



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: NR Vessel Corporation

File B-250925

Date: February 11, 1993

David Cohen, Esq. and Jeanne A. Anderson, Esq., Cohen & White, for the protester.
Cynthia S. Emerson, Esq., Defense Logistics Agency, for the agency.
Kathleen A. Gilhooly, Esq., and Michael R. Volpe, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bid was properly rejected as nonresponsive where statement included in bid modification imposed conditions that modified material solicitation requirements.

DECISION

NR Vessel Corporation protests the rejection of its bid as nonresponsive under Sale No. 31-2315, conducted by the Defense Logistics Agency (DLA), Defense Reutilization and Marketing Service, Memphis, Tennessee, for scrap of various inactive fleet Navy ships.

We deny the protest.

NR Vessel, the high bidder for several items at the September 24, 1992 bid opening, submitted a bid modification prior to bid opening that stated in pertinent part:

"The NR Vessel Corp. bid on any vessel(s) awarded under IFB. 31-2315 is subject to verification pursuant to Item 46, Page 15, of IFB 31-2314 that shipboard cables containing PCB(s) can be processed in a wire chopper (shredder) and the resulting waste (fluff) can be disposed of as non-hazardous waste.

"In the event that the cable cannot be processed and disposed of as non-hazardous waste, then the bidder agrees to purchase the vessel(s) under the condition that the Government will take delivery of the shipboard cable at the buyer's dismantling

yard and reimburse the buyer for the cable at \$.22/lb."

Item 46 of the IFB, referenced by NR Vessel in its bid modification, stated:

"PCB CABLE: The Environmental Protection Agency supports beneficial recycling activities when conducted in an environmentally sound manner. The EPA currently regulates shredding/chopping of PCB laden electrical cable in the same manner as automobiles and consumer appliances. The Purchaser is required to contact the advised cognizant EPA Office for explicit details. . . ."

DLA rejected NR Vessel's bid as nonresponsive, finding that the bid contained impermissible conditions. The protester responded by letter dated September 25, 1992, explaining that it had wanted to make sure of the exact disposal requirements, that the first paragraph of its bid modification quoted above was only for purposes of clarification, and that the second paragraph was only offered as an alternative disposal program if the cable was considered hazardous material and could not be disposed of economically. In another letter dated September 28, 1992, the protester informed DLA that it had just become aware of a July 28, 1992, letter from EPA to another ship scrapper that confirmed that shipboard PCB-contaminated cable could be disposed of as "fluff", i.e., in ordinary landfills. The protester stated that:

"Therefore, unbeknownst to us at the time of our bid, the question we had raised in our bid concerning the disposal of shipboard cable insulation had already been resolved to our satisfaction by the EPA. Thus, there never was any possible condition on our bid because any condition had already been satisfied at the time of the bid."

By letter dated September 29, 1992, DLA again informed NR Vessel that its bid was nonresponsive because of the conditions placed upon the bid at bid opening.

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. Southwest Marine, Inc., B-247639, May 12, 1992, 92-1 CPD ¶ 442. If in its bid a bidder attempts to impose conditions that would modify material requirements of the

invitation, limits its liability to the government, or limit rights of the government under any contract clause, then the bid must be rejected. Bishop Contractors Inc., B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555.

In our view, DLA correctly rejected NR Vessel's bid as nonresponsive because, contrary to IFB requirements, NR Vessel reserved the right to verify that the shipboard cable could be processed as non-hazardous waste, and, in the event the cable could not be processed in that manner, to buy the items only if the government agreed to buy back the cable at \$.22 a pound. NR Vessel's statement is inconsistent with the following IFB provisions which place the responsibility for compliance with disposal requirements solely with the purchaser.

The IFB's description of each item contained notes cautioning that:

"All electrical cables are presumed to contain regulated PCBs unless otherwise tested. . . .The Purchaser shall be responsible to handle and dispose of all items containing PCB contamination in quantities regulated under applicable federal, state, and local laws and regulations. (See Sale By Reference, including Part 12, Article A1. . . .)"

Part 12, Article A1, entitled DISPOSITION AND USE OF HAZARDOUS PROPERTY, provided that:

"The Purchaser represents, warrants, and certifies to the United States Government that he will use and ultimately dispose of any hazardous property purchased under this Invitation for Bids in accordance with all local, national, and invitational [sic] laws and regulations in a manner safe for the public and the environment."

By conditioning its bid on the government taking back the PCB-laden cables if it could not dispose of them in ordinary landfills, NR Vessel attempted to eliminate its legal responsibility for disposing of the cables as defined in the IFB provisions quoted above. Allowing NR Vessel to exclude itself from this responsibility would be prejudicial to the other bidders who bound themselves to the disposal requirements. See Hewlett-Packard Co., B-216530, Feb. 13, 1985, 85-1 CPD ¶ 193.

NR Vessel argues that even taking into account the condition in its bid, its bid remains high for several items and thus the condition should be waived as a minor informality. However, in our view, acceptance of this condition would

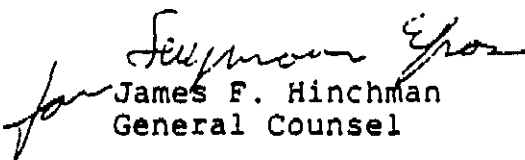
result in a substantial change in the terms of the solicitation. As noted above, the condition posed by NR Vessel would require the Government to take back the hazardous material and dispose of it at Government expense. We have held that a deviation to a solicitation provision which has the effect of changing the legal relationship between the parties is material and cannot be waived, even if the impact on price is trivial. Bishop Contractors Inc., B-246526, supra.

NR Vessel also argues that compliance with the disposal 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 comply with all material terms and conditions of the IFB; responsibility refers to a bidder's apparent ability and capacity to perform. Bishop Contractors, Inc., B-246526, supra. As discussed above, NR Vessel, on the face of its bid, specifically declined to be unequivocally bound to the disposal requirements.

Finally, NR Vessel's letters dated September 25 and September 29 stating that it had not taken exception to the IFB's requirements cannot be considered in determining the responsiveness of its bid since only material available at bid opening may be considered in making a responsiveness determination. F.J. Dahill Co., Inc., B-235272, Aug. 3, 1989, 89-2 CPD ¶ 103. In any event, the agency argues that the July 28, 1992 letter from EPA Region IX (cited above) is not clearly applicable to the protester's proposal since the letter was addressed to a company other than the protester and involved recycling operations in a different EPA region. The protester has not rebutted the agency's argument on this issue.

In comments on the agency report, NR Vessel suggests that the government is not getting the best value for the vessels by rejecting its high bid as nonresponsive. The importance of preserving the integrity of the competitive bidding system, however, outweighs the possibility that the government might realize monetary savings if a material deficiency in a bid is corrected or waived. See Pettinato Associated Contractors and Engineers, Inc., B-246106, Feb. 19, 1992, 92-1 CPD ¶ 201.

The protest is denied.


for James F. Hinchman
General Counsel