

Robert Little
Proc. II

DECISION



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

FILE: B-186737

DATE: February 4, 1977

MATTER OF: Dominion Road Machinery Corporation

DIGEST:

1. A bidder's unsolicited descriptive data may not be disregarded where it appears that the bidder is offering the model described therein. Therefore, when such model does not comply with the Government's stated material requirements, the bid must be rejected as nonresponsive.
2. Where IFB called for item which required First Article testing only if item offered was not on qualified products list (QPL), bidder's notation in bid schedule that First Article testing was "not applicable", when read in conjunction with information contained in other portion of bid indicating that bidder's item was included on QPL, reasonably can be construed as bidder's offer to furnish a QPL item.

(This bid protest tests the responsiveness of the two lowest bids for the Government's road grader requirements under invitation for bids (IFB) DSA 700-76-B-1059, issued by the Defense Construction Supply Center (DCSC), Columbus, Ohio. Dominion Road Machinery Corporation (Dominion) is challenging DCSC's determination that Dominion's apparent low bid is nonresponsive to the solicitation because of the unsolicited descriptive literature contained in its bid. Moreover, Dominion asserts that the second low bid of Gallon Manufacturing Division of Dresser Industries, Inc. (Gallon) was not responsive for failing to offer First Article testing and, therefore, that firm should not be awarded the contract in the event Dominion's bid is ultimately found to be nonresponsive. For the following reasons, we concur in DCSC's finding that Dominion's bid was nonresponsive and that Gallon's bid also was responsive to the solicitation.

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Dominion's Bid

DCSC found Dominion's bid to be nonresponsive, because Dominion's inclusion of unsolicited information in its bid created an ambiguity as to whether Dominion was offering to meet the solicitation's requirements. Dominion contends that DCSC erred in considering the unsolicited information as a qualification of the bid and asserts that such information should have been disregarded. Before considering the legal merits of Dominion's arguments, it is necessary to review the factual circumstances wherein Dominion's bid was received and evaluated.

The solicitation requested bids to supply a quantity of motorized road graders meeting Federal Specification 00-G-630D dated February 16, 1970, as amended. The solicitation did not request that bidders quote a particular item, although it did give bidders the option of indicating that they manufactured an article qualified to the applicable specification in order to show the bidders' eligibility for an "exemption from" (as distinguished from a "waiver of") First Article testing. In any event, bidders were only required to submit a price in order to be responsive. The Alternate Offers clause of the IFB stated that:

"When supplies are described by specifications and/or drawings, alternate offers in response to advertised solicitations will not be considered. Nevertheless, any reference by offerors to model or part number will be assumed to mean that the supplies so referenced conform to specifications or will be modified to conform, unless it is clear from the offer or accompanying papers that an alternate offer is intended. Supplies delivered under any resultant contract must conform to the specifications and/or drawings."

Instead of merely indicating its prices in the appropriate spaces on the Schedules, Dominion included the following information in its bid package:

(1) A letter dated April 22, 1976 stating in pertinent part as follows:

"We wish to thank you for your inquiry, DSA700-76-B-1058, and are pleased to make the attached quotes. Also enclosed you will please find specifications on our Champion D-715 Motor Grader."

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(2) Attached quotes for each contract line item consisting of motor graders, of which page 1 is an example:

"Quantity

7 Item #0001 Our Champion D-715 Motor Grader B-02

This includes:

Code No.

Exhaust Extension	M11
Clark, 4 Speed Transmission	N08
18:00 x 24-12 ply tires	R02"

[28 other features also were listed, most of which had a code number. Listings for other line items were similar.]

"Total \$31,118.70 each

Delivery: 90-120 Days

Freight: To New York, NY, add \$522.00 each"

(3) Two pages of detailed "specifications" for the Champion D-715 motor grader.

When bids were opened, the contracting officer could determine from Dominion's bid (1) that it was offer for model D-715 B-02 motor grader, and (2) the specifications for the D-715 motor grader. The record indicates that pursuant to a protest lodged by Galion and based on the buyer's own reservations, the contracting officer requested a legal review as to Dominion's responsiveness. It was counsel's view, inter alia, that references to model D-715 in Dominion's bid should be disregarded under the Alternate Offers clause of the solicitation, quoted above. Nevertheless, counsel recommended that questioned portions of Dominion's bid be clarified. Upon receipt of Dominion's unequivocal offer to meet the solicitation's requirements, the contracting officer notified Galion that its protest was denied. Galion protested to this Office. Dominion then replied to the specific allegations raised in Galion's protest.

Dominion's reply prompted a further inquiry of Dominion from the contracting officer, because Dominion had not replied to several allegations made by Galion which seemed to indicate that the model numbers inserted in Dominion's bid, along with the specification sheet, differed from the specifications. After receiving Dominion's

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reply, the contracting officer contacted the using activity to reconcile the apparent conflict between Dominion's explanation of its bid and the solicitation's requirements. In the opinion of the contracting officer, the using activity could not reconcile the discrepancies. Subsequently, the contracting officer, in his final report, made the following determination regarding Dominion's bid:

"12. After reviewing Dominion's bid, including the specification sheet for Model No. D-715 attached thereto, in light of the specific questions raised by Gallion's letter of 30 June 1976, together with Dominion's response to these questions, the undersigned has concluded that Dominion's bid as originally submitted is non-responsive for the following reasons:

a. The specification sheet for Model D-715 cannot be disregarded under ASPR § 2-202.5(f) and must be considered in determining the responsiveness of Dominion's bid * * *.

b. The specification sheet for Model D-715 indicates that service brakes will be mounted on two driving wheels. The specification sheet is thus in direct conflict with paragraph 3.13.1 of Federal Specification 07-G-630D which requires that wheel mounted brakes be mounted on all four tandem wheels * * *.

c. Although Item (6) on page 22 of the invitation requires that CLIN [contract line item] 0002 be equipped with an engine coolant defroster, Dominion's bid on CLIN 0002 expressly refers to Code No. S15 which is an electric defroster and thus directly conflicts with the requirement for an engine coolant defroster for CLIN 0002.

d. Although Dominion's bid specified a Clark 4-speed transmission for each CLIN, Dominion now proposes to use a Clark 6-speed transmission because the 4-speed transmission will not perform satisfactorily.

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e. Notwithstanding Clause C10 [Alternate Offers] of the invitation, the references in Dominion's bid to a basic tool kit and Code No. U15 create an ambiguity with respect to its obligation to comply with the requirements of paragraph 3.22 of Federal Specification 00-G-630D * * *.

f. The reference in Dominion's bid to shop manuals and maintenance manuals (and Code Nos. U10 and U11) and to a one year warranty create an ambiguity in regard to its undertaking to comply with the requirements of CLINs 0005 and 0010 and clause L17 * * *."

On the basis of the above, the contracting officer proposed to award the contract to Gallon. At that point Dominion protested.

Upon further consideration, the contracting officer has concluded that Dominion's bid was responsive regarding the one-year warranty and the transmission offered. All other matters remain at issue.

We agree with the contracting officer that the most important issue with regard to the responsiveness of Dominion's bid is the effect of the inclusion of the specification sheet for D-715 motor graders with the bid. DCSC and Dominion agree that the specification sheet's effect on the bid is governed by Armed Services Procurement Regulation (ASPR) § 2-202.5(f)(1975). That section states:

"(f) Unsolicited Descriptive Literature. If the furnishing of descriptive literature is not required by the invitation for bids, but such literature is furnished with a bid, it will not be considered as qualifying the bid, and it will be disregarded, unless it is clear from the bid or accompanying papers that it is the bidder's intention to qualify the bid."

DCSC relies, in part, on our decision 49 Comp. Gen. 851 (1970), as it modified B-169057, April 23, 1970. For the following reasons, we believe that reliance is well placed.

In B-169057, *supra*, the bidder, although enclosing brochures covering a number of models of mechanical presses manufactured

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by it, did not specify any particular model as meeting the solicitation's requirements. There were no cross-references between the brochures and the bid. In short, the only relationship the brochures had to the bid was their both being in the bid package. We distinguished an earlier case, B-167584, October 3, 1969, wherein the enclosed descriptive literature contained item-by-item descriptions of the specific items solicited in the specification. In B-167584 we held that the bid must be considered nonresponsive where the unsolicited material accompanying and referenced to the bid contained deviations from the specifications. Since there was no perceivable intended relationship between the unsolicited brochures and the bid in B-169057, we concluded that the brochures should not have been considered as qualifying the low bid and should have been disregarded in accordance with ASPR § 2-202.5(f).

Both the procuring agency and the next low bidder requested reconsideration of B-169057, *supra*, and indicated that the case appeared to be at variance with our previous cases holding that the intent of the bid must be determined from all material included in the bid package, e. g., unsolicited material. The request focused this Office's attention on the fact that ASPR § 2-202.5(f) precluded the contracting officer from considering factually conflicting unsolicited literature as rendering a bid ambiguous regarding the bidder's intent to conform to the solicitation. In reconciling B-169057 with our prior decisions, we stated in 49 Comp. Gen. 851 at 852 that:

"* * * If the circumstances are reasonably susceptible of a conclusion that the literature was intended to qualify the bid or if inclusion of the literature creates an ambiguity as to what the bidder intended to offer, then the bid must be rejected as non-responsive to the invitation for bids. See B-166284, April 14, 1969, May 21, 1969, and B-167584, October 3, 1969. As we stated in B-166284, April 14, 1969:

The crux of the matter is the intent of the offeror and anything short of a clear intention to conform on the face of the bid requires rejection.

* * * * *

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'When more than one possible interpretation may reasonably be reached from the terms of a bid a bidder may not be permitted to explain the actual meaning or bid intended since this would afford the bidder the opportunity to alter the responsiveness of his bid by extraneous material.'

"Award of a contract pursuant to formal advertising may be made under 10 U.S.C. 2305(c) only to the low responsible bidder whose bid conforms to the invitation. We do not believe that statutory requirement may be negated by a regulatory provision, such as Armed Services Procurement Regulation 2-202, 5(f), which presumes a bid to conform or be unqualified where the intent of the bidder is ambiguous. Cf. B-166284, May 21, 1969. Nor do we believe that the invitation for bids may establish any arbitrary conventions which provide that the clear language of the bid will be ignored unless presented in a particular form.

"On page three of our prior decision we stated:

'It is our view that the voluntary furnishing of literature with a bid, with nothing to evidence an intent to qualify the bid or to deviate from the advertised specifications, does not render such a bid nonresponsive.'

"On page four we stated:

'We believe therefore that the brochure submitted by Wayne with its bid should not be considered as qualifying its bid, and should be disregarded in accordance with the provision of ASPR 2-202, 5(f).'

"These statements were premised upon our conclusion, as set forth on page three of the decision preceding the first statement, that we did not believe Wayne's bid was qualified or ambiguous even taking into consideration the unsolicited brochure. The statements should not be construed to stand for the proposition that the unsolicited brochure may simply be disregarded and to the extent that such an impression is conveyed by statements in B-169057, April 23, 1970, that decision is modified."

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In view of the cases cited above, the question to be decided is whether the inclusion of the literature can be reasonably said either to qualify Dominion's bid or to create an ambiguity as to what the bidder intended to offer. As Dominion notes, the bid clearly indicated Dominion's intent to supply its D-715 B-02 motor grader. If we concede that without more, the included model number should be disregarded in evaluating Dominion's bid pursuant to the "Alternate Offers" clause (contra, 50 Comp. Gen. 8 (1970); Huey Paper and Material, Stacor Corporation, B-185762, June 16, 1976, 76-1 CPD 382), nevertheless, we must conclude that the specification sheet headed by "D-715 Motor Grader" and containing, inter alia, "D-715 Specifications" could reasonably have been interpreted as being intended to describe the motor grader offered by Dominion.

Dominion's literature, being reasonably considered to be part of the bid, is subject to close scrutiny in order to determine whether the bid contained deviations from the solicitation. See, E. C. Campbell, Inc., B-185611, March 4, 1976, 76-1 CPD 155. DCSC's examination of the D-715 specifications indicated that the D-715 motor grader is equipped with hydraulic brakes on only two wheels, instead of four wheels as required and was, therefore, materially nonresponsive. Accordingly, Dominion's bid was properly rejected, because the face of the bid did not indicate Dominion's unequivocal offer to provide the requested items in total conformance with the specification requirements of the solicitation. E. C. Campbell, Inc., supra.

Galion's Bid

Dominion contends that Galion's insertion of "N/A" adjacent to Items 0004 and 0009 of the Schedule renders Galion's bid nonresponsive. Each of these items states that it:

"* * * identifies the first article test requirement incorporated by provisions C27 and C27a of the solicitation. The quantity 1 TE (TEST) signifies the test requirement. See para. (a) of the first referenced provision for the number of units to be tested. This is not an additional quantity of supplies being procured (See para. (e) of the same provision). Offeror will enter the total price for this requirement or 'no charge' in the 'amount' column. If neither is indicated, the Government

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will assume the requirement is offered on a 'no charge' basis. In the event the first article test and approval requirement are waived, an award will not be made for CLIN[s] 0004 [and 0009]."

Amendment 0002 dated April 2, 1976, modified provision C27 and C27a to the effect that they were to be included in the contract:

"* * * only if unqualified graders furnished."
(Emphasis supplied.)

Finally, Section F of the solicitation modified the specifications regarding unqualified graders as follows:

"3.2.2 Unqualified Graders. Delete [the requirement that graders furnished have passed certain qualification tests] and substitute: 'If unqualified graders are furnished they shall be tested in accordance with the following requirements: First Article.'"

When read in the context of the solicitation, the above quoted portions of the specifications indicate that (1) graders furnished which are qualified under the applicable Qualified Products List (QPL) are exempt from First Article testing; (2) graders furnished which are not listed under the QPL may be tested under the First Article test criteria; and (3) a responsive grader need not be one which is qualified under the QPL. We might again mention that the solicitation did not require a bidder to offer any particular model of grader. Also, as we mentioned before, bidders were given the opportunity in clause B11 to indicate whether they manufactured a QPL qualified item. Thus, under the terms of the solicitation, bidders have the option of furnishing any item they manufacture so long as it meets the specification requirements and either passes First Article testing or is listed in the QPL.

DCSC and Galion contend, in effect, that Galion has offered to furnish a QPL item, thereby eliminating its option. That position is taken in reliance on the effect of Galion's insertion of the following information appearing in Section B (Contract Form and Representations, Certifications, and other Statements of Offeror), clause B11 (Qualified End Products):

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ITEM NAME GRADER, Mtd. 6x4 DED

TEST No. AMSME-RZK-KM-16 Columbus, Ohio.

w/Rev. April/1971"

Galion and ECSC contend that the above information refers to a CPL grader and that, irrespective of any condition in Galion's bid regarding its offer to supply First Article testing, any such testing would be inapplicable to Galion. While clause B11 was not used in its usual role of identifying the item and test number where end items purchased are "required to be qualified products" (See, ASPR §§ 7-2003.6, 1-1107.2(a)) by the solicitation, we believe that the information included therein, when read in conjunction with Galion's statement that First Article testing was "Not Applicable" to its offer to comply with the specifications, reasonably can be construed as Galion's offer to furnish a CPL grader. Accordingly, we will not object to an award to Galion.

W. H. ...
Deputy Comptroller General
of the United States