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DECISION

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

FILE: B-200277.2

DATE: June 24, 1981

MATTER OF: Jensen Corporation

DIGEST:

1. Contracting officer erroneously advised potential bidders that they were limited to offering individual prices for six items of laundry equipment, and could not submit alternative bids based on award of more than one item, unless specifically requested to do so by IFB and unless alternative bid was based on award of no less than all six items. However, bidder relied on erroneous oral advice at its own risk.

2. IFB's "Successful Commercial Operation" clause providing that no item of equipment would be acceptable unless equipment of approximately same type and class had operated successfully for at least one year appears to involve bid responsiveness and should have been satisfied by material submitted with bid. Even if clause is construed as relating to bidder's responsibility, it was not satisfied when pre-award inquiry of equipment users disclosed that item would not be in use for one year until two months after award was made.

Jensen Corporation protests the award to G.A. Braun, Inc. of a contract for two items of laundry machinery for the Veterans Administration Medical Center in Huntington, West Virginia, under invitation for bids (IFB) M2-43-80, issued by the Veterans Administration Marketing

[Protest of VA Contract Award]

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Center (VA). Jensen protests on the grounds that it was deprived of the opportunity to bid competitively due to oral advice it received from the contracting officer and that one item offered by G.A. Braun was not in successful commercial operation for one year as required by the IFB.

The IFB was issued on August 15, 1980, and bids were due September 15. On September 8, the contracting officer telephoned Jensen, among other potential bidders, and "informed them that in my interpretation of the Regulations and guidelines that I felt if a summary bid was called for then they had to bid on all items to be considered for the summary. I closed the conversation by adding that the bottom line was that the solicitation had to be bid as it was issued, unless amended."

We understand that in some procurements of laundry equipment the VA requires bidders not only to submit a price for each line item but a "summary bid" for all items. This "summary bid" may total the amount of the individual item prices or it may reflect a discount offered by the bidder if considered for award of all items. The VA then awards the contract, or contracts, on an individual item or "summary bid" basis depending upon which results in the lowest cost to the Government.

The instant IFB called for bids on six different items of laundry equipment and did not specifically request "summary" bids. Six bidders competed: one bid on all six items, one bid on one item, three bid on two items, and one bid on four items. Braun bid only on items 2 and 3, upon which it bid \$27,320 and \$11,600, respectively, for a total of \$38,920. Alternatively, Braun offered a price of \$32,000 if awarded both items. Jensen bid on items 2 through 5 and was subsequently awarded a contract for items 4 and 5, for which it was the low bidder. For item 2, it bid \$21,393 and for item 3 it bid \$11,413, a total of \$32,806. Braun was awarded the contract for items 2 and 3 based upon its alternative bid of \$32,000. Jensen protested, stating that it would have offered a price reduction based upon an award of items 2 and 3 but for the contracting officer's oral advice.

The contracting officer apparently was under the impression that bidders were limited to offering a price for each line item only, and prohibited from offering alternative bids based upon the award of a combination of items unless such alternative bids were (1) specifically requested by the IFB and (2) were based on the award of no less than all six items sought by the IFB.

The VA now concedes that the contracting officer's pre-bid oral advice was in error, and that bidders such as Jensen were free to offer alternate bids extending discounts based upon the award of any combination of items.

The present IFB included Standard Form 33A, paragraph 3 of which warns bidders that oral explanations or instructions given before the award of a contract are not binding. The general rule in these situations is that the bidder must suffer the consequences of its reliance upon such advice. See, e.g., Mor-Flo Industries, Inc., B-192687, June 5, 1979, 79-1 CPD 390. We will sustain a protest, however, if it can be shown that as a result of the erroneous oral advice effective competition was not achieved. Here, there were three bids on Items 2 and 3: only Braun offered a discount if it was awarded both items. Jensen asserts that it would have offered such a discount but for the oral advice of the contracting officer. In this regard, the contracting officer has provided us with a copy of a prior bid by Jensen for three items of laundry equipment in which both individual item prices and a price "summary" were solicited. Jensen's "summary" price was simply the total of its individual item prices: no discount was offered. Jensen, on the other hand, has referred to other past procurements where it did offer a reduced price on a "summary" basis. We can only speculate, at this point, as to whether Jensen would have offered a discount in excess of \$806, which would have made it the low bidder, but for the advice of the contracting officer. Under these circumstances we do not believe it has been shown that effective competition was precluded to such an extent as to warrant sustaining the protest.

Jensen further argues that Braun should not have been awarded item 3 because the firm's Model SPF small piece folder offered under that item did not meet the "Successful Commercial Operation" clause of the solicitation, which provides in part:

"No item of equipment will be acceptable unless the manufacturer has had equipment of approximately the same type, and class as that offered which shall have operated successfully in a commercial or institutional laundry in the United States for at least one year. * * *

"Offeror to indicate Model Numbers and 3 sites where models are in operation for each item bid:

<u>ITEM #</u>	<u>MODEL #</u>	<u>INSTALLATION SITES</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____

The record shows that two days prior to award, a VA employee called three users of Braun's SPF folder and asked how long it had been in operation and whether any problems had been experienced with it. All those called responded that no problems had been encountered. However, the one-year period would not be met until November 1980, approximately two months after the expected date of award. Nevertheless, the contracting officer determined that the one-year requirement would be satisfied since it would have elapsed by the time the equipment was scheduled to be delivered in late January or early February 1981. The contract was awarded on September 25, 1980 and we understand the equipment was in fact delivered in November 1980.

We have long recognized a distinction between solicitation requirements related to a bidder's capability and experience and those which are concerned with the history of a product's performance and its reliability. See 52 Comp. Gen. 647, 649 (1973). The experience of a bidder has been treated as a matter of responsibility and, consonant with the general rules governing responsibility determinations, information bearing on that subject may be furnished after bid opening and prior to award. On the other hand, information bearing on the performance history of a product to be furnished involves a matter of responsiveness and that information therefore must be submitted with the bid. See 48 Comp. Gen. 291 (1968), where we regarded as a matter of responsiveness a requirement in an IFB for

diesel engine generator sets that the bidder show that the engines it proposed to furnish "shall have performed satisfactorily in an installation independent of the contractor's facilities for a minimum of 8000 hours of actual operation." That requirement, we stated, was directed to the past operating experience and reliability of the engines offered rather than to the experience and capability of the manufacturer.

The wording of experience clauses in solicitations varies enormously and may include elements which pertain both to the bidder's responsibility and to the responsiveness of its bid. See, e.g., B-175493(1), April 20, 1972, in which the IFB required that "manufacturers bidding on the equipment must have at least five (5) years experience" and "must have a quantity of the type offered in this bid in satisfactory general public use for at least one year." In our decision, we accepted the procuring agency's position that the 5-year requirement addressed itself to the responsibility of the manufacturer and the 1-year requirement was addressed to the reliability of the item.

Turning to the experience requirement in the present IFB, we note that it pertains to "equipment of approximately the same type, and class as that offered." (Emphasis added.) When an experience requirement does not pertain exclusively to the item being procured, but includes generally similar equipment previously produced by the bidder, we have tended to regard it as bearing on the bidder's responsibility. See, e.g., Carco Electronics, B-186747, March 9, 1977, 77-1 CPD 172, where we so interpreted a provision which read:

"Bids will be accepted only from bidders who have built similar simulators. Information submitted with bids must include a list of simulators delivered, with organizations, addresses and the names of individuals that may be contacted. * * *"

See also United Power & Control Systems, Inc., B-184662, May 25, 1976, 76-1 CPD 340, at p. 6. Therefore, the use of the word "approximately" lends at least arguable support for the conclusion that the VA's experience clause concerned the bidder's responsibility.

In other respects, however, the provision appears to be concerned with the reliability of the specific equipment to be supplied under the contract -- a matter of responsiveness. We note the title of the clause, "Successful Commercial Operation", refers to the equipment, not the bidder. The clause then says that "No item of equipment shall be acceptable * * *" unless the experience requirement has been met and requires bidders to supply model numbers and three sites "where models are in operation for each item bid." (Emphasis added.) We realize the wording of the latter provision does not necessarily require the bidder to list the identical model as that offered in the bid: otherwise, it would read "where models are in operation of each item bid." Nevertheless, it seems to us that through this experience provision the VA was seeking to assure itself that the equipment offered by the bidder had been proven reliable through a year's successful operation in a commercial or institutional environment, either in the identical configuration offered by the bidder or one so similar that the reliability of the basic components would be established.

Thus, it appears that the Braun model SPF folder should have had one year's successful commercial operation as of the date of bid opening, and as it did not, Braun's bid was nonresponsive as to that item and should not have been accepted. Even if one regards the experience clause as going to Braun's responsibility, however, and therefore could be satisfied by information furnished after bid opening, we believe the required experience would have to be accumulated prior to award. That was not the case here: the contracting officer awarded the contract based upon a projection that the equipment would continue to operate successfully for the balance of the one-year period.

Although Jensen's protest is sustained as to this issue, corrective action with regard to this procurement is not practicable since the contract has been performed. We are bringing the deficiencies which we have observed to the attention of the Administrator of Veterans Affairs.



Acting Comptroller General
of the United States