

**DECISION**

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

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FILE: B-183496

DATE: June 30, 1975

MATTER OF: Bendix Corporation

**DIGEST:**

1. Contention that bid is nonresponsive because all pages of solicitation were not submitted with bid is without merit since bid incorporated by reference omitted material.
2. Contention that solicitation is defective because bid evaluation did not include certain option items and thereby encouraged unbalanced bidding is not supported where agency reports that there is low probability that option items will be exercised and that, therefore, option items will be deleted at time of award. Furthermore, latter action is not objectionable since it has not been alleged or demonstrated that inclusion of option items in solicitation prejudiced any bidder on evaluated items.

The Bendix Corporation (Bendix) has protested against the award of a contract pursuant to invitation for bids (IFB) A4M-4-7305, issued by the Federal Aviation Administration (FAA), to anyone other than Bendix. Basically, Bendix argues that the apparent low bid submitted by Westinghouse Electric Corporation (Westinghouse) is nonresponsive because several pages of the solicitation are not contained in the bid and, furthermore, that it is materially unbalanced. In addition, it is argued that the method of evaluation stated in the solicitation was defective.

The IFB for the procurement of Air Route Surveillance Radar (ARSR-3) Systems was issued on February 19, 1975, pursuant to the two-step formal advertising procedures of the Federal Procurement Regulations. Bid opening occurred March 20, 1975. In its bid, Westinghouse failed to include 11 of the 12 clauses attached to the IFB as issued and listed on page 69 of both its bid as submitted and the IFB. Also, Westinghouse did not include a document entitled "Contract Maintenance Service Requirements for Surveillance Radar (ARSR-3)" which constituted attachment # 1 of the IFB and was the specification for Item 7 of Schedule III of the IFB.

This Office has held that as a general rule where a bidder fails to return with his bid all of the documents which were part of the invitation, the bid must be submitted in such form that acceptance would create a valid and binding contract requiring the bidder to perform in accordance with all of the material terms and conditions of the invitation, Leasco Information Products, Inc., 53 Comp. Gen. 932, 74-1 CPD 314 (1974).

Although Westinghouse did not return attachment # 1 with its bid, the Westinghouse bid included prices for item 7 and contained the following language:

"Maintenance services, including on-the-job-training in accordance with attachment # 1  
\* \* \*."

Bendix, however, questions whether the words "attachment # 1" in Westinghouse's bid are a sufficient reference and cites our decision in Leasco, supra. In that case there was a question as to whether a reference in the solicitation to "Scope of Work (Enclosure I)" was sufficient to adequately reference a particular document and thereby insure that the bidders knew what they were bidding on since the whole title of the document was not given and no mention was made of pagination. We agreed with the contracting officer that the reference was not ambiguous. Bendix contends, that our decision in Leasco that there was no ambiguity was dependent upon the finding that an amendment to the solicitation had set forth the full title to the document and such amendment had been acknowledged. Therefore, Bendix argues, that in the in the present case the Westinghouse reference should be deemed ambiguous because attachment # 1 is not clearly identified by an amendment as in the Leasco case.

However, we disagree with the Bendix interpretation of the Leasco decision. While in the Leasco case we did rely in part on the fact that the acknowledged amendment identified the "Work Scope" provision by its full title, we also stated as our primary basis for the holding that we agreed with the contracting officer's

conclusion that the reference to "Work Scope" could reasonably be regarded as referring only to the "Work Scope for the operation of EDRS." We believe the same rationale is applicable here. In addition, as noted above, Westinghouse submitted bid prices on Item 7 which specifically referenced attachment # 1 and, therefore, in our opinion, acceptance of its bid would obligate it to provide the maintenance services in accordance with attachment # 1.

A similar conclusion is required for the adequacy of the reference to the clauses listed in Article XXX of the IFB. The clauses were listed in the IFB on page 69 and attached thereto. In the bid submitted by Westinghouse the listing on page 69 was included, but the clauses were not. However, as noted in the Leasco case, supra, referring to the holding in B-170044, October 15, 1970, the bid submitted by Westinghouse included Standard Form 33, which indicates in block 4 that it is page 1 of 70, and in block 9 under the headings "SOLICITATION" and OFFER, respectively, contains the following language:

"All offers are subject to the following:

1. The attached Solicitation Instructions and Conditions, SF 33-A.
2. The General Provisions, SF 32 \_\_\_\_\_ edition, which is attached or incorporated herein by reference.
3. The Schedule included below and/or attached hereto.
4. Such other provisions, representations, certifications, and specifications as are attached or incorporated herein by reference. (Attachments are listed in the Schedule.)

\* \* \* \* \*

"In compliance with the above, the undersigned offers and agrees, if this offer is accepted within \_\_\_\_\_ calendar days (60 calendar days unless a different period is inserted by the offeror) from the date for receipt of offers specified above, to furnish any or all items upon which prices are offered, at the price set opposite each item, delivered at the designated point(s), within the time specified in the Schedule."

In addition, Article XXX of the General Provisions on page 69 includes the following pertinent language followed by a listing of the applicable clauses:

"The General Provisions of this contract consist of the following:

\* \* \* \* \*

"D. The following clauses, attached hereto, form a part of these General Provisions:"

In Leasco we concluded that in these circumstances "the bid identified the complete solicitation to which it responded and that the clauses contained or referenced therein were incorporated by specific reference in the bid submitted \* \* \*" and, therefore, the bidder bound itself to comply with of the material terms of the solicitation.

Bendix points out that some of the listed clauses were different from the standard variety contained in the regulations, and one, the Economic Price Adjustment clause, differed from the similar clause used in the first step of this procurement. It is argued, therefore, that by submitting only page 69, Westinghouse did not meet the standard for clear identification demanded by Leasco.

The solicitation, however, states that the clauses are attached, thereby indicating with specificity the terms of the clauses forming a part of the General Provisions. The bid as submitted by Westinghouse includes the listing, takes no exception thereto, makes no change in the list of the clauses, and, consequently, leaves no question as to the clauses referred to. Therefore, there is no other reasonable interpretation of the list of clauses in the bid than that it refers to the clauses attached to the IFB and, thus, properly incorporates them by reference. For the above reasons we believe that the bid by Westinghouse was responsive since it adequately referenced all of the material terms and conditions of the invitation.


The protester's other contention is that Westinghouse submitted a materially unbalanced bid which was facilitated by the agency's improper decision not to evaluate certain options. These options were for services, including training, which, according to the protester, would definitely be needed to maintain the sophisticated equipment covered in this procurement and which would have to be supplied by the hardware manufacturer in order to avoid severe technical and operational problems. Knowing that these necessary but unevaluated options would have to be exercised, it is contended

that a bidder could then bid very high on them without fear of losing the award and bid very low on the evaluated items in order to be placed in a better position to be determined the low bidder. It is this tactic which the protester attributes to Westinghouse and which it contends caused the Westinghouse bid to be unbalanced.

In response, FAA reports that because it recognized the possibility of unbalanced bidding and a consequent "buy-in" which might preclude the Government from obtaining the lowest actual cost, the option items for training services were initially included in the award evaluation provisions. However, it is reported that because it is FAA's practice to provide its own training whenever possible and because it was determined that there was a low probability of exercising the options, it was decided to eliminate most of the training service options from the evaluation and such action was accomplished by amendment to the solicitation. Although Bendix disputes the validity of FAA's conclusion concerning the low probability of exercising the options, contending that they are "captive to the basic contract" and, therefore, should be evaluated, it would be inappropriate for our Office to take exception to FAA's position in this regard. Moreover, in view of its conclusion concerning the low probability of exercising the options, FAA has now decided to drop a substantial portion of the unevaluated options at the time of award. In these circumstances, we believe that the question of whether Westinghouse's bid for the option items is unbalanced is immaterial.

The protester has also questioned FAA's proposed deletion of the options at the time of award. Bendix points to several of our prior cases which hold that a contract must be awarded upon the same specifications offered to all bidders. In the present case, however, where the deleted items were unevaluated options, the action by the agency was not improper for the bidders were on notice that the agency might well not purchase the option items thereon. In essence, therefore, award is to be made on the same items offered to all bidders. Although Bendix has alleged that deletion of the options at the time of award is a sham in that they will ultimately be included in the contract through modification, our Office would not be justified in objecting to the proposed deletion on such a speculative basis.

For the above reasons, the protest is denied.

  
Deputy Comptroller General  
of the United States