

01548

Roger Ayer  
Proc. II

**DECISION**



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

FILE: B-187571

DATE: February 23, 1977

MATTER OF: Flo Tek, Inc.

**DIGEST:**

1. Agency specified that instrument "capsule material" be of 316 stainless steel with intent that portion of instrument wetted by solution being measured be made of that material. Protester's design utilized 316 stainless steel capsule and wetted diaphragm of 430 stainless steel. Protester reasonably read specifications as consistent with its product although in fact product does not meet agency's needs. In view of specification ambiguity, unawarded portion of procurement should be readvertised.
2. Where solicitation states that there is 117 Volt A. C. power supply and instruments must run off 24 Volt D. C. power supply, solicitation amendment indicating that agency will furnish the 24 Volt D. C. converter does not contradict earlier statement that there is 117 Volt A. C. power supply.
3. Allegation that bid should be rejected as nonresponsive because of bidder's failure to acknowledge receipt of an amendment to IFB is academic since portion of procurement which would be awarded to that bidder shall be readvertised.

Flo Tek, Inc. protests the award of a contract to Tri-Tech Engineering Corporation (Tri-Tech) and the proposed award of a contract to Equipment & Controls, Inc. (E & C) for portions of the process instrumentation hardware sought by Invitation for Bids (IFB) 48-76, issued by the Energy Research and Development Administration's (ERDA) Morgantown Energy Research Center (MERC).

Flo Tek's low bid on several of the items was rejected as non-responsive. Flo Tek's principal contention is that this determination was erroneous.

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The "Notice to Bidders" cover sheet accompanying the IFB cautioned bidders not to "include descriptive literature with the bid unless the solicitation specifically requires such literature" and that "inclusion of terms, conditions and provisions which differ from those contained in the solicitation may be cause for rejection of the offer." However, the Standard Form 33A, as amended, made a part of the IFB also contained a "Brand Name or Equal" clause requiring bidders to submit descriptive material in the event they were offering a product "equal" to a brand name product specified in the IFB schedule. Since the instant IFB did not identify the items sought by make and model, the "Brand Name or Equal" clause was not applicable, and there was no obligation upon any bidder to furnish descriptive material. However, the record suggests that Flo Tek's president may have misread the IFB as requiring descriptive material.

Flo Tek inserted numbers, such as "420RF12A2" adjacent to certain portions of the specifications, and enclosed with its bid 18 pages of specifications, drawings, and installation, operation and maintenance instructions for a certain line of transmitters.

Flo Tek's bid was subjected to a technical evaluation, as a result of which the bid was found to be nonresponsive. The specifications for the transmitters stated that the "Capsule Material" was to be "316 SS [stainless steel]." The record shows that what ERDA contemplated obtaining through this specification was a transmitter of a "closed configuration" design in which the portion of the device ("capsule material") which is wetted by the flow of the solution which the instrument is measuring is made of 316 SS. The design offered by Flo Tek was of an "open configuration" design which contained two 316 SS capsules but the sensing diaphragm of which was clearly shown to be of 430 SS. It is this sensing diaphragm which is wetted by the process solution in the Flo Tek design.

The transmitter described in Flo Tek's bid does not meet the agency's requirements in that the element wetted by the solution being measured consists of 430 SS rather than 316 SS. However, Flo Tek has advised that had it been on notice of ERDA's true requirement it could have readily complied therewith. At the same time, we do not believe it was unreasonable for Flo Tek to regard its design as satisfying the requirement that the "capsule material" be of 316 SS. It appears that the specification is subject to two reasonable interpretations and therefore is ambiguous. 48 Comp. Gen. 757, 760 (1969). In this regard, we note that the procuring activity has recently changed the specification to read as follows:

"Pressure Sensor: The capsule, sensing element or measuring element metal parts, including all diaphragms

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that are 'wetted' by the process fluid shall be of 316 SS." (Emphasis added.)

The question is then presented as to what action may be taken to correct the effect of the ambiguous specification. A portion of the procurement was awarded to Tri-Tech before the protest was filed. Although ERDA was successful in having performance of that contract suspended for a limited time, performance has resumed and a substantial part of the 120-day delivery period has passed. Under these circumstances, we do not believe Tri-Tech's contract should be disturbed. However, the portion of the procurement which has not yet been awarded should be readvertised using a more precise specification.

Flo Tek next contends that it is the only bidder whose product satisfies the power supply requirements of the IFB. The original specification advised bidders as to "Electric Service" that "Alternating current supply will be nominal 117 volts, 60 Hz." In response to a request from a bidder other than Flo Tek for clarification of the power supply situation, the following specification provision was added by amendment: "Power supply: Transmitters will be supplied from an ERDA owned 24 V D.C. Power supply." Flo Tek maintains that it submitted the only responsive bid since it alone manufactures instruments which can operate on 117 Volts A.C. or 24 Volts D.C.

ERDA states that the IFB amendment was intended to advise bidders that the Government would provide a 24 Volt D.C. power supply, and its purpose was not to require instruments which would operate from 117 Volts A.C. and 24 Volts D.C.

We do not believe the solicitation as amended necessarily contained a discrepancy or dual voltage requirement because the standard power source for this kind of instrumentation is 24 Volt D.C. What this means is that a bidder offering a standard instrument which operates off 24 Volt D.C. would have to provide some kind of converter to change the 117 Volt A.C. into 24 Volt D.C. to operate the instrument. The amendment merely made it clear that ERDA would provide the converter. It appears that ERDA's converter would operate off the 117 Volt A.C.

ERDA admits that it should have deleted the reference to 117 Volt A.C. from the solicitation. However, it is our opinion that the net effect of the amendment was to advise the offerors that they need only bid the instrument alone and not the instrument plus converter.

Finally, Flo Tek argues that the bid of E & C should have been rejected as nonresponsive because of that firm's failure to acknowledge the amendment. Since the items which would have been awarded to

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E & C shall be readvertised pursuant to this decision, we believe this aspect of the protest is academic.

Therefore, the protest of Flo Tek is sustained in part and the as yet unawarded portion of the procurement should be readvertised using a specification which clearly indicates the minimum needs of the Government.

*R. K. ...*  
Acting Comptroller General  
of the United States