

DECISION



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

40382

FILE: B-179076

DATE: January 28, 1974

MATTER OF: Electron Research, Inc. *44*

DIGEST: Where descriptive literature submitted with bid as required by solicitation contained deviations from specifications, bid was properly rejected as neither overall offer to conform nor claim of error viewed as basis for waiving specific exceptions to specifications. Furthermore, bid of successful bidder properly determined responsive where it contained no exception to specifications and descriptive literature was considered as satisfactorily indicating compliance to specifications. Finally, successful bid was responsive even though bidder's name was omitted from certain pages as it was otherwise properly completed and signed.

2/10/74
Invitation for bids No. N00600-73-B-0317, was issued on May 9, 1973, to fill the requirement of the Naval Air Station (NAS), Alameda, California, for an electron beam welder. The solicitation included a requirement for descriptive literature which provided that, "Failure of descriptive literature to show that the product offered conforms to the specifications * * * will require rejection of the bid." Although Electron Research Inc. (ERI), submitted the low bid in the amount of \$154,000, its bid was rejected as nonresponsive as it was determined on the basis of the descriptive literature submitted with the bid that its electron beam welder did not conform to the specifications. Therefore, award was made to Sciaky Bros., Inc., as the only other bidder, at a price of \$158,488.

1/25/74
For the reasons discussed below, the protest is denied.

ERI contends that it took no exception to the specifications and its bid was erroneously determined nonresponsive to paragraph 3.5.2 of the specifications which required a pump-down time of not more than 5 minutes. In this connection,

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the protester points out that its bid included the word "accepted" with regard to this requirement, and that the statement in its descriptive literature that the pumping time is less than 10 minutes resulted from a clerical misinterpretation. It is also argued that a pumping time of "less than 10 minutes" is not inconsistent with the requirement because "5 minutes is less than 10 minutes."

It is our conclusion that ERI's bid was properly determined nonresponsive. It is clear in our opinion that "less than 10 minutes" is not the same as "not more than 5 minutes", even though the latter time period is included in the former. Furthermore, the administrative report includes an explanation of the necessity for and materiality of the requirement. In addition, it is also pointed out in the technical evaluation report that ERI's descriptive literature also failed to include information demonstrating compliance with the performance requirements of paragraph 4.6.2 and Table I as specified in paragraph 8. Although ERI contends that its bid was responsive notwithstanding these deficiencies as its bid also included the word "accepted" opposite the relevant specifications, we have held that the intent of a bid must be determined from a reasonable interpretation of its entire contents, including any descriptive literature. B-174801, March 20, 1972. In that case, we stated:

"* * * Because the bid form submitted by DeVac indicated that bidder's intention to comply with the specifications, but the test report accompanying such bid did not comply with those specifications, we must regard the intent of the bidder ambiguous as to what it actually intended to furnish. Where more than one possible interpretation may reasonably be reached from the terms of a bid and its accompanying materials, a bidder may not be permitted to explain the actual meaning or bid intended, since this would afford the bidder the opportunity to alter the responsiveness of the bid by reference to extraneous material or by explanation. The intent of the offeror must be determined

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from the bid and anything short of a clear intention in the bid to conform to the advertised specifications requires rejection."
B-167584, October 3, 1969.

Moreover, we have also held that: "* * * an overall offer to conform to the specifications, in whatever form, can cure a specific deviation only in situations where the promise or offer makes it patently clear that the offeror did in fact intend to so conform * * * anything short of a clear intention to conform on the face of the bid requires rejection." B-168668, February 18, 1970. Therefore, ERI's statement of acceptance did not remedy the fact that its bid deviated from material specifications. Furthermore, even if the deviations resulted from clerical error, as ERI argues, error correction is only permissible where a bid is otherwise responsive and acceptable under the terms of the solicitation. B-176171, August 29, 1972. Since ERI's bid was nonresponsive as submitted, it could not be made responsive through mistake correction procedures. See 46 Comp. Gen. 1 (1966); B-166778, July 9, 1969.

Furthermore, ERI contends that Sciaky's bid was not responsive because the model it bid on does not meet the requirement for a minimum work height of 26 inches, and its descriptive literature did not establish compliance with paragraphs 7 and 8 of the solicitation with respect to equipment experience of more than 1 year meeting the requirements of paragraph 4.6.2.

In this regard, a letter dated September 5, 1973, from the Acting Deputy Commander, Procurement Management, Department of the Navy, Naval Supply Systems Command, states that NAS, Alameda, California, evaluated the Sciaky bid and found the equipment offered to conform to the technical requirements of the solicitation. In a letter dated August 10, 1973, the Commanding Officer of the Naval Air Rework Facility, Alameda, stated that:

"a. Sciaky has taken no exceptions to the specifications, therefore they must comply with paragraph 1.2 of the amendment 0003 /the amendment specifies that the machine's chamber have a minimum work height of 26 inches/. This may be accomplished by minor modification to existing standard model equipment as allowed under paragraph 7.


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"b. Paragraph 8 was complied with, to the satisfaction of this Activity, by the submission of the weld parameter for various materials and material thicknesses."

Moreover, from our examination of Sciaky's descriptive literature we believe it supports the finding of the Naval procurement personnel. Therefore, we are unable to conclude that Sciaky's bid was nonresponsive. With regard to ERI's continued insistence concerning noncompliance with the 26 inch work height requirement, Sciaky has advised the Navy that "* * * the vacuum chamber * * * provides a 26" working height * * *" Furthermore, the Navy advises that upon delivery the equipment will be inspected for compliance with this and other requirements.

Finally, we find no merit in ERI's contention that Sciaky's bid was nonresponsive because its name was not posted on certain pages of its bid. Although Sciaky's name was omitted from certain pages as contended, we are not aware of any basis for concluding that the bid was therefore nonresponsive as the bid and DD Form 1423 were otherwise properly completed and signed.

Accordingly, the protest of the award to Sciaky Bros., Inc., is denied.


Deputy Comptroller General
of the United States