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DECISION

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

[Protest Against Rejection of Bid]

FILE: B-199138

DATE: September 23, 1980

MATTER OF: Trident Industrial Products, Inc.

DIGEST:

1. Fundamental question which must be addressed when compliance with QPL clause is at issue is whether essential needs of Government, as reflected in QPL, will be satisfied by offered product.

2. Transferring product which is qualified in bulk form into pressurized containers is not simply "repackaging" since product in pressurized form is subject to specialized QPL tests additional to those established for product in bulk form.

3. Where product offered by protester had not been subjected to additional specialized QPL tests established for product in form offered by protester and called for by IFB, protester was not offering to supply qualified end item as required, and agency acted reasonably in rejecting protester's bid as nonresponsive.

4. Contention that protester was misled by agency personnel concerning need for QPL qualification of product is without merit since IFB provided that oral explanations were not binding and erroneous advice given by agency personnel cannot act to estop agency from rejecting nonresponsive bid as it is required to do so by law.

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Trident Industrial Products, Inc. protests the rejection of its bid under invitation for bids (IFB) No. 6PR-W-JO751-B2-F, issued by the General Services Administration (GSA). GSA rejected the bid because it found that Trident did not satisfy the requirements of the "Qualified Products List" (QPL) clause of the IFB. For the reasons set forth below, we deny the protest.

The solicitation called for three items of corrosion preventive, one in bulk form in five gallon cans and two in pressurized form in 16 ounce aerosol cans. Trident was the low bidder on items number 2 and 3, the aerosol cans. Trident offered to furnish aerosol cans which it filled with corrosion preventive purchased in bulk from a QPL listed manufacturer.

The QPL clause of the IFB reads as follows:

"QUALIFIED PRODUCTS:

"(a) With respect to products described in this solicitation as requiring qualification, awards will be made only for such products as have, prior to the time set for opening of offers, been tested and approved for inclusion in the qualified products lists identified below. Manufacturers who wish to have a product tested for qualification are urged to communicate with the office designated below.

* * * * *

"(b) The offeror shall insert, * * * the name of the Qualified Source of material, product designation, and QPL test or qualification number of each product offered. Qualified products may be packaged in any container which has the identifying label or markings of the Qualified Source of material and complies with the packaging requirements cited in the Bid Schedule. Any offer which does not identify the Qualified product offered will be rejected.

The relevant packaging and packing requirement cited in the QPL clause required the use of a 16 ounce aerosol can, and stated that "the aerosol containers shall be packed in fiberboard boxes to insure delivery at destination, to provide for redistribution by the initial receiving activity, and shall be acceptable by common carrier under National Motor Freight Classification and Uniform Freight Classification."

GSA points out that the QPL clause contained in the solicitation was revised to its present form in November 1979 to allow repackagers to furnish the product of a qualified manufacturer in accordance with our decision in Methods Research Products Company, 59 Comp. Gen. 43 (1979), 79-2 CPD 272. In that case we held that the essential needs of the Government are for the end item being procured rather than for the containers holding the end item so that the QPL status of the qualified product should not generally be regarded as affected by a nonmanufacturing step such as repackaging the end item.

The protester in Methods Research Products Company (MRP) had purchased adhesive in five gallon drums from a qualified manufacturer and repackaged it into bottles and cans. The QPL clause in use at that time was viewed by GSA as requiring that qualified products must be delivered in the manufacturer's containers. The stated reason for this requirement was to ensure product integrity. We found this argument to be without merit because the packaging did not relate to the QPL status of the offered product and concluded that the repackaging restriction under the circumstances present was unduly restrictive of competition.

In the instant case, Trident proposed to furnish the corrosion preventive compound of a qualified manufacturer, but intended to fill and pressurize the aerosol cans itself. The contracting officer rejected Trident's bid because Trident was not itself a qualified aerosol manufacturer, i.e., the filled aerosol can was not a qualified product.

The decision to reject Trident's bid is asserted by GSA to be consistent with the RFP since it was based on the contracting officer's conclusion that filling and pressurizing the cans is a manufacturing process rather than a packaging process, and that the filled and pressurized can was the product or end item under the QPL. According to the contracting officer, the conclusion that filling and pressurizing the cans is a manufacturing process is indicated by the need for an approved formula showing the amounts of corrosion preventive and type and amounts of propellant, as well as for testing and approval of the type and size of valve and activator.

At the outset, we believe that GSA has placed undue emphasis on the manufacturing process discussion in MRP. That discussion related to a paragraph in GSA's QPL clause which is no longer used and was in way of explanation of a prior GAO decision which GSA had apparently relied on in establishing the portion of the QPL clause in question.

In MRP, we indicated that the status of a qualified product generally will be affected by an additional manufacturing step but not by repackaging. We noted that one exception to the latter would be where the original packaging served a special function in the use of the product. We did not mean to imply, however, that these are the only considerations relevant to determining whether a product is qualified as required.

Rather, the fundamental question which must be addressed when compliance with a QPL clause is at issue is whether the essential needs of the Government, as reflected in the QPL, will be satisfied by the offered product.

In this case, the IFB called for two items of corrosion preventive in pressurized form and stated that QPL qualification was required for all items. The relevant QPL lists products qualified under Military Specification MIL-C-0081309C dated August 30, 1973, as amended. This specification establishes tests for Class 1 (bulk) and Class 2 (pressurized) corrosion preventive. Class 2, exclusive of propellant, is subject to the same tests as Class 1 but, significantly, is also subject to additional specialized tests when in pressurized cans with propellant.

This is reflected in the QPL which specifies the type and class of corrosion preventive for which each manufacturer is qualified.

Thus, the QPL qualification of the product in pressurized form is dependent upon its ability to pass the additional specialized tests applicable to it. These tests establish a number of criteria peculiar only to the pressurized cans. Accordingly, we do not believe that transferring the basic product, which is qualified in bulk form, into pressurized containers amounts to nothing more than repackaging a qualified product or that it has no affect on the qualified status of the end product. Since the pressurized product offered by Trident had been subjected only to those tests established for the basic material but not the additional specialized tests for the product in aerosol cans, we conclude that Trident was not offering to supply the qualified product called for by the IFB. We therefore believe that GSA acted reasonably in rejecting Trident's bid as nonresponsive.

In support of its position that rejection of its bid was improper, Trident alleges that it was misled by GSA contracting personnel who advised that Trident would be fully qualified as a bidder simply by conforming to the formulations specified for the product in pressurized form. GSA responds that while contracting personnel did explain to Trident that some confusion existed over whether Trident must acquire QPL qualification under our decision in MRP, they never told Trident it did not have to be qualified under the QPL. GSA asserts that in fact, Trident was informed that to be on the "safe side" it should seek such qualification.

In any event, as GSA points out, this Office has held that where the IFB states that oral explanations are not binding, reliance of the bidder on an oral explanation is at the bidder's own risk and also that erroneous advice given by agency personnel cannot act to estop an agency from rejecting a nonresponsive bid as it is required to do so by law. Klean-Vu Maintenance, Inc., B-194054, February 22, 1979, 79-1 CPD 126; CFE Air Cargo, Inc., B-185515, August 27, 1976, 76-2 CPD 198. Paragraph 3 of Standard Form 33A, which was incorporated by reference

into the instant solicitation, clearly states that oral explanations or instructions given before award will not be binding and that any explanation desired regarding the meaning or interpretation of the solicitation must be requested in writing. Furthermore, GSA correctly found Trident's bid to be nonresponsive. Accordingly, we find no merit to Trident's argument that it was misled by GSA contracting personnel.

The protest is denied.

Milton J. Socolar

For the Comptroller General
of the United States