



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

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B-178298

September 10, 1973

The Lynch Company, Inc.
P.O. Box 540
Honolulu, Hawaii 96809

Attention: Mr. Harold K. C. Wong

Gentlemen:

We refer to your telegram of March 26, 1973, and subsequent correspondence, protesting the award of a contract to Hawaiian Equipment Company (Hawaiian) under invitation for bids (IFB) No. DAGA01-73-B-0030, issued by the Department of the Army.

You maintain that the Department improperly decided that your bid was nonresponsive for failing to show compliance with salient feature (e) of the IFB. We must agree with the Department's decision for the reasons discussed below.

The procuring activity issued the IFB on January 23, 1973, for one road sweeper, Wayne Manufacturing Company Model 984 or equal, with the following salient features:

- "a. Minimum hopper capacity: 4 cu yd minimum
- b. Power steering
- c. Hydraulic controls * * *
- d. Sweeper shall have three sweeping spreads * * *
- e. Sweeper shall be self-propelled and capable of sweeping a minimum 9 feet swath"

The "Brand Name or Equal" clause (1961 Nov) of the IFB also cautioned bidders offering "equal" products to furnish all descriptive material necessary for the procuring activity to determine whether the product offered met the IFB's requirements.

The contracting officer reports that you submitted the lowest bid (\$14,645.00) for the requirement; however, you indicated in entry "n" on page 4 of your bid that the equal product (Elgin Sweeper Company Model No. 475) which you proposed was not in strict accordance with the IFB's specifications. On the reverse side of the page you explained the offered product's differences as follows:

[Protest of Army Contract Award]

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"Sweeping swath with single gutter broom 8 ft. similar to manufacture specified. We are able to provide a 10 ft. swath with dual gutter broom at an additional cost of \$960.00 is desired."

You also submitted a descriptive brochure with your bid containing information on the Elgin model which is quoted in pertinent part:

"Sweeping path, one side broom	8'
Sweeping path, two side broom	11'"

The contracting officer states that she considered your firm offer to furnish a sweeper with an 8-foot sweeping path to be nonresponsive to the salient requirement for a minimum path of 9 feet; that acceptance of your "alternate bid" to supply a dual side broom with a 10-foot sweeping path was not permitted under the terms of the IFB; and that she also believed your "alternate bid" was not a definite offer which, upon acceptance, would bind you to meet all the IFB requirements. Her local advisor commented, in this regard, that your "alternate bid" amounted to no more than an invitation to the Government to make an offer for the dual side broom you were able to furnish, if the Government so desired. Because of this decision, the contracting officer awarded the requirement to Hawaiian, which offered Wayne Sweeper Model No. 2-984 with a dual side broom having a sweeping path of 11 feet, at a total price of \$16,799 on March 15, 1973.

We have consistently held that bidders offering "equal" models should not have to guess at the material characteristics of the brand name item against which the equality of their models will be administratively determined in accordance with the terms of the "Brand Name or Equal" clause. 49 Comp. Gen. 274, 276 (1969). To this end, Armed Services Procurement Regulation (ASPR) 1-1206.2(b) requires that bidders be advised in the solicitation of the salient features or characteristics of the referenced item which they are required to meet.

Since compliance with all salient features is the standard for determining the acceptability of an "equal" product, the model you proposed with a sweeping path of 8 feet cannot be considered equal to the referenced brand name product which is capable of sweeping a minimum path of nine feet (salient feature (c)). We must therefore agree with the decision to reject your bid to supply an "equal" model with an eight-foot sweeping path.

You maintain, in this connection, that Hawaiian's offer to supply a sweeper with a sweeping path of 11 feet does not comply with salient

feature (e) of the IFB, since you interpret the feature to require a sweeping path of exactly 9 feet. We cannot agree. The feature only describes a minimum requirement for sweeping path width; no maximum width is listed. Furthermore, the feature does not state a requirement for either single or dual side brooms. Consequently, single or dual side broom sweepers having sweeping path widths of 9 feet or more, such as the dual broom sweeper offered by Hawaiian, must be viewed as complying with the feature.

Contrary to the opinion reached by the contracting officer, submission of an alternate bid does not require rejection if the bid is otherwise responsive to the IFB. B-161909, July 12, 1967; 33 Comp. Gen. 499 (1954). The prohibition against "alternate" bids only forbids consideration of those bids which offer something other than that which is called for by the specifications. On the other hand, we agree with the position of the contracting officer's legal advisor that your "alternate bid" to supply a sweeper with a 10-foot broom was no more than an invitation for an offer from the Department.

Offers (bids) must consist of a promise that something over which the offeror assumes to have control shall be done or happen or shall not be done or happen if the conditions stated in the offer are complied with. See Williston on Contracts, third edition, sections 24A, 26. A mere expression of intention or general willingness to do something does not amount to an offer, the acceptance of which would result in a binding contract; further, an invitation to enter into negotiations is not an offer which, together with acceptance thereof, forms a contract. See Williston, supra, section 27.

With this in mind, we believe your statement that you were able to furnish a model with a nine-foot sweeping width was not a definite promise (or offer) to supply the model, but rather an indication of your general willingness or ability to supply the model. We also think the phrase "is (if) desired" in your offer is ambiguous at best as to whether you were requesting further discussions with the Government as a precondition to making a firm offer to supply the model. In addition, your intent, in this regard, could not be clarified after bid opening since this would give you a chance to affect the responsiveness of your bid which is prohibited. See 45 Comp. Gen. 221 (1965). Consequently, we agree with the Department's decision that acceptance of your "alternate bid" would not result in a binding contract and, therefore, such "bid" could not be considered for award.

You also maintain that if we uphold the rejection of your bid this will mean that no sweeper except the brand name itself could have

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qualified for award. We do not agree. If your "alternate bid" had contained an unequivocal offer to furnish a sweeper with a sweeping path of 10 feet it would have been an acceptable "equal" model insofar as compliance with salient feature (e) is concerned. Therefore, we do not agree with your further comment that the "brand name or equal" specification used here was proprietary and improperly restricted competition.

For the above reasons, your protest must be denied.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States

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