removed prior to the installation of equipment. Amendment No. 4 added to the IFB a qualification requirement for the corrosion-preventive compound that incorporated Federal Acquisition Regulation (FAR) clause 52.209-1, "Qualification Requirements," which provided, in part, that:

"(a) Definition: "Qualification Requirement," as used in this clause, means a Government requirement for testing or other quality assurance demonstration that must be completed before award.

(b) . . . For those supplies . . . requiring qualification, . . . the product . . . must have demonstrated that it meets the standards prescribed for qualification before award of this contract. . . .

With respect to product(s) described in the specifications as requiring qualification, the appropriate QPL (Qualified Products List) . . . [is] identified as follows:

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(3) Corrosion-preventive compound . . . listed on QPL of Products Qualified Under Military Specification MIL-C-16173. . . ."

The clause further provided:

"(e) . . . If this is a sealed bid acquisition and the product . . . that is already qualified or is to be qualified before award is not identified, either above or elsewhere in the bid, the Contracting Officer shall reject the bid. . . ."

DOI received five bids under the solicitation. The three lowest-priced bids were submitted by Gracon Corporation (\$2,212,439), C.R. Fedrick, Inc. (\$2,640,115), and Gardner (\$2,707,306). Neither Gracon nor Fedrick identified the corrosion-preventive compound anywhere in their bid. Gardner maintains the contracting officer therefore was required by paragraph (e), above, to reject the bids as nonresponsive at the time of bid opening. We disagree.

opportunity to have its bid considered for award solely because an offered item is not on a list of qualified products or has not been identified as meeting a qualification requirement, so long as the prospective contractor demonstrates that it can meet the standards for qualification before the date specified for contract award. FAR § 9.202(c).

Thus, since the qualification requirements clause clearly concerns bidder responsibility rather than responsiveness, it would have been improper for the agency to reject the challenged bids at bid opening for failure to identify the offered corrosion-preventive compound. The ARO Corp., B-225727, supra.

The protester asserts that the IFB required rejection of the bids by virtue of its mandatory language that the contracting officer "shall reject" a bid that fails to identify the qualified product. It is well established, however, that the terms of a solicitation cannot convert a matter of responsibility into one of responsiveness. The ARO Corp., B-225727, supra. (qualification requirements clause concerned responsibility, not responsiveness, notwithstanding that it included provision that if the product that is or will be qualified before award is not identified in the bid, the bid will be rejected.)

The protester argues that this case is different from others where we have held that product qualification information concerns responsibility, since in those cases the issue was whether the bidder had identified the product adequately, while here the bidders failed to identify the product at all. We disagree. Gardner is correct that in ARO, for example, most bidders did refer to the IFB item number while failing to furnish only detailed descriptions of offered products. The basis of our holding, however, was not that the bidders had met some minimal, threshold level of product identification, but that qualified product identification information, by its nature, concerns bidder responsibility, not responsiveness. As we noted in that case, before the FAR was changed in 1985 we did hold that products must be identified in the bid where the solicitation contains a qualification requirements clause; we departed from our earlier holdings, however, citing the 1985 FAR change that specifically provided for qualification any time prior to award. Thus, we find no basis for distinguishing the present case from others in which this issue has arisen.

As a general matter, responsiveness involves a determination of whether a bidder has unequivocally offered to provide supplies or services in conformity with all material terms and conditions of the solicitation. See, e.g., The ARO Corp., B-222486, June 25, 1986, 86-2 CPD ¶ 6. Only where a bidder provides information with its bid that reduces, limits or modifies a material requirement of the solicitation may the bid be rejected as nonresponsive. Id. Responsibility, on the other hand, refers to a bidder's apparent ability and capacity to perform all contract requirements, and is determined, not at the time of bid opening, but at any time prior to award, based on any information received by the agency up to that time. Great Lakes Dredge & Dock Co., B-221768, May 8, 1986, 86-1 CPD ¶ 444.

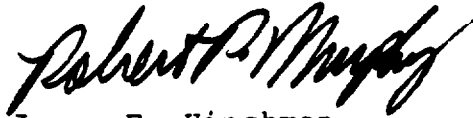
We have examined the bids in question and find nothing in them that takes exception to any of the IFB requirements, including the requirement to obtain product qualification prior to award. Both of the challenged bidders completed the bid schedule for the items on which they were bidding, and signed their bids, thereby obligating themselves to furnish products conforming to the specifications, descriptions, and qualification requirements listed for each item. See The ARO Corp., B-225727, supra. The bidders' alleged failure to provide identifying information required under clause 52.209-1 did not eliminate or reduce this obligation; their bids therefore were responsive. Id.

On the other hand, as shown in the language quoted above, clause 52.209-1 provided that the bidders' products had to be qualified under appropriate standards only by the time of contract award. It follows, therefore, that bidders were permitted to furnish details under the clause after bid opening, as information on the qualification status of their offered products became available. Since, as we have stated, the two low bidders already had established their obligation to furnish the qualified product by completing the bid schedule and signing their bids, this additional information necessarily related to bidder responsibility, that is, whether the bidder was capable of satisfying the qualified product requirement. See The ARO Corp., B-225727, supra.

The FAR clause in question formerly required that products be qualified at the time of bid opening. See FAR § 52.209-1 (1984). The clause was specifically changed, however, to allow qualification up until the time of award. See Federal Acquisition Circular (FAC) 84-11 (Aug. 30, 1985); The ARO Corp., B-225727, supra. Elsewhere, the FAR specifically provides that a prospective contractor may not be denied an

See, Syllor, Inc. and Ease Chemical, B-234723, B-234724,
June 6, 1989, 89-1 CPD ¶ 530 (information pertaining to QPL
eligibility pertains to bidder's responsibility and need not
be established until the time of contract award).

The protest is denied.



for James F. Hinchman
General Counsel