

**DECISION**

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

**FILE:** B-214699

**DATE:** September 18, 1984

**MATTER OF:** Sovereign Electric Company

**DIGEST:**

1. A protest against a contracting agency's allegedly incorrect interpretation of a solicitation provision is without merit when there is only one reasonable interpretation, that advanced by the agency. Allegation that the provision imposes requirements that are inconsistent with and more stringent than either the general provision that it supplements or applicable procurement regulations also is without merit when such an interpretation would render the protested provision redundant.
2. When solicitation clearly requires the contractor to provide satisfactory evidence of title to material stored either on the construction site or elsewhere before its value can be considered in calculating progress payments, and the contracting agency, before bid opening, advises the protester in writing that "title" generally refers to evidence that the seller of the material has been paid or has released all claim to them, GAO cannot conclude that the agency's alleged failure to define the title requirement prevented the protester from submitting a bid.
3. GAO will deny a protest against an allegedly unreasonable requirement that the contractor provide satisfactory evidence of title to material stored either on the construction site or elsewhere before its value can be considered in calculating progress payments when the protester has not shown that without such evidence, the government is protected from liens or other encumbrances on the property that the progress payments

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cover. Moreover, the fact that 14 bids were submitted refutes the protester's argument that the requirement unduly restricted competition.

4. Since, under applicable procurement regulations, the contracting officer's consideration of the value of material stored on a construction site in calculating progress payments is itself discretionary, a requirement that the contractor provide evidence of title to such goods as a precondition to progress payments is not an abuse of discretion.
5. Protest allegation that bidders were not treated equally because the agency did not formally amend an allegedly deficient solicitation is untimely when the protest was not filed until approximately 3 months after bid opening, since the protester knew at opening that the agency did not intend to issue an amendment.

Sovereign Electric Company protests the terms and conditions of invitation for bids No. 620-25-84, issued by the Veterans Administration (VA), alleging that they prevented it from submitting a bid for replacement of a high voltage electrical distribution system at the Franklin Delano Roosevelt Hospital in Montrose, New York.

We deny the protest in part and dismiss it in part.

Sovereign primarily disputes the VA's interpretation of a solicitation provision as requiring the successful contractor to provide satisfactory evidence of title to material and equipment stored on the construction site before its value can be considered in calculating progress payments. The protester also alleges that the VA failed to define adequately what constitutes satisfactory evidence of title and implies that the requirement for such evidence is unreasonable and unduly restrictive.

The solicitation in question was issued January 10, 1984, with an amended opening date of March 7, 1984. It contains two separate provisions regarding progress payments. The first, which incorporates the standard Federal Procurement Regulations (FPR) clause set forth at 41 C.F.R. § 1-7.602-7(b) (1983), appears in the General Provisions portion of the solicitation. It states:

"7. PAYMENTS TO CONTRACTOR . . .

"(b). . . [T]he Contracting Officer, at his discretion, may authorize material delivered on the site and preparatory work done to be taken into consideration. Material delivered to the contractor at locations other than the site may also be taken into consideration (1) if such consideration is specifically authorized by the contract and (2) if the Contractor furnishes satisfactory evidence that he has acquired title to such material and that it will be utilized on the work covered by this contract. . . ."

The second appears in the General Conditions portion of the solicitation, supplementing the above clause. The paragraph applicable here is as follows:

"D. The Contracting Officer will consider for monthly progress payments material and/or equipment procured by the contractor and stored on the construction site as space is available or at a local approved location off the site under such terms and conditions as such officer approves, including, but not limited to the following:

. . . . .

"2. The contractor furnishes satisfactory evidence of possession of title to such material and/or equipment and that the material and/or equipment will be utilized on work covered by the contract . . . ."

In its unsuccessful, pre-opening protest to the VA and in its subsequent protest to our Office, Sovereign maintains that subsection (2) of the second provision applies only to the language after "or," so that satisfactory evidence of title is required only for material stored off-site. Sovereign argues that if this General Condition also requires satisfactory evidence of title for material stored on-site, then it is inconsistent with and more stringent than the General Provision of the solicitation and/or the FPR.

We agree with the VA that the only reasonable interpretation is that subsection (2) modifies both the phrase before the conjunction "or" and the one after it, and that the solicitation therefore requires satisfactory evidence of title for material stored either on-site or elsewhere before its value can be considered in calculating progress payments. Neither the language nor the punctuation of the General Condition is disjunctive.

Further, we see no conflict between the two solicitation provisions concerning progress payments. The first is a standard clause dealing with payments under construction contracts and permits the contracting officer, "at his discretion," to authorize material stored on the site to be considered in calculating progress payments. The second sets forth what the VA contracting officer, exercising reasonable discretion, has determined is a necessary precondition to the calculation of progress payments for this particular procurement. Accordingly, the General Condition supplements rather than contradicts the General Provision and the FPR. Under any other interpretation, the General Condition would be redundant, and there would be no reason for the VA to have included it in the solicitation.

As for whether the title requirement was adequately defined, by letter dated February 14, 1984 (3 weeks before bid opening), the VA advised Sovereign that "'[t]itle' has generally been evidence that the seller of the material has been paid or has released all claim to such materials."

Sovereign contends that "generally" is too vague. The firm equates the title required here with publicly-recorded deeds for real property or state-issued

certificates of title for motor vehicles and argues that such documents are not part of purchase contracts for material or equipment. In addition, Sovereign asks how it can show title to material fabricated from its own inventory.

Nothing in the solicitation leads us to believe that only formal documents of title filed with or issued by governmental bodies constitutes satisfactory evidence of title, and the VA's letter of February 14, 1984, should have dispelled Sovereign's notion to the contrary. The record indicates that in the experience of the Chief of the Supply Service at the VA hospital in question, a copy of a paid invoice has always been required before the agency has paid for material stored on-site. Clearly, a copy of a supplier's release also would have met the VA's requirement for evidence that the contractor possessed and was free to transfer ownership of material or equipment to be considered in calculating progress payments.

In addition, nothing in the solicitation prevents the contracting officer from accepting evidence that the contractor possessed title to the component parts of material fabricated from its own inventory. Accordingly, we cannot conclude that the VA's alleged failure to define what constitutes satisfactory evidence of title deprived Sovereign of the opportunity to submit a bid. Cf. Crimson Enterprises, Inc., B-209918.2. June 27, 1983, 83-2 CPD ¶ 24 (where specification refers to usage by an established trade, it provides an adequate frame of reference for bid preparation).

To the extent that Sovereign is arguing that the title requirement for material stored on-site is unreasonable and unduly restrictive, and therefore constitutes an abuse of discretion on the part of the contracting officer, we find that it is not.

Sovereign contends that the requirement is unnecessary because the solicitation specifically provides that all work and material on which progress payments are made shall become the sole property of the government and because the purchase orders used by Sovereign in procuring supplies incorporate the terms of the solicitation.

While the making of a progress payment may settle title as between the government and the contractor, as the VA points out, it would not necessarily protect the government from liens held by third parties such as suppliers or from other encumbrances on the property that the progress payments covered. Sovereign has not shown that the VA was aware of its attempt to incorporate the terms of the solicitation into its purchase orders or that such action would be legally effective to protect the government's interest in goods for which it had paid the contractor if the contractor, in turn, had not yet paid a supplier. In any case, the VA could not rely upon all bidders to use similar purchase orders for material for the VA project.

In short, Sovereign has not demonstrated that the VA was unreasonable in seeking to protect its interest in material not yet incorporated into the project. The fact that 14 other firms submitted bids, in our opinion, effectively refutes any argument that the requirement for satisfactory evidence of title unduly restricted competition. And since under the FPR provision concerning progress payments, the contracting officer's consideration of the value of material stored on the construction site is discretionary in any event, we do not find the imposition of a title requirement for such goods an abuse of discretion.

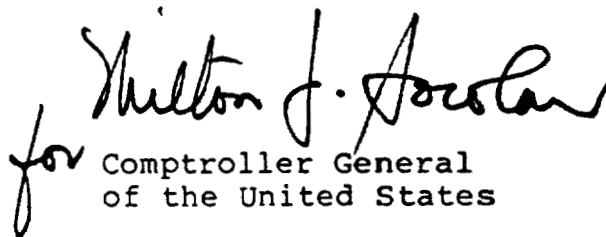
At most, the requirement for satisfactory evidence title imposes a burden on the contractor by preventing it from using a particular progress payment to pay the supplier of the goods covered by that payment. We do not believe, however, that the VA must relinquish the protection afforded by the requirement in order to improve a contractor's cash flow. Rather, it is incumbent upon the contractor to allow for this burden, which is analogous to other contractual risks, in computing its bid. See Edward E. Davis Contracting, Inc., B-211896, Nov. 8, 1983, 83-2 CPD ¶ 541.

Sovereign's remaining bases of protest are either without legal merit or untimely. Sovereign alleges that in the past, the VA has considered material stored on-site in calculating progress payments without requiring

evidence of the contractor's title to such material; the VA denies that this has been its practice. In the absence of evidence to the contrary, we must accept the agency's statement on this point, concluding that Sovereign has not met its burden of proof. See The Nedlog Co. et al., B-212665, B-212665.2, Feb. 22, 1984, 84-1 CPD ¶ 215. In any event, we do not believe that such a past practice would preclude the agency from requiring evidence of title in the current procurement.

Finally, Sovereign argues that bidders were not treated equally because the VA did not issue a formal amendment informing them that it intended to require satisfactory evidence of title for material stored on-site. The protester first raised this issue approximately 3 months after bid opening, in its comments on the VA's report to our Office. Sovereign is not entitled to complain of this alleged deficiency at this late date. Our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(2) (1984), require bid protests to be filed not later than 10 working days after the basis for them is known or should have been known, whichever is earlier. Since Sovereign knew at bid opening that the VA did not intend to issue such an amendment, we will not consider its protest in this regard. See King-Fisher Co., B-209097, July 29, 1983, 83-2 CPD ¶ 150.

For the above reasons, the protest is denied in part and dismissed in part.

  
for Comptroller General  
of the United States