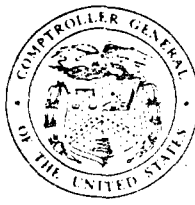


DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

57042

FILE: B-183820

DATE: September 24, 1975

MATTER OF: S. Livingston & Son, Inc.

97424

DIGEST:

1. While procuring activity contends deviations from certain features of "brand name" item are minor and do not affect suitability of item for intended purpose, by including such features in specifications, they were made material and award to bidder whose sample did not conform in all respects to salient characteristics was improper. However, as items have been delivered, no corrective action is possible.
2. Bid, which conditions delivery upon receipt of Government-furnished material under IFB requiring delivery within 45 days from receipt of award, is nonresponsive because bidder imposed condition modifying requirements of IFB.

On May 22, 1975, the Smithsonian Institution issued invitation for bids (IFB) No. FA-5-51260 for 3,316 guard shirts, short sleeve, Elbeco Style 378-3 or equal. Bids were opened on June 19, 1975, and award was made to the low bidder, M. Setlow & Son, Inc. (Setlow), on June 24, 1975, at a unit price of \$3.95.

S. Livingston & Son, Inc. (Livingston), has protested the acceptance of Setlow's bid on the basis that the sample submitted by Setlow did not comply in various respects with the specifications contained in the IFB. These deviations from the specifications of Setlow's sample, as noted by Livingston, were that:

- (1) The flaps on the pockets did not have mitred corners as required;
- (2) The flaps were not secured to the shirt with two rows of stitching, but with only one row;
- (3) The sample was not poly bagged as required but wrapped in tissue paper;
- (4) The buttons did not conform to the specifications but Setlow advised that the furnished shirts will have the required buttons;

- (5) The collar points exceed the length called for in the specifications; and
- (6) The sample did not indicate the textile fiber products content.

While the Smithsonian has conceded that the Setlow sample did have the above deviations, its position is that the variances are of such a minor nature that they do not affect the shirt's suitability for the use intended by the Smithsonian. The Smithsonian relies on section 1-1.307-7(a) of the Federal Procurement Regulations (FPR) (1964 ed. amend. 117) which states, in pertinent part:

"* * * Bids shall not be rejected because of minor differences in design, construction, or features which do not affect the suitability of the products for their intended use."

However, we believe this section must also be read in conjunction with the clause contained in FPR § 1-1.307-6(a)(2), which was included in the IFB. The last sentence of paragraph (a) of that clause reads as follows:

"* * * Bids offering 'equal' products * * * will be considered for award if such products are clearly identified in the bids and are determined by the Government to meet fully the salient characteristics requirements listed in the invitation."

Therefore, the decisive question in this matter is whether the six deviations noted above in the sample of Setlow were material.

The IFB, in addition to listing the brand name and style number (Elbeco Style 378-3), contained two pages entitled "Specifications" which enumerated in a detailed fashion the manner of construction of the shirts being procured. It is from these specifications which the above six deviations were made.

The drafting of proper "brand name or equal" purchase descriptions which set forth essential characteristics to meet the requirements of the Government is a matter primarily within the

jurisdiction of the procuring activity. However, where, as here, the contracting agency in a "brand name or equal" solicitation goes beyond the make and model of the brand name and specifies particular features, we have held that such features must be presumed to have been regarded as material and essential to the needs of the Government. 51 Comp. Gen. 247 (1971) and 49 Comp. Gen. 195 (1969).

Concerning Smithsonian's indication that the deviations contained in Setlow's sample were minor and did not affect the shirt's suitability, if this were the case, such features should not have been listed as salient characteristics of the brand name item in the specification. This action, we feel, may have misled other bidders into believing such features were mandatory and incorporated them in their samples with a resulting higher bid price. It may also have had the effect of causing some potential bidders not to submit bids, hence lessening competition. Therefore, based on the above, we believe the contract was improperly awarded to a bidder who was nonresponsive to the requirements contained in the IFB.

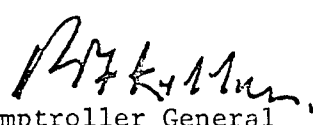
While the items solicited have already been delivered and, therefore, corrective action is not possible at this time, we are advising the Secretary of the Smithsonian Institution that steps should be taken to avoid a recurrence of this situation in the future.

Furthermore, in reviewing the bids submitted in response to the IFB, we note that the bid of Livingston was nonresponsive in another respect. The IFB required delivery to be made within "45 days from receipt of the award." In the bid of Livingston, the words "and emblems" were added to the end of this sentence. The emblems referred to were to be furnished by the Smithsonian to the contractor for incorporation into the shirts.

FPR § 1-2.404-2(a) (1964 ed. amend. 121) provides that any bid which fails to conform to the essential requirements of the IFB must be rejected as nonresponsive. Ordinarily, a bid must be rejected where the bidder imposes conditions which would modify requirements of the IFB or limit rights of the Government under any contract clause or limit its liability to the Government so as to give such bidder an advantage over other bidders. FPR § 1-2.404-2(b)(5) (1964 ed. amend. 121).

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In the instant case, Livingston added a condition, which if accepted, could extend the delivery schedule beyond the required 45 days and, therefore, its bid is nonresponsive. Kipp Construction Co., B-181588, January 16, 1975, 75-1 CPD 20.


Deputy Comptroller General
of the United States