

DECISION



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

60641

FILE: B-185868

DATE: March 16, 1976

MATTER OF: International Signal & Control Corp.;
Stewart-Warner Corporation

98483

DIGEST:

Bid which omitted pages of invitation for bids is nonresponsive, notwithstanding it contained every page which required an entry, but which did not serve to incorporate by reference other material pages, and was accompanied by cover letter stating that "applicable documents" are being submitted, which was ambiguous as to whether it referred to documents of IFB as issued or to documents returned with bid, because bidder's intention to be bound by all material provisions of solicitation is unclear.

The Department of the Navy, Naval Electronic Systems Command (NAVELEX), by letter dated February 6, 1976, has requested an advance decision as to whether the bid of International Signal & Control Corp. (ISC) is responsive to a solicitation.

On November 20, 1975, invitation for bids (IFB) No. N00039-75-B-0056 was issued as the second step of a two-step formally advertised procurement by NAVELEX for radio transmitters, receivers and related equipment. Bids were opened on January 8, 1976, with five bidders responding. The low bidder was ISC with a total bid of \$8,763,119. The second low bidder was Stewart-Warner Corporation (S-W) which submitted a bid of \$9,492,283.

When ISC submitted its bid, it included all those pages of the IFB upon which it was required to place an entry, but did not submit any of the remaining pages. However, a cover letter submitted with its bid stated in part:

"International Signal & Control Corporation (ISC) is pleased to submit herewith the original and one (1) copy of applicable documents in complete response to subject solicitation." (Emphasis supplied.)

Counsel for S-W maintains that the letter evidenced an intent that the only documents applicable to the IFB were the documents submitted by ISC and that no other documents were intended to be included

PUBLISHED DECISION
55 Comp. Gen.

in the bid either by incorporation by reference or otherwise. Counsel for ISC argues that if awarded a contract, the letter indicates that ISC would accept all the terms of the IFB. Counsel for ISC also argues that "incorporation by reference" is not a requirement in determining whether a bid is responsive.

Page 1 of the IFB, Standard Form (SF) 33, which was submitted by ISC, in block 9 under the heading "SOLICITATION," contained 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.)"

The reference to SF 32 is inapplicable since the form was not part of the IFB.

Further down the page, the "OFFER" portion of SF 33 states:

"OFFER (NOTE: Reverse Must Also Be Fully Completed By Offeror)

"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."

The general rule is that 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 the material terms and conditions of the invitation. See

B-185868

Leasco Information Products, Inc., 53 Comp. Gen. 932 (1974), 74-1 CPD 314.

In 49 Comp. Gen. 289 (1969), which counsel for ISC argues is indistinguishable from the present case, the bidder submitted a bid "in compliance with the above," that is, in compliance with the Solicitation Instructions and Conditions, the General Provisions, the Schedule, and such other provisions, representations, certifications and specifications as were incorporated by reference or listed in the Schedule as attachments. Also, in that decision the bid included that portion of the Schedule entitled "Composition," which identified in detail all of the various conditions, provisions, schedules, certificates and other documents comprising the terms of the contract to be awarded. In view of these facts, we held that such references in the bid clearly operated to incorporate all the invitation documents into the bid and that award to the bidder would therefore bind him to performance in full accord with the conditions set out in the referenced documents. In the instant case, similar to the situation in the cited case, the present solicitation contained a "Table of Contents" on page 3 which listed all sections comprising the bidding document. However, unlike the cited case, ISC did not return this page with its bid.

While counsel argues that incorporation by reference is not a requirement for a finding of responsiveness in decisions of our Office, it seems clear that this is the basic thread connecting many cases where pages of an IFB were omitted and the bid was nevertheless determined to be responsive. In addition to the above-cited case, see 49 Comp. Gen. 538 (1970); B-170044, October 15, 1970; and Spectrolab, a Division of Textron, Inc., B-180008, June 12, 1974, 74-1 CPD 321. In B-170044, supra, the bid included SF 33 with the "Solicitation" and "Offer" clauses referred to previously; however, it failed to include pages 5 and 6 of the solicitation, which contained numerous material terms, including clauses supplementary and modifying SF 32 and SF 33A. The decision stated:

"* * * The question then arises whether there is some evidence in the Gornell bid, or language in those portions of the invitation submitted with its bid, that would incorporate the above provisions into the corporation's bid. In this connection we note that the entire invitation package consisted of 28 pages numbered in sequence. Gornell executed the 'Offer' portion of the Standard Form 33 used in the solicitation, and included that form with its bid. The solicitation was specifically identified, by number and date and place


B-185868

of issuance, at the top of the facesheet of the form, and as being comprised of 28 pages which designated the facesheet as 'Page 1 of 28.' Since Gornell's bid clearly identified the complete solicitation to which it responded as consisting of 28 pages all of the 28 pages of the invitation and the clauses contained or referenced therein were, in our opinion, incorporated by specific reference in the bid documents as signed and submitted by Gornell. Such documents should therefore be considered as evidencing Gornell's intention to be bound by all of the substantive terms and conditions of the IFB. See 47 Comp. Gen. 680 (1968)."

In short, it seems clear that in the above-cited case the omitted provisions were specifically incorporated by reference because Gornell completed the "Offer" portion of the facesheet of SF 33 which identified the solicitation as being comprised of 28 pages. This does not appear to be true in the present situation. While ISC completed and returned the facesheet of SF 33, including the "Offer" portion, the facesheet only indicated that it was page 1 and did not show that the solicitation consisted of 234 pages, including section "L" which was comprised of several material provisions.

Furthermore, we believe the meaning attributable to the cover letter submitted with ISC's bid is not free of ambiguity. It could be interpreted to mean that ISC's response was in complete conformance to all the terms and conditions of the IFB as issued. On the other hand, we believe it could reasonably be interpreted to mean that ISC was agreeing to be bound by only such terms and conditions as were encompassed in those documents submitted with its bid. Thus, we find no clear indication that ISC intended to be bound by all the material provisions of the solicitation. In B-172183, June 29, 1971, we stated that where a bid is subject to two reasonable interpretations, under one of which it would be responsive and under the other nonresponsive, we have consistently followed the rule that the bidder is not permitted to explain his intended meaning after bid opening. Rather, the bid is considered nonresponsive.

In view of the foregoing, the bid is nonresponsive and not acceptable for award.


Deputy Comptroller General
of the United States