



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Bishop Contractors, Inc.

File: B-246526

Date: December 17, 1991

Thomas F. Spaulding, Esq., for the protester.
Sherry Kinland Kaswell, Esq., and Justin P. Patterson, Esq.,
Department of the Interior, for the agency.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

A bid that limits the bidder's liability to obtain permits and pay fees, which are responsibilities assigned the bidder under an invitation for bids (IFB) for a construction project, materially modifies the terms of the IFB and must be rejected as nonresponsive.

DECISION

Bishop Contractors, Inc. protests the rejection of its bid as nonresponsive and the award of a contract to Lorentz Bruun Company, Inc., under invitation for bids (IFB) No. FOVA-112, issued by the National Park Service (NPS), Department of the Interior, for the reconstruction of a historic building at Fort Vancouver National Historic Site, Vancouver, Washington. We invoked and decided this protest under our express option procedures, 4 C.F.R. § 21.8 (1991).

We deny the protest.

Bishop submitted a bid of \$1,000,000 on September 9, 1991, with a cover letter stating that it was unable to obtain information relative to permit costs required by the City of Vancouver. The final paragraph of the letter stated, "[t]herefore, our proposal excludes any and all permits and fees required in the construction of this project." On September 10, prior to bid opening, Bishop submitted a bid modification reducing its bid to \$503,000. The final paragraph of the bid modification stated, "[w]e have obtained the costs for the sewer and water permits, and our proposal now includes these costs."

NPS rejected Bishop's bid as nonresponsive, finding that the bid failed to include all costs related to the project. NPS made award to Lorentz Bruun, who had submitted the next lowest bid of \$524,172.

A bid must be responsive to be considered for award, which means that the bid submitted must be an offer to perform, without exception, the exact thing called for in the IFB, and, upon acceptance, will bind the contractor to perform in accordance with all the material terms and conditions of the IFB. Terra Vac, Inc., B-241643, Feb. 7, 1991, 91-1 CPD ¶ 140. If in its bid a bidder attempts to impose conditions that would modify material requirements of the invitation, limit its liability to the government, or limit rights of the government under any contract clause, then the bid must be rejected. Federal Acquisition Regulation (FAR) § 14.404-2(d); Hewlett-Packard Co., B-216530, Feb. 13, 1985, 85-1 CPD ¶ 193.

General Contract Provision 42 in the IFB (FAR § 52.236-7) requires the contractor to obtain "any necessary licenses and permits," and to comply "with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work." Section 01011, part 1.2 of the IFB requires the contractor to obtain necessary permits from the City of Vancouver and to "pay all city fees, including any water or sewer service connection fees and water meter installation fees."

Bishop argues that the context of its bid cover letter limited the scope of the exclusion of permits and fees to those required by the City of Vancouver. Since the City allegedly only requires permits for water and sewer service, Bishop asserts that its bid modification, which included the cost of these permits in the bid, completely and unequivocally removed its prior exclusion.

Bishop's initial exclusion in its bid cover letter expressly encompassed "any and all possible permits and fees," not just those required by the City of Vancouver. It is unreasonable to assume that Bishop's discussion in that letter of the specific difficulties in obtaining permit information from the City of Vancouver would necessarily limit the scope of that letter's general exclusion of "any and all permits and fees," which was plainly stated to be part of the bid. Therefore, Bishop's express inclusion of city sewer and water permit costs in its bid modification did not fully retract its original exclusion from the bid of "all" permits and fees. For example, while Bishop's original exception affirmatively encompassed both permits and fees, its modification only mentioned permits, which left open to question whether city "fees," e.g., the city water

meter application fee,¹ were Bishop's responsibility. Moreover, there may be permits or fees required by the county or state, e.g., county dumping fees or contractor licensing requirements, or other permits or fees (not related to water or sewer service) required by the city.

If any substantial doubt exists as to whether a bidder, upon award, could be required to perform all material requirements specified in the IFB, the integrity of the competitive bidding system requires rejection of the bid as nonresponsive.² Terra Vac, Inc., supra. Since Bishop's bid did not bind it to obtain permits (other than city water and sewer permits) or to pay fees, NPS properly rejected Bishop's bid as nonresponsive.

Bishop argues that even if its bid did exclude certain required fees, the cost of those fees is immaterial³ and this matter should be waived as a minor informality. A deviation to a solicitation provision which has the effect of changing the legal relationship between the parties is material and cannot be waived, even if the impact on price is trivial. Versailles Maint. Contractors, Inc., B-203324, Oct. 19, 1981, 81-2 CPD ¶ 314. IFB provisions, such as those here, that define which party is responsible for complying with laws, codes, or regulations of various governmental bodies are descriptive of the legal relationship of the parties. See H.M. Kern Corp., B-239821, June 22, 1990, 90-1 CPD ¶ 586. Bishop's denial of responsibility for "any and all permits and fees" in its bid purported to change its legal obligations to comply with the local permit requirements. Therefore Bishop's failure to unequivocally remove this exception in the bid modification

¹All parties agree this was required. Although Bishop now asserts that it included the water meter application fee as a cost of the water and sewer permits, the responsiveness of a bid must be determined at the time of bid opening, and a bidder may not explain the meaning of its bid after bid opening. Hewlett-Packard Co., supra.

²It is a fundamental rule of federal procurement that all bidders must compete on a common basis. FAR § 14.301(a); Hewlett-Packard Co., supra. Bidders have a right to assume that the essential requirements of an IFB are the same for all bidders. Id. Allowing Bishop to exclude itself from responsibility for permits and fees would be prejudicial to the other bidders who bound themselves to those requirements.

³Bishop asserts that the total cost of all fees that the agency suggests may not have been included in the bid is less than \$400.

rendered its bid nonresponsive, regardless of the price connected with obtaining all necessary permits and fees. We do not believe the contracting officer has to identify and analyze all permits and fees that may be required to determine materiality; the IFB was intended to put this burden on the contractor. See Hewlett-Packard Co., supra.

Bishop finally argues that compliance with the permitting requirements is a matter of responsibility, not responsiveness, and thus is subject to clarification after bid opening. However, responsiveness concerns whether a bidder has unequivocally offered to provide the supplies or services in conformity with all material terms and conditions of the IFB; responsibility refers to a bidder's apparent ability and capacity to perform. Southern Ambulance Builders, Inc., B-236615, Oct. 26, 1989, 89-2 CPD ¶ 385. As discussed above, Bishop, on the face of its bid, specifically declined to be unequivocally bound to the material permitting and licensing requirements.

The protest is denied.


for James F. Hinchman
General Counsel