

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

60199

FILE: B-182864

DATE: November 21, 1975

MATTER OF: Durable Metal Products Company

97699

DIGEST:

Failure of bidder to submit with bid written authorization to use Government-furnished equipment already in bidder's possession under another contract renders bid nonresponsive. Bidder's allegation (disputed by agency) that it had oral authorization is irrelevant as IFB required written authorization and burden is upon bidder to obtain written authorization prior to bid submission.

The United States Army Armament Command issued solicitation No. DAAA09-74-B-7448 for 1320 M85, for .50 caliber machine gun cartridge ejectors to be priced with and without first article approval (FAA).

The low bid was submitted by Durable Metal Products Company (Durable) in the amount of \$30.94 per unit with FAA and \$29.94 without FAA. The second and third low bids were \$34.00 and \$34.40 with FAA and \$34.00 and \$48.60 without FAA, respectively.

Because of the difference between the low bid and the other bids received, the contracting officer requested and Durable did confirm its bid price. Still concerned over the discrepancy between the bids, the contracting officer called Durable relative to a provision in the solicitation carried forward into its bid relating to the use of Government-furnished equipment (GFE) during the performance of the contract. In its bid, Durable had indicated that GFE (inspection gages which Durable was using under a current contract for the same item) would be used without charge as opposed to on a rental basis. Durable stated that if it could not obtain permission to use these gages, \$1.73 would be added to each item in the bid.

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In view of this information, the contracting officer requested Durable to submit a letter from the contracting officer of the other contract under which the equipment was being used showing that the equipment could be transferred for use without charge to the instant contract. Durable never submitted this letter. The contracting officer, therefore, decided to treat the correspondence from Durable with respect to the GFE as a request for correction of a mistake in bid and asked Durable to submit worksheets showing how it arrived at the \$1.73 additional charge per item. Durable submitted worksheets but the claim for correction was denied by the contracting officer for failure to submit clear and convincing evidence of its intended bid price; however, the contracting officer determined to permit Durable to withdraw its bid. Award was made to the second low bidder.

Following award, Durable received a letter from the contracting officer advising that the above award action had been taken and that Durable's bid had been withdrawn.

Durable has protested the above action to our Office contending that (1) it never intended to withdraw the bid; (2) it was misled by the contracting officer into supplying the additional cost information without being told the purpose behind such action; namely, to correct a mistake in its bid; and (3) the contract with the second low bidder should be terminated and award made to Durable as the low responsive, responsible bidder.

While agreeing with the result reached by the contracting officer, we believe the reason given for the nonconsideration of Durable's bid was erroneous.

All of the correspondence from the contracting officer to Durable between bid opening and award was directed toward an error in Durable's bid price. The alleged mistake in the bid price of Durable is irrelevant as regards what we believe to have been the proper basis for the rejection of Durable's bid --the failure to submit with its bid written authorization from the cognizant contracting officer for use of the GFE.

As stated previously, the solicitation contained a Government-furnished equipment clause, the portion of which is pertinent here reads as follows:

"Requirement of Offeror's. If Solicitations are based on the use of Government property already in the possession of the offeror or his anticipated subcontractors under other contracts or property offered for use in this Solicitation, the offeror shall submit with his Solicitation the following:

"a. a list or description of all Government production and research property which the offeror or his anticipated subcontractors propose to use on a rent-free basis, including property offered for use in the Solicitation, as well as property already in possession of the offeror and his subcontractors under other contracts;

"b. with respect to such property already in possession of the offeror and his proposed subcontractors, identification of the facilities contract or other instrument under which the property is held, and the written permission of the Contracting Officer having cognizance of the property for use of that property."

Our Office has held in the past that the failure of a bidder to submit the information required by paragraph b above renders the bid nonresponsive since the use of Government property may materially affect the contract price and, therefore, the failure to comply with the above clause is not a minor informality subject to waiver. B-154759, November 16, 1964, affirmed in B-154759, December 21, 1964.

Durable acknowledges that while it did not have written permission from the cognizant contracting officer to use the GFE, upon receipt of the solicitation Durable orally contacted that contracting officer and was advised that the use of the gages would be no problem and to submit a written request for such use. Durable advises that it submitted the written request, but before receiving the reply, had to submit its bid in accordance with the bid opening date. There is nothing in the record to show that Durable received a response to the request.

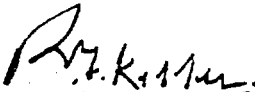
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The above allegations concerning the alleged attempt by Durable to obtain, prior to bid opening, permission to use the GFE are disputed by the Army. The cognizant contracting officer denies that the above-noted conversation ever occurred.

We do not find it necessary to resolve this factual dispute. Even if Durable was given oral authorization to use the GFE for the instant procurement, such an oral authorization does not comply with the conditions of the solicitation which require that written authorization be submitted with the bid. B-155770, March 25, 1965.

Moreover, the alleged failure of the cognizant contracting officer to reply to the request for written authorization prior to the date set for bid opening did not relieve Durable of the responsibility which is placed upon all bidders to prepare their bids in accordance with the terms of the IFB as provided by 10 U.S.C. § 2305 (1970). Therefore, it was incumbent upon Durable to pursue its GFE authorization request before bid opening. Also, it is well settled that in the absence of a specific statutory provision, the Government is not responsible for the malfeasance, misfeasance, negligence or omissions of duty of its agents or employees. B-154759, December 21, 1964, supra.

For the foregoing reasons, Durable's protest is denied.


Acting Comptroller General
of the United States