

DECISION

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

W. H. Perren

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FILE: B-213558

DATE: May 22, 1984

MATTER OF: Giant Lift Equipment Manufacturing
Company, Inc.

DIGEST:

1. "Conditions of Sale" provision incorporated into bid which conflicts with, among others, a solicitation's termination for convenience and default clauses renders the bid nonresponsive.
2. Improper award in one or more procurements does not justify repetition of the same error in subsequent procurements.

Giant Lift Equipment Manufacturing Company, Inc. (Giant), protests the determination of the National Aeronautics and Space Administration (NASA) that Giant's bid, submitted in response to invitation for bids (IFB) No. 3-503528, was nonresponsive.

We deny the protest.

Giant's low bid was determined to be nonresponsive because the firm's own quotation sheet was submitted with the bid. That sheet expressly incorporated numerous "Conditions of Sale," including one entitled "Cancellation":

"This contract may not be cancelled, except with the seller's written approval and upon terms and conditions which will indemnify the seller against any loss."

NASA rejected Giant's bid because the above condition created at the very least an ambiguity concerning the government's right to terminate the contract for convenience under the following IFB clause:

"The performance of work under this contract may be terminated by the government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Government."

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The "Conditions of Sale" clauses were viewed by NASA to be incorporated into Giant's bid because the face of the quotation sheet stated that items listed would be furnished subject to the "Conditions of Sale."

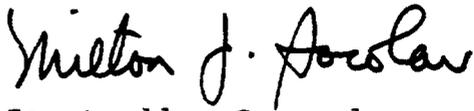
In its protest, Giant states that it has been contracting with the government for 12 years and never before have its bids been rejected when submitted on the forms used in bidding on this procurement.

A bid is responsive if the bidder unequivocally offers to provide the requested items in total conformance with the specification requirements and the conditions of the invitation. Free-Flow Packaging Corporation, B-204482, February 23, 1982, 82-1 CPD 162. "Terms and conditions of sale" submitted with a bid generally will be considered as a part of the bid for purposes of determining the bid's responsiveness unless the bid itself expressly states that they are not intended to apply. See Searle CT Systems, B-191307, June 13, 1978, 78-1 CPD 433.

Giant's "Conditions of Sale" must be considered part of the bid. See Searle CT Systems, Id. The sheet was addressed to the contracting office, referenced the solicitation by number, contained a product description, repeated several key parts of the accompanying bid (e.g., price) and was signed by the bid signer. Therefore, those conditions which conflict with any material IFB clauses do not constitute an unequivocal offer to perform the contract in total conformance with the terms and conditions of the IFB. 36 Comp. Gen. 535 (1957); Fluke Trendar Corporation, B-196071, March 13, 1980, 80-1 CPD 196.

Although Giant's conditions conflicted in several respects with material IFB clauses, we agree with NASA that Giant's "cancellation" clause which requires Giant's consent before cancellation is a material deviation from the termination for convenience clause and, we note, default clause, in the IFB in that it affords the bidder immunity from liability and that it creates a corresponding restriction of the rights of the government. See 36 Comp. Gen., supra; Free-Flow Packaging Corporation, supra; Dubie-Clark Company, B-186918, August 26, 1976, 76-2 CPD 194. Accordingly, the bid was properly rejected.

Giant's allegation concerning prior procurements does not alter the fact that its bid was properly rejected as nonresponsive in this procurement. Improper award in one or more procurements does not justify repetition of the same error in subsequent procurements. 36 Comp. Gen., supra; Wright Tool Company, B-212343, October 12, 1983, 83-2 CPD 457.

for 
Comptroller General
of the United States