



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** New Dimension Masonry, Inc.

**File:** B-258876

**Date:** February 21, 1995

Robert J. Marks, Esq., Marks & Golia, for the protester.  
Frank K. Kotarski, Esq., and Cynthia S. Guill, Esq.,  
Department of the Navy, for the agency.  
Ralph O. White, Esq., and Christine S. Melody, Esq., Office  
of the General Counsel, GAO, participated in the preparation  
of the decision.

### DIGEST

Protest contention that low bidder should have been rejected as nonresponsive because statements included in a cover letter conditioned the bid is sustained where one of the challenged statements limited rights of the government expressly reserved in the solicitation.

### DECISION

New Dimension Masonry, Inc. protests the award of a contract to Ron Shoffeitt Masonry pursuant to invitation for bids (IFB) No. N68711-94-B-0069, issued by the Department of the Navy for the demolition of existing wood fences and construction of decorative block privacy fences at the Naval Air Facility in El Centro, California. New Dimension argues that Shoffeitt's low bid was nonresponsive and should have been rejected because Shoffeitt attached conditions to its bid that were inconsistent with the terms of the IFB.

We sustain the protest.

The IFB, issued August 19, 1994, anticipated award of an indefinite quantity demolition and construction contract. On September 9, the agency amended the IFB to provide answers to questions from prospective bidders. On September 20, at bid opening, three bids were received with prices as follows:

Ron Shoffeitt	\$239,800
New Dimension	\$340,000
All Pro Masonry	\$345,000

Shoffeitt's apparent low bid was accompanied by a short cover letter setting forth five statements, termed "conditions," three of which form the basis for New Dimension's protest.<sup>1</sup> The three "conditions" were that:

"Contractor will need stock yard area for materials."

"[Contractor will] [p]rovide performance [and] payment bond[s] within 2 week[s] after award of contract."

"Dirt shall be backfilled [and] leveled over footings and excess dirt will be haul[ed] off base."

On September 27, New Dimension filed an agency-level protest arguing that the Shoffeitt bid was nonresponsive because the conditions were inconsistent with the terms of the IFB. The Navy denied the agency-level protest by letter dated September 29, and this protest followed.

#### Availability of Stock Yard Area

The protester argues that Shoffeitt's statement that the "[c]ontractor will need stock yard area for materials" is inconsistent with IFB paragraph 2.1.2, which reserves to the agency the right not to continue to provide a laydown and storage area. According to the protester, the IFB's express statement regarding the continuous availability of such a storage area during the course of this indefinite quantity contract was a material term of the IFB and added substantially to the protester's bid price. Thus, the protester contends that this condition gave Shoffeitt an unfair advantage in pricing its bid by assuming the continuous availability of a storage area. We agree.

Generally, to be responsive, a bid must be an unequivocal offer to perform, without exception, the exact thing called for in the solicitation so that acceptance of the bid will bind the contractor to perform in accordance with all the IFB's material terms and conditions. Stay, Inc., B-237073, Dec. 22, 1989, 89-2 CPD ¶ 586, aff'd, 69 Comp. Gen. 296 (1990), 90-1 CPD ¶ 225. If, in its bid, a bidder attempts to impose conditions that would modify material requirements of the IFB, limit its liability to the government, or limit

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<sup>1</sup>The other two "conditions" are not at issue here as they were not cited by the protester, and were not found by the agency to impermissibly condition the bid. In addition, we see nothing in the other two "conditions" to support a conclusion that the bid was nonresponsive.

the rights of the government under any contract clause, then the bid must be rejected. See Federal Acquisition Regulation (FAR) § 14.404-2(d); NR Vessel Corp., B-250925, Feb. 11, 1993, 93-1 CPD ¶ 128; Bishop Contractors, Inc., B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555.

Subpart 2.1 of the specifications appended to the IFB discussed requirements related to the facilities and services available to the contractor during contract performance. At paragraph 2.1.2, the IFB states:

"Jobsite, Laydown, and Storage Area Maintenance: Maintain the jobsite, laydown, and storage areas in a neat and orderly condition on a continuing basis, and comply with the standards of cleanliness and appearance of the regulating Station. The continued availability of the laydown and storage areas to the Contractor is at the convenience of the Government."

In addition, at paragraph 2.1.3, entitled "Contractor's Storage Area," the IFB references FAR § 52.236-10, entitled "Operations and Storage Areas." This clause requires contractors to confine operations (including operations related to the storage of materials) to areas authorized or approved by the contracting officer. Further, IFB paragraph 2.1.6, entitled "Temporary Construction Fencing," specifies the type of temporary construction fencing to be used in delimiting the construction site and storage area.

The protester correctly argues that the availability or non-availability to a contractor of government facilities can be a material requirement in an IFB which has a substantial effect upon the price of the bid. Campbell Indus.--Recon., B-189356, Feb. 3, 1978, 78-1 CPD ¶ 99. For example, where a solicitation provides that only a portion of the work may be performed at a government facility, a bid conditioned on performing all of the work at that facility is properly rejected as nonresponsive. Cloyd Duke Gull and Assocs., Inc., B-192095, Dec. 4, 1978, 78-2 CPD ¶ 382.

In this case, although the agency's obligation to provide a storage area is not expressly set forth in the IFB, the specifications at paragraphs 2.1.2, 2.1.6, and the FAR clause referenced in paragraph 2.1.3, clearly implied that the contractor would have such storage space. We reach this conclusion because the above-referenced IFB provisions require that the storage area be neatly maintained, properly fenced, and that temporary buildings constructed within the storage space must be removed at the end of contract

performance.<sup>2</sup> Since the availability of a storage area was anticipated in the IFB, the bidder's statement that it would need such an area for its materials is consistent with the implicit promise in the IFB to provide such an area.

However, as quoted above, the IFB also provided that "[t]he continued availability of the laydown and storage areas to the Contractor is at the convenience of the Government," IFB ¶ 2.1.2. Since this provision expressly reserves to the government the right to deny the availability of such a site to the contractor, Shoffeitt's stated condition alters the balance of rights set forth in the IFB.

When conditions placed by bidders alter the balance of rights as has happened here, the role of our Office is to consider whether the "statement constituted such a condition as was repugnant to the invitation and prejudicial to other responsive bidders." 38 Comp. Gen. 508, 510 (1959) (bid properly rejected as nonresponsive when accompanied by letter stating that performance will require rent-free use of government facilities). Here, the protester argues that the impact of assuming continuous availability of a storage area was material.

In its comments on the agency report, New Dimension explains that since the IFB anticipates award of an indefinite quantity contract, the possibility that there would not be continued availability of a storage area was a significant factor in computing its price. According to the protester, "[i]f a laydown area is not continuously available, the contractor faces expensive move-in and move-out costs with each order." New Dimension also states that it factored the additional costs associated with this possibility into its bid price. Neither the agency, nor Shoffeitt, has rebutted the protester's contentions, which on their face appear reasonable.

We have held that where a bidder conditions its bid upon the use of government facilities not made available in the solicitation, the bidder has availed itself of benefits not extended to other bidders by the advertised specifications, and rendered the bid nonresponsive. Id.; Cloyd Dake Gull and Assocs., Inc., supra; see also Campbell Indus.--Recon., supra. Similarly, we conclude here that Shoffeitt's attachment of a condition regarding the availability of a storage area, in the face of the agency's reserved right not to provide such an area, rendered its bid nonresponsive,

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<sup>2</sup>In addition, paragraph 2.1.4.1 requires that any temporary buildings constructed in the storage area must be appropriately painted.

given the potential material effect on bid prices of the uncertain availability of a storage area.

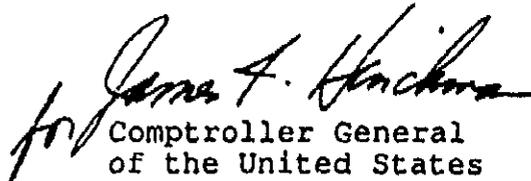
#### Excess Dirt and Payment and Performance Bonds

Since we sustain New Dimension's protest with respect to the condition regarding the availability of a storage area, we need not consider whether the other two challenged conditions in Shoffeitt's bid, regarding removal of excess dirt and the time for submission of performance and payment bonds, also rendered the bid nonresponsive.

#### Recommendation

Because we conclude that the Shoffeitt bid was nonresponsive, we recommend that the bid be rejected and award made to next low responsive, responsible bidder. In the alternative, if the agency concludes that it no longer needs to reserve the right to withdraw the contractor's access to a storage area, it may amend the solicitation to clearly so indicate and resolicit. In addition, we find that New Dimension is entitled to recover the costs of filing and pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6 (1994). New Dimension's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

  
Comptroller General  
of the United States