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**DECISION**



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

FILE: B-188796

DATE: November 28, 1977

MATTER OF: Delta Electronic Control Corporation

**DIGEST:**

1. Protest filed with GAO after bid opening alleging impropriety of descriptive literature requirement in IFB is untimely under 4 C.F.R. § 20.2(a) (1977), when alleged improprieties were or should have been apparent prior to bid opening.
2. Where bidder fails to submit required descriptive literature with bid such bid is nonresponsive and bidder may not subsequent to bid opening cure such failure by submitting published commercial literature which was publicly available prior to bid opening.
3. Where agency determines that next low bidder's descriptive literature demonstrates conformance of offered electronic equipment to highly technical requirements of IFB, GAO will not disturb such determination in the absence of showing that agency's action was either erroneous or arbitrary.

Delta Electronic Control Corporation (Delta) protests the rejection of its bid, for failure to submit required descriptive literature under invitation for bids (IFB) DAAD07-77-B-0009 issued January 21, 1977, by the Army White Sands Missile Range (Army). The IFB called for the furnishing, installation, testing and demonstration of an Uninterruptable Electric Power System (UPS) plus ancilliary items, in accordance with White Sands Missile Range Purchase Description 6209-76. Four bids were received and opened on March 17, 1977. The low bid was submitted by Delta while the next low bid was submitted by the Emerson Electric Company (Emerson). Delta's bid was rejected because that firm failed to submit with its bid descriptive literature required by the IFB.

Delta argues that the IFB's purchase description is so complete that the inclusion of a descriptive literature requirement in the solicitation was unnecessary. In the alternative, Delta argues that even if the Army was reasonable in requiring the descriptive literature, there is no prohibition against Delta submitting such literature after bid opening where the literature so submitted was

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published and available in the trade months prior to bid opening. Finally, Delta argues that material discrepancies exist between the descriptive literature submitted by Emerson and the stated requirements of the IFB. Delta protests the Army determination that the descriptive literature submitted by Emerson demonstrated compliance with the invitation's requirements.

The Army contends that we should dismiss as untimely Delta's argument that the IFB's purchase descriptive is so complete that it was improper to call for descriptive literature. In support of its position, the Army cites our decision Waukesha Motor Company, B-178494, June 18, 1974, 74-1 CPD 329, in which we found that, notwithstanding the apparent validity of a protester's argument that an IFB requiring submission of descriptive literature did not comply with the requirements of an applicable regulation, a protest founded upon such an argument and filed after bid opening was untimely. Here, as in Waukesha, we are of the opinion that the protester should have been aware of the alleged defect prior to the submission of bids. Section 20.2(a) of our Bid Protest Procedures 4 C.F.R. Part 20 (1977) requires that protests based upon an alleged impropriety in a solicitation which is apparent prior to bid opening must be filed prior to bid opening to properly be for consideration by our Office.

It could be argued that Delta's complaint is really that the Army failed to waive the requirement for descriptive literature as it applied to Delta in which event its protest of the matter would be timely. We have held requests for descriptive literature, which were unnecessary for proper evaluation of bids, to be informational in nature and that failure of a bidder to furnish such literature would not prevent acceptance of its bid because the bidder was otherwise bound to perform in accordance with the solicitation. Sulzer Bros., Inc. and Allis-Chalmers Corporation, B-188148, August 11, 1977, 77-2 CPD 112. However, we believe that Sulzer is distinguishable from the situation here presented. In Sulzer we noted that the information sought dealt only with the preliminary design and even then the information called for was so sparse that it could add little or nothing to the evaluation of the bids. Moreover, the descriptive literature requirement in Sulzer could be met by merely parroting back the specifications. In this case the Army reports that in previous procurements of similar items it was evident that some bidders had not fully considered the purchase description requirements and that descriptive literature was there used successfully in evaluation of the technical responsiveness of the bids submitted. In purchasing UPS systems the Army is procuring systems which are marketed commercially. However, the commercial systems

offered vary from one commercial application to another. The Army wanted to be certain that the highly technical commercial system furnished would be in accordance, paragraph by paragraph, with its specialized use as outlined in the purchase description and for this reason complied fully with the requirements of Armed Services Procurement Regulation (ASPR) § 2-202.5 (1976) in its issuance of the instant solicitation. We do not believe that the information sought was merely informational nor that it would not contribute to the evaluation of the bids. For these reasons we conclude that the Army acted properly in not waiving compliance with the descriptive literature requirement.

Delta has referred to several of our decisions in proffering its alternative argument that it should be allowed to submit the required descriptive data subsequent to bid opening. We believe Delta's reliance to be misplaced. The cases upon which Delta relies deal with the submission of unsolicited descriptive data in the form of model numbers, Lift Power, Inc., B-182604, January 10, 1975, 75-1 CPD 13, and part numbers, B-169813, July 6, 1970, and the submission of descriptive literature which supports a bidder's contention, in a "brand name or equal" procurement, that the model specified by the bidder in the bid is in fact equal to the "brand name" item, B-172588, July 16, 1971, and B-170074, August 25, 1970. The considerations applicable to those situations are inapplicable to a situation such as this.

In those situations the bidder either gratuitously or because the solicitation required it, submitted something more than a mere promise to perform the contract in accordance with the specifications. In the case of both unsolicited data and brand name or equal procurements it is clear at bid opening that the bidder is offering for example, "Model X." In such situations we feel it appropriate for a contracting officer to clarify an ambiguity that might exist as to the nature of "Model X" by considering published commercial literature which is publicly available prior to bid opening. See, e.g., Pure Air Filter International; Thermal Control, Inc., B-188047, May 13, 1977, 77-1 CPD 342.

In the instant case, Delta has failed to give the Government that "something more" which the descriptive literature requirement of the solicitation sought. Were the Government to allow Delta to cure its deficient submission it would be permitting Delta to affect the responsiveness of its bid after bid opening. Moreover, the descriptive literature requirement of the IFB constituted a material requirement of the IFB at the time of bid opening. We, therefore, conclude that Delta's bid was nonresponsive and that the deficiency could not be cured. B-163063, February 1, 1968.

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Delta's final contention is that material discrepancies existed in the descriptive literature submissions of the next low bidder. In support of this contention Delta has submitted a detailed technical analysis of Emerson's descriptive literature. The Army has responded with an equally detailed analysis of the Emerson submission in which it concludes that the Emerson submission is responsive. In the course of this technical exchange it became apparent that the Army's technical experts were in part relying upon an Emerson brochure which was not contained in the procurement file. Delta in its rebuttal of the Army's technical response questioned the reliance on the brochure. Delta argues that if the Army can rely on descriptive literature that was not submitted with the Emerson bid, in its efforts to show that Emerson's descriptive literature was technically responsive, then fairness dictates that Delta ought to be afforded the same opportunity.

The Army states that the brochure was in the Emerson bid when it was received. In support of its statement the Army has provided the affidavit of an Army engineer who saw the bids opened and accompanied the bids from the time of opening until he had an opportunity to make a preliminary evaluation of the bid packages including the required descriptive literature. At the time of his preliminary evaluation the engineer removed the brochure from the Emerson bid package in order to make a copy of it. The original brochure was ultimately lost; however, the engineer retained and relied upon the copy of the brochure in making his technical analysis. We see no reason to question the Army's report in this respect.

We have taken the position that where an agency determines that a bidder's descriptive literature demonstrates conformance of offered electronic equipment to highly technical requirements of the IFB we will not disturb that determination unless our review of the record demonstrates that the agency's action was either erroneous or arbitrary. Atlantic Research Corporation, B-179641, February 25, 1974, 74-1 CPD 98.

We have reviewed the numerous technical arguments raised by Delta. It argues, for example, that Emerson's descriptive literature failed to meet the requirements of the descriptive literature clause of the solicitation with regard to paragraph 3.2.2(h) of the purchase description. In particular it is argued that the Emerson submission failed to affirm the capability of Emerson's unit to meet the performance characteristics required by paragraph 3.2.2(h) concerning Input/Output phase lock. The purchase description requires that phase lock and synchronization between UPS Output

and the commercial power source b. within 0.1 millisecond. Delta's argument is that Emerson's descriptive literature does not specifically address the requirement and that Army technical experts relied upon other aspects of the Emerson literature to draw the inference that Emerson's offering would comply with the requirement. It is Delta's opinion that Emerson's submission must explicitly affirm the capability of the Emerson offering to meet the Input/Output phase lock requirement. Delta argues that unless a bidder is required to submit an explicit, essentially point blank, response the issue of whether the literature submitted meets the particular requirement will inevitably become the subject of debate among experts holding differing opinions.

We believe Delta has failed to establish that the inferences which the Army drew were either erroneous or arbitrary. We are further of the opinion that there may be a misconception regarding the purpose of descriptive literature in situations such as this. The descriptive literature is supposed to furnish something beyond a mere recitation of the agency's performance specifications. The literature is supposed to show how the product offered will meet the specifications. This can be accomplished by showing the characteristics, or the construction of the product, or by explaining the operation of the product. We think that the drawing of technical inferences is, and should be, an intrinsic portion of the Government's analysis of the literature submitted provided, of course, that such inferences as are drawn are derived logically from the material analyzed.

Another argument which Delta offers is that the Emerson descriptive data indicated Emerson's intention to furnish a battery which would not perform in accordance with the parameters stated in the purchase description at paragraph 3.2.4. The purchase description required that the UPS include a battery with sufficient capacity to provide power to the load for not less than 15 minutes. During the course of the procurement the question was raised as to whether the battery would be subjected to the temperature/humidity test. The Army in a solicitation amendment indicated that it would. The temperature range of the test environment was 10°C to 38°C. The Emerson literature indicated that the battery it planned to furnish was rated on the basis of a minimum temperature of 77 F (25°C). Delta contends that such a battery would only be capable of operating at 83 percent to 54 percent of maximum capacity were it subjected to testing at 10°C (50°F). Delta further contends that the Emerson battery would not be good for more than 12 1/2 minutes at the lower temperature range. The Army takes the position that the battery furnished must first comply with the Interim Federal Specification W-B-00134B (GSA-FSS) for Type I, Class 2 batteries and second, when it is installed

as a component of "the system" the battery must operate in such a manner that the system as a whole is capable of passing the temperature/humidity test. Thus, while it is true that the battery, as a part of the system, will be subjected to the temperature/humidity test it is also true that it is not the battery itself which must provide power to the load for not less than 15 minutes at 10 C (50 F), but rather the system as a whole. The Army advises that such a result is not unlikely because the system, by its very operation, generates a sufficient quantity of heat to warm the battery to a point where total system operation will meet the environmental test requirement. We see no reason to question the Army's conclusion in this regard.

In yet another technical argument Delta urges that the Emerson descriptive literature failed to demonstrate that the maximum current demanded, at any time, by its system would not exceed 150 percent of the current demanded when its output is supplying a maximum continuous rated load, as is required by paragraph 3.3.6 of the purchase description. Delta points out that the Emerson proposal states, under the heading "Magnetizing In-rush," that "[w]hen the rectifier/charger is first turned on, the input transformer will draw subcycle magnetizing current. The subcycle magnetizing current will be five to eight times the normal full load current." The Army admits that this appears to be in conflict with the UPS input current limiting requirement. The Army, however, distinguishes "transient" or "magnetizing" currents from "input" currents and contends that a reading of the whole purchase description reveals that transient limits are specified where they are required. The Army contends that Emerson demonstrated its capability to meet the requirement when it states in its proposal:

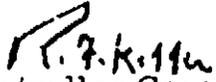
"Current Limiting-The rectifier/charger provides for input current limiting whereby the maximum input currents will be limited to a maximum of 110 percent of normal full input load ratings."

Delta argues that the Army is taking a position contrary to the plain meaning of its purchase description which indicates that the system is not to exceed the current limit at any time. While we cannot conclude that Delta's interpretation is unreasonable, neither can we conclude that the Army's interpretation, which is premised upon reading the purchase description as a whole, is erroneous or arbitrary.

Delta has raised a number of other technical arguments of a similar nature which we will not discuss here because our conclusions regarding their merits do not lead us to believe that the Army's plan to make an award to Emerson is improper.

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Accordingly, the protest is denied.

  
Deputy Comptroller General  
of the United States