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DECISION



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

FILE: B-189578

DATE: October 7, 1977

MATTER OF: Cubic Western Data, Inc.

DIGEST:

Invitation requirement for submission of test data to enable grantee to determine "competency" of bidder to perform contract relates to bidder responsibility, and bidder's alleged failure to furnish complete test data with bid does not render bid nonresponsive.

On March 28, 1977, the Metropolitan Atlanta Rapid Transit Authority (MARTA) issued invitation for bids (IFB) No. CQ 210 for the design, furnishing and installation of the fare collection system for MARTA's Rapid Rail Transit System. The procurement is to be funded in substantial part (80 percent) by a grant from the Urban Mass Transportation Administration (UMTA), Department of Transportation, pursuant to the Urban Mass Transportation Act of 1964, Pub. L. 88-365, as amended, 49 U.S.C. § 1601 et seq.

Four bids were received in response to the solicitation. Duncan Industries (Duncan), a division of Qonnar Corporation, submitted the low bid of \$3,726,150. The next lowest bid, \$3,749,614, was submitted by Cubic Western Data, Inc. (Cubic). MARTA determined that Duncan's bid was nonresponsive and requested UMTA's concurrence in an award to Cubic. UMTA believes Duncan's bid is responsive and disapproved the proposed award to Cubic.

On July 12, 1977, Cubic filed a complaint with this Office against any award to Duncan. On July 25, 1977, MARTA rejected all bids under the IFB because of a purported technical deficiency in the public notice of the advertisement for bids and to avoid "protracted administrative and judicial proceedings and other costly delays." On the following day, Duncan filed an action in the United States District Court for the Northern District of Georgia (Qonnar Corporation v. The Metropolitan Atlanta Rapid Transit Authority, Civil Action No. 77-1218A) seeking to compel MARTA to award a contract to Duncan. We then dismissed Cubic's complaint in accordance with our policy of declining to rule on matters involved in litigation in the courts unless the court expresses an interest in receiving our opinion.

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Cubic Western Data, Inc., B-189578, August 3, 1977, 77-2 CPD 78. Cubic's complaint was reinstated on August 4, 1977, when the court requested this Office to render an opinion "on the question of whether the bid of Duncan Industries should be rejected as nonresponsive." See Union Carbide Corporation, 56 Comp. Gen. 487 (1977), 77-1 CPD 243.

UMTA, MARTA, Duncan and Cubic have each submitted briefs to this Office. MARTA and Cubic allege that Duncan's bid is nonresponsive for failure to comply fully with Exhibit J of the IFB which calls upon bidders to furnish test data for the "ticket handler", an important component of the fare collection equipment. Duncan's position is that Exhibit J relates to bidder responsibility, rather than responsiveness, and that the alleged deficiency in its bid was properly resolved after bid opening. Alternatively, Duncan maintains that even if Exhibit J pertains to responsiveness, it was responsive to Exhibit J requirements. UMTA agrees with MARTA and Cubic that Duncan did not adequately respond to Exhibit J, but views Exhibit J as addressing only bidder responsibility.

At the outset, we point out that this matter does not involve a direct Federal procurement and that the Federal Government will not be a party to the contract awarded. Our function, in a case such as this, is to determine whether there has been compliance with applicable statutory requirements, agency regulations, and grant terms, and to advise the Federal grantor agency accordingly. Union Carbide Corporation, supra, and cases cited therein. In view of the court's request, we will limit our review to the question of the responsiveness of Duncan's bid.

The grant requires "unrestricted competitive bidding, and award to the lowest responsive and responsible bidder." The IFB states that "all questions concerning the Contract, * * * including all bids therefor, * * * and the award thereof, shall be governed by and decided according to the law applicable to Government procurement contracts." Pursuant to this provision, the parties' submissions to this Office have been based on Federal procurement law. Accordingly, in resolving the issue, we will rely on the general principles applicable to Federal procurements.

The procurement contemplates the use of a sophisticated ticket handling device as part of the fare collection system. The ticket handler is to accept a magnetically encoded ticket, similar in appearance to a credit card, read the information encoded on

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the card and emit a signal to open a turnstile and let a passenger through if the ticket is valid. No fare collection system currently in use employs all the features required by MARTA's specifications, but components are available that can be readily modified to meet MARTA's needs. The record also indicates that when MARTA learned that Duncan wanted to compete in the procurement but did not have a suitable ticket handling device actually in service, MARTA agreed to accept test data based on either the actual ticket handler proposed or a "prototype", which Duncan did have.

MARTA regarded the test data accompanying Duncan's bid as falling short of meeting the Exhibit J requirements. However, after bid opening, MARTA obtained additional information from Duncan to the effect that "Duncan's prototype ticket handling device could in fact meet the performance and reliability standards stipulated by the sections of the technical specifications on which Exhibit J was based * * *." The threshold question, therefore, is whether MARTA may properly consider the information obtained after bid opening. That, in turn, depends upon whether Exhibit J bears upon responsibility of the bidder or the responsiveness of the bid.

It may generally be stated that invitation requirements which concern a bidder's general capacity to perform in accordance with contract terms are matters of responsibility, while requirements directed primarily to the item being procured, rather than to the prospective contractor, concern bid responsiveness. See 49 Comp. Gen. 9 (1969). Thus, where a requirement goes to the bidder's experience, it bears on the responsibility of the bidder, while a requirement relating to the precise item being procured must be complied with as a matter of bid responsiveness since it goes to the legal obligation that would result upon acceptance of the bid. 52 Comp. Gen. 647 (1973); 48 Comp. Gen. 291 (1968); B-175493(1), April 20, 1972.

The distinction between responsibility and responsiveness is an important one because a bid which is nonresponsive at bid opening must be rejected; it cannot be made responsive after bid opening through the submission of additional information. 46 Comp. Gen. 434 (1966); 40 id. 432 (1961); see Shnitzer, Government Contract Bidding 237-9 (1976). However, a bid may not be rejected for failure to include information relating to the bidder's responsibility; information bearing on responsibility may be furnished after bid opening. Allis-Chalmers Corporation, 53 Comp. Gen. 487 (1974), 74-1 CPD 19; Concept Merchandising, Inc., et al.,

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B-187720, December 17, 1976, 76-2 CPD 505. This is so ever where the solicitation states that the information must be submitted with the bid or that the bid will be rejected if the information is not included. Victory Van Corporation, 53 Comp. Gen. 750 (1974), 74-1 CPD 178 52 Comp. Gen. 647, supra; id. 389 (1972); id. 265 (1972); 48 id. 158 (1968).

Exhibit J of the IFB reads as follows:

"EXHIBIT J

TICKET HANDLER
QUALIFICATION

"Bidder shall furnish supporting evidence that the ticket handler specified herein can be supplied as specified. This evidence shall consist of test data furnished with the Bid Document which demonstrates compliance with the basic performance parameters listed below:

"A. Transport the specified ticket at a rate sufficient to meet the barrier unlatch time specified;

"B. With the condition in A above, write at least 30 bits of magnetic data of the type and of at least the bit density specified, on a single magnetic stripe of the ticket specified;

"C. With the condition in A above, read the magnetic data recorded in B above.

"D. With the condition in A above, read the magnetic data recorded in B above, and transcribe this data onto the same location on the magnetic stripe during the same ticket pass with the same characteristics required in B above; and

"E. Repeat C above and erase all data recorded after reading the data.

"Data sheets certified by the Contractor shall be provided with the Bid Documents attesting that each of the above five tests have been performed 1,000 consecutive times without failure or error or deviation from specified limits."

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Exhibit J was introduced by paragraph 4.1, which in its original form read as follows:

"Each Bidder shall submit the Appendix, forms and Exhibits specified hereinabove [including Exhibit J] to show that he has successfully executed a contract for the design, furnishing, and installation of Fare Collection Equipment of the complexity of this Contract within the two-year period preceding this Bid. Each Bidder shall furnish supporting evidence that the ticket handler specified herein can be supplied as specified. This evidence shall consist of test data furnished with the Bid Documents which demonstrates compliance with the basic performance parameters specified on Exhibit J. Failure of the Bidder to provide complete responses to the forms for the Submittal of Bids so that his competency can be determined may result in his Bid being considered nonresponsive. The duly executed Bid Form, Bid Security, and other specified documents constitute his Bid. Bids shall be submitted as indicated in the Invitation for Bids and on the Bid Form. Bids shall be valid for 60 days after the specified Bid Opening Date."

In Amendment No. 1 to the IFB, MARTA changed paragraph 4.1 to read:

"Each Bidder in order to demonstrate his qualifications to perform the Contract in a timely and satisfactory manner shall submit the Appendix, forms, and Exhibits specified hereinabove [including Exhibit J] to show that he has successfully executed a contract for the design, furnishing, and installation of Fare Collection Equipment of the complexity of this Contract within the two-year period preceding this Invitation for Bids. Each Bidder shall furnish supporting evidence that the ticket handler specified herein can be supplied as specified. This evidence shall consist of test data which demonstrates compliance with the basic performance parameters specified on Exhibit J. Failure of the Bidder to provide sufficient data so that his competency can be determined may result in rejection of his Bid. The duly executed Bid Form,

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Bid Security, and other specified documents constitute his Bid. Bids shall be submitted as indicated in the Invitation for Bids and on the Bid Form. Bids shall be valid for 60 days after the specified Bid Opening date."

Duncan argues that the quoted language clearly goes to the bidder's capability to perform and therefore to the bidder's responsibility. It asserts that any doubts in this regard are dispelled by Amendment No. 1 which eliminated certain language having responsiveness overtones, and by the depositions of various MARTA personnel who participated in drafting the IFB indicating their belief that the purpose of the test data submission requirement was to determine bidder responsibility. MARTA and Cubic, on the other hand, concede that the quoted language goes to responsibility in part, but insist that other language in Exhibit J and paragraph 4.1 can only be construed as going to responsiveness. In this connection, Cubic asserts that Exhibit J establishes descriptive data requirements similar to those authorized by Federal Procurement Regulations (FPR) § 2-202-5, compliance with which is a matter of bid responsiveness.

It is, of course, a basic tenet of competitive advertised procurement that the procuring activity's needs and requirements be stated as clearly as possible in the solicitation so that all bidders can discern precisely what is required and so they will be competing on an equal basis. See 44 Comp. Gen. 529 (1965); 43 *id.* 544 (1964). When, as here, the meaning of a solicitation provision is the subject of dispute, we believe the interpretation advanced by the procuring activity must be carefully considered since it is normally that activity which is in the best position to set forth what was intended. However, the agency's interpretation is not controlling since it may be unreasonable or inconsistent with the language actually used. Accordingly, it is the language of the solicitation itself which ultimately must provide the answer.

Our decisions are consistent with this approach. For example, in a case somewhat similar to this one, we considered what the agency had intended in determining that the clause in question contained two separable provisions, one going to bidder responsibility and one going to item reliability and therefore to bid responsiveness. See B-175493(1), *supra*. In that case, the clause could reasonably be read in accordance

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with what had been intended by the agency. See also Western Waterproofing Company, Inc., B-183155, May 20, 1975, 75-I CPD 306. On the other hand, in another case, we held that the provision in question involved only bidder responsibility even though the agency intended the provision to bear on bid responsiveness and had attempted to draft the provision to give effect to that intention. See 52 Comp. Gen. 647, supra, id. 640 (1973), and id. 87 (1972).

In this case, of course, there is some dispute as to MARTA's actual intention, since MARTA's official position and the statements in the depositions are somewhat at variance. We need not resolve that particular matter, however, because in our view paragraph 4.1 and Exhibit J can reasonably be read only as going to bidder responsibility.

The purpose of the two provisions is clearly set forth in the opening sentence of the amended paragraph 4.1, which provided that the bidder, "in order to demonstrate his qualifications to perform * * *," was to submit Exhibit J and other forms and appendices "to show he has successfully executed a contract for the design, furnishing and installation of Fare Collection Equipment of the complexity of his contract within the two-year period preceding this Invitation for Bids." Qualifications to perform, of course, involve bidder responsibility, as does the specific 2-year experience requirement. 52 Comp. Gen. 647, supra; 39 Comp. Gen. 173 (1959); B-175493(1), supra.

Cubic alleges that notwithstanding that first sentence, the next two sentences involve bid responsiveness. Those two sentences, as well as the following one, state:

"Each Bidder shall furnish supporting evidence that the ticket handler specified herein can be supplied as specified. This evidence shall consist of test data which demonstrates compliance with the basic performance parameters specified on Exhibit J. Failure of the Bidder to provide sufficient data so that his competency can be determined may result in rejection of his Bid."
(Emphasis added.)

We do not agree with Cubic. While those two sentences, if considered in the abstract, could arguably refer to the item to be furnished rather than to the bidder's capability to furnish it, we think they must be read in conjunction with the sentences

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that precede and follow them. The former sentence, as stated above, established the purpose of submitting and complying with Exhibit J. The latter sentence, affirming what is stated in the first sentence, makes it plain that the evidence/test data referred to in the two sentences relied on by Cubic is for evaluation of the "competency" of the bidder, which again is a bidder responsibility matter.

Exhibit J itself merely states, in language virtually identical to that in paragraph 4.1, that bidders are to furnish "supporting evidence that the ticket handler * * * can be supplied," by furnishing test data demonstrating "compliance with * * * basic performance parameters" set forth in the remainder of Exhibit J. While there have been instances where test data requirements involved the item to be furnished and this went to bid responsiveness, see, e.g., Western Waterproofing Company, Inc., supra; there is nothing in Exhibit J which leads to the conclusion that the test data was required for any purpose other than that stated in paragraph 4.1: to enable MARTA to determine the competency of the bidder to furnish the ticket handler required. In this regard, we point out that test data requirements do not relate exclusively to bid responsiveness but may also be imposed to enable an agency to determine if a bidder is able to furnish the item required. See B-174467, February 4, 1972.

With regard to the statement in Exhibit J that the test data shall be "furnished with the Bid Documents," while we have held that similar statements may be sufficient to place bidders on notice that the requirement involves bid responsiveness, see 37 Comp. Gen. 845 (1958), such statements alone are not controlling and, as stated above, do not preclude the submission of information after bid opening when the requirement properly must be read as concerning bidder responsibility. See cases cited supra, page 4. In light of the precise language of paragraph 4.1, and in view of the deletion of the language originally contained in paragraph 4.1, we do not think it is reasonable to read that Exhibit J statement as by itself establishing a requirement different from that set forth in paragraph 4.1.

Finally, we find no merit to the contention that the test data requirement should be treated as analogous to the descriptive literature requirements of FPR § 1-2.202.5. Descriptive literature is information, generally in the form of design illustrations, drawings and brochures, which shows the characteristics or construction of a product or explains its operation. It is required to be furnished by a bidder as part of his

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bid to describe the exact product offered. Here, as previously indicated, the test data was required "so that [a bidder's] competency can be determined," not to indicate precisely what would be furnished. In this connection, we note that MARTA viewed as acceptable test data based on prototype equipment which obviously is not the precise equipment that would be furnished under a contract awarded to Duncan. Moreover, we have consistently held that, where as here, there are detailed specifications setting forth the agency's requirements, it is inappropriate to impose the data requirements of FPR § 1-2.202-5 and under such circumstances improper to reject as nonresponsive a bid which does not comply with the data requirements. See 48 Comp. Gen. 659 (1969); B-174467, supra.

The cases cited by Cubic and MARTA involving descriptive literature requirements are clearly distinguishable from this matter involving test results. In Western Waterproofing Company, Inc., supra, the data submission requirement was established for the explicit purpose of requiring bidders to provide evidence of the physical compatibility of the replacement stone proposed with the existing building stone. In Transport Engineering Company, Inc., B-185609, July 6, 1976, 76-2 CPD 10, the protester's bid was rejected because it proposed indoor-outdoor carpeting rather than hard rubber flooring required by the invitation's specification. In Atlantic Research Corporation, B-179641, February 25, 1974, 74-1 CPD 98, the low bid was rejected because the product design indicated in the descriptive literature showed that the item proposed would not conform to the IFB purchase description. Global Fire Protection Company, B-185961, July 8, 1976, 76-2 CPD 22, concerned the bidder's failure to show pipe sizes on the bidder's drawing. We find all of these cases inapposite to the situation here.

Accordingly, we concur with UMTA that Duncan's bid is responsive to the MARTA solicitation.

R. F. Kelly
Deputy Comptroller General
of the United States