



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Erincraft, Inc.

File: B-235829

Date: October 10, 1989

DIGEST

Where as a result of the insertion of model numbers beside each item on the bid Schedule it was necessary for the contracting agency to consider in the evaluation of bids a brochure submitted by the bidder in response to the standard descriptive literature clause, all of the brochure, including a legend stating that specifications are "subject to change without prior notice or obligation" is for consideration, and because there is nothing else in the bid indicating that the legend was not intended to affect the bidder's obligations under the bid, the bid was properly rejected as nonresponsive.

DECISION

Erincraft, Inc., protests the rejection of its bid under invitation for bids (IFB) No. FS-28-89, issued by the Forest Service, U.S. Department of Agriculture, for two- and five-drawer lateral files. Erincraft's low bid was determined to be nonresponsive because of a legend on its descriptive literature, and award was made to the next low bidder, Remco Business Systems. We deny the protest.

The IFB contained a requirement for descriptive literature consisting only of the standard clause which required bidders to submit with their bids descriptive literature to establish, for the purposes of evaluation and award, details of the product offered. Erincraft submitted the low bid and included its commercial brochure, depicting equipment which complied with the specifications. This brochure, however, contained the following legend: "Continuous development and improvement of Erincraft, Inc. products requires that all specifications are subject to change without prior notice or obligation."

The contracting officer determined that the inclusion of the legend in the descriptive literature indicated that a firm

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bid had not been submitted and that the bidder reserved the right to change the specifications after the contract was awarded. The contracting officer accordingly found the bid submitted by Erincraft to be nonresponsive and awarded the contract to Remco Business Systems.

Erincraft contends that the legend in its brochure was not intended to qualify its bid. The protester also argues that the Order of Precedence clause in the solicitation, Federal Acquisition Regulation (FAR) § 52.214-29 (FAC 84-35), states that the "contract" takes precedence over submitted literature. Erincraft further maintains that the purpose of the descriptive literature is to establish the technical acceptability of its offered product, and that its literature was sufficient for that purpose.

The agency does not dispute that the descriptive literature submitted by Erincraft demonstrates conformance with the technical specifications; rather the agency argues that the statement in the descriptive literature that specifications are subject to change is a material deficiency rendering the bid nonresponsive. In support of his determination, the contracting officer cites our decision in Galaxy Distrib., Inc., B-220535, Oct. 22, 1985, 85-2 CPD ¶ 441, wherein we held that solicited descriptive literature containing a legend stating that specifications are subject to change without notice, and containing nothing else indicating that the legend was of no effect, renders the bid nonresponsive.

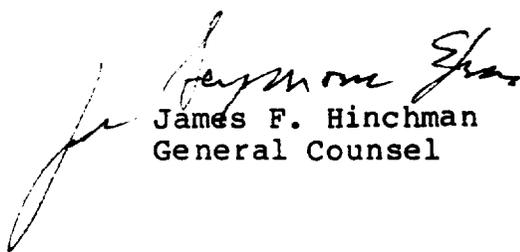
We agree with the agency that our decision in Galaxy is controlling. Where descriptive literature which is solicited and used for bid evaluation contains a reservation of the right to change the specifications, we have generally held the bid nonresponsive. Galaxy Distrib., Inc., *supra*. We have permitted exceptions only where it was reasonably clear from the face of the bid that the legend was not intended to reserve a right to change the offered product or to deviate from any of the government's material requirements, and where the descriptive literature was not solicited and did not affirmatively reserve the right to alter the specifications. See, e.g., Yale Materials Handling Corp., B-228974.2, Dec. 3, 1987, 87-2 CPD ¶ 550; Waukesha Motor Co., B-178494, June 18, 1974, 74-1 CPD ¶ 329. We have also stated that where the agency failed to properly implement the descriptive literature clause, by not stating the nature of or the purpose for the requirement (FAR § 14.205(d)(1) (FAC 84-11)), the literature submitted by bidders could not be used for evaluation purposes, and therefore the literature, including the legend, could be disregarded. Tektronix, Inc.; Hewlett Packard Co., B-227800; B-227800.2, Sept. 29, 1987, 87-2 CPD ¶ 315. A

different result obtains here, however--although the Forest Service defectively implemented the descriptive literature clause--because it is clear that Erincraft intended its brochure to be part of its bid as evidenced by the fact that it inserted specific model numbers on the bid Schedule adjacent to each item. This meant that of necessity, the agency had to refer to Erincraft's brochure to establish what it offered and whether products complied with the specifications.

Once the brochure was to be considered in the evaluation of Erincraft's bid, all the brochure's contents--including the "subject to change" legend--had to be considered and given effect. We know of no basis under which the contracting officer reasonably could be expected to consider only part of the brochure's contents and disregard other portions, such as the legend, absent some indication in the bid that the legend was to have no effect. As in Galaxy, there is nothing in Erincraft's bid, such as a notation on its brochure or a statement in its cover letter, that contradicts or negates the legend. In addition, the Order of Precedence clause does not operate to negate the legend in the protester's descriptive literature. The purpose of the clause only is to assist in resolving any inconsistency which may appear among the solicitation's provisions themselves, not to nullify a submission by a bidder which makes its bid nonresponsive.

As a result, we find that the uncontradicted legend on the literature submitted by Erincraft reserved to it the right to alter its product's specifications and its bid was therefore properly rejected as nonresponsive.

Accordingly, we deny the protest.



James F. Hinchman
General Counsel