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**DECISION**



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

**FILE: B-190418**

**DATE: February 10, 1978**

**MATTER OF: United McGill Corporation and Lieb-  
Jackson, Inc.**

**DIGEST:**

1. Bidder's unsolicited descriptive literature may not be disregarded where the circumstances are reasonably susceptible of a conclusion that the literature was intended to qualify the bid. Therefore, when such literature contains exception to stated material requirements, the bid must be rejected as nonresponsive.
2. Bid that excluded applicable taxes was properly rejected as nonresponsive for deviating from the IFB's tax clause requiring all bids to include applicable taxes.
3. Bid correction procedures are available only to correct bids which are responsive to the invitation. After bid opening, bidder may not be given opportunity to delete nonresponsive conditions.
4. Where bid is subject to two reasonable interpretations, under one of which it would be responsive and under the other nonresponsive, bid must be rejected as ambiguous. Bidder's acknowledgment of amendment of canceled IFB containing specification requirements deviating from terms of current IFB rendered bid ambiguous. Bid must unequivocally offer to provide, without exception, the requested items in total conformance with the terms and specification requirements of IFB.
5. Responsiveness of bid is determined from face of bid itself at time of bid opening. Bidder should not be allowed to explain meaning of bid after bid opening.

These two bid protests were filed against the Army Corps of Engineers' (Corps) award of a contract under solicitation No. DACA31-77-B-0080 (IFB-0080) which requested bids to furnish an electrostatic precipitator

system for the Lima Army Modification Center, Lima, Ohio. United McGill Corporation (McGill) argues that the contracting officer incorrectly considered unsolicited literature in its bid as rendering the bid nonresponsive. Lieb-Jackson, Inc. (Lieb-Jackson) argues that its acknowledgment of an amendment issued under a prior canceled solicitation did not render its bid nonresponsive. For the reasons that follow, we concur with the contracting officer's conclusion that both McGill's and Lieb-Jackson's bids were nonresponsive to the solicitation.

#### The McGill Protest

The Corps found McGill's bid to be nonresponsive, because McGill included unsolicited information which the Corps determined took material exception to the terms and conditions of the solicitation. McGill contends that the information included in the bid package was not intended to qualify its bid and should have been disregarded. In the alternative McGill argues that the qualifications were de minimis and should have been waived.

The solicitation requested lump sum bids to provide and install an electrostatic precipitator conforming to the detailed specifications and drawings in the solicitation. The bidders were not requested to offer any particular model or demonstrate how they would comply with the specifications. Instead of merely indicating its price in the appropriate space in the Schedule, McGill included the following pertinent documents in its bid package:

(1) A cover letter dated September 14, 1977 (the bid opening date), signed by McGill's project manager, stating in pertinent part as follows:

"United McGill is pleased to submit the enclosed electrostatic precipitator system bid for the above referenced project.

"United McGill will provide a complete turnkey installation of the electrostatic precipitator, direct system, and appurtenances in accordance with the bid document and addendum. The attached proposal documents outline the scope of the work, labor, material, and equipment United McGill will supply."

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(2) A fourteen page letter dated September 12, 1977, signed by McGill's president and a sales engineer, entitled, "Proposal for Electrostatic Precipitator System" in which the Table of Contents listed Section 12, "Exclusions." The exclusion section stated in pertinent part as follows:

"United McGill makes certain exclusions listed below, to be done or provided by the Owner or added to our price later:

\* \* \* \* \*

b. Sales, use and any other non-payroll taxes."

(3) Standard Form 33, Solicitation, Offer, and Award, to which was attached the General Provisions (Supply Contract) dated November 24, 1975 which states in pertinent part:

" \* \* \* \* \*

"23. FEDERAL, STATE, AND LOCAL TAXES (1971 NOV) (a) Except as otherwise provided in this contract, prices includes all applicable Federal, State, and local taxes and duties."

\* \* \* \* \*

The IFB contained no exception to this provision.

By letter of October 6, 1977, the contracting officer informed McGill that its bid had been rejected as nonresponsive, because McGill had substituted its proposal for many of the contractual and technical provisions contained in the solicitation. The second reason given by the contracting officer, which we believe is dispositive, was that:

"\* \* \* you [McGill] qualified your bid so that it differed materially from the requirements of the Government in another respect. Section 12b of your proposal, page 13, excludes payment of 'sales, use and any other non-payroll taxes' from the bid price. Although the amount of these taxes cannot be calculated with any certainty, they could potentially be very high. The Government requires that these taxes be included in the

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bid price. Therefore, the exclusion of taxes from the bid price is a material deviation which constitutes a second basis for your bid being nonresponsive."

McGill relies on Armed Services Procurement Regulation (ASPR) § 2-202.5(f) (1976) for the proposition that unsolicited descriptive literature will not be considered as qualifying a bid and will be disregarded unless it is clear from the accompanying papers that it was the bidder's intention to so qualify the bid. In Dominion Road Machinery Corporation, 56 Comp. Gen. 334 (1977), 77-1 CPD 89, we analyzed the language of ASPR § 2-205.5(f) in the context of a case similar to this one. We held that it is sufficient for a finding of nonresponsiveness that the unsolicited descriptive literature create an ambiguity as to the bidder's intention to perform.

Whether or not the accompanying literature can be considered as qualifying a bid or rendering the bid ambiguous is a function of whether there is a reasonably perceivable intended relationship between the unsolicited documents in the bid package and the offer made in the solicitation. As we stated in 49 Comp. Gen. 851 (1970) at 852:

"In our view the intent of the bid must be determined from a reasonable construction of its entire contents including any unsolicited literature. If the circumstances are reasonably susceptible of a conclusion that the literature was intended to qualify the bid or if inclusion of the literature creates an ambiguity as to what the bidder intended to offer, then the bid must be rejected as nonresponsive to the invitation for bids. See B-166284, April 14, 1969, May 21, 1969, and B-167584, October 3, 1969. As we stated in B-166284, April 14, 1969:

'The crux of the matter is the intent of the offeror and anything short of a clear intention to conform on the face of the bid requires rejection.

\* \* \* \* \*

'When more than one possible interpretation may reasonably be reached

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from the terms of a bid 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 extraneous material.'

"Award of a contract pursuant to formal advertising may be made under 10 U.S.C. 2305(c) only to the low responsible bidder whose bid conforms to the invitation. We do not believe that statutory requirement may be negated by a regulatory provision, such as Armed Services Procurement Regulation § 2-202.5(f), which presumes a bid to conform or be unqualified where the intent of the bidder is ambiguous. Cf. B-166284, May 21, 1969. Nor do we believe that the invitation for bids may establish any arbitrary conventions which provide that the clear language of the bid will be ignored unless presented in a particular form."

The question before us is whether the included literature can be said to be reasonably susceptible of a conclusion that it was intended to qualify the bid. In our view the repeated references to the solicitation in the cover letter and attached "proposal" could reasonably have been perceived by the contracting officer as making the included information a part of McGill's bid.

The literature, having a perceivable intended relationship to McGill's bid, is subject to close scrutiny in order to determine whether it contained deviations from the solicitation. Dominion, supra. As pointed out above, McGill took exception to the requirement that it include all applicable taxes in its price. In the event of an award on such a bid the contractor would be in a position to insist that the contract price should be increased by the amount of any applicable taxes, such as state and local taxes, contrary to the tax clause of the invitation. This exception to including all applicable taxes in the bid was therefore a material deviation from the terms of the IFB. Allis-Chalmers Material Handling Sales and Service, B-183228, May 6, 1975, 75-1 CPD 280. As we stated in 41 Comp. Gen. 289 (1961) at 293:

\*\* \* \* [W]e would not deem it appropriate to impose upon the several contracting agencies

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the burden of examining into the tax situation of each bidder who may elect to submit a bid price on an unsolicited tax-excluded basis, and of making unilateral determinations of the amount of applicable taxes which may or may not be correct and acceptable to such bidders."

Since the condition imposed in McGill's bid is a material variation from the exact requirements of the invitation for bids, it may not be waived or corrected. Allis-Chalmers, supra; 41 Comp. Gen., supra; ASPR § 2-405.

McGill also argues that the unsolicited documents were not intended to modify its bid, and, to the extent they did so, they were mistakenly included in the bid package. To that end, relying on ASPR § 2-406, McGill, after bids were opened, submitted affidavits to affirm the intended meaning. We have consistently held, however, that bid correction procedures are available only to permit correction of bids which, as submitted, are responsive to the invitation. Such procedures may not be used to make them responsive. To permit otherwise would be contrary to the principle that bids may not be altered after bid opening to make them acceptable. Redifon Computers Limited--Reconsideration, B-186691, June 30, 1977, 77-1 CPD 463.

Inasmuch as the issues discussed are dispositive of the protest, we do not consider the additional grounds relied upon by the contracting officer in finding McGill's bid non-responsive.

#### The Lieb-Jackson Protest

Prior to the current solicitation of August 22, 1977, the Corps issued invitation for bids DACA31-77-B-0053 (IFB-0053) on July 6, 1977, for the procurement of the same end item, the electrostatic precipitator.

On July 8, 1977, Amendment 0001 to IFB-0053 was issued, revising certain portions of the specifications concerning coal analysis. Lieb-Jackson prepared a bid for this solicitation but was unable, for unexplained reasons, to submit the bid by August 3, 1977, the bid opening date. Since only one nonresponsive bid was received by the Corps to this solicitation, IFB-0053 was canceled.

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On August 22, 1977, IFB-0080 was issued. The only revisions to the solicitation from IFB-0053 were in the technical specifications, including those concerning coal analysis. The revised specifications concerning coal analysis in IFB-0080 varied from those contained in Amendment 0001, dated July 8, 1977 under IFB-0053, the prior canceled solicitation. No amendments were issued to IFB-0080.

Lieb-Jackson submitted duplicate bids to IFB-0080. Both bids contained an acknowledgement of Amendment 0001, dated July 8, 1977, which had been previously issued under the prior solicitation.

The Corps reports that the electrostatic precipitator is being procured to reduce pollutants emitted from coal-fired boilers in its heating plant at Lima, Ohio. The Government must specify in the solicitation the grade of coal it intends to use in order to establish the design criteria, e.g. size, capacity, and efficiency of the electrostatic precipitator.

The coal analysis specified in Amendment 0001 and referenced in Lieb-Jackson's bid, established a collection efficiency of 97%, a maximum outlet loading of 0.135 lbs./10<sup>6</sup> BTU, and a maximum unit capacity of 50,000 lbs./hr. The coal analysis specified in IFB-0080 established a collection efficiency of 98.5%, a maximum outlet loading of 0.12 lbs/10<sup>6</sup> BTU, and a maximum unit capacity of 60,000 lbs./hr. Thus, the coal analysis specifications set forth in Amendment 0001 can be met by an electrostatic precipitator which may not be able to meet the coal analysis specifications of IFB-0080. The contracting officer, therefore, determined Lieb-Jackson's bid to be nonresponsive.

Lieb-Jackson contends that a bid is not nonresponsive by the reason of the acknowledgment of a nonexistent amendment and that such an acknowledgment should be waived as a minor informality, citing Tennessee Valley Service, Inc., B-186380, June 25, 1976, 76-1 CPD 410. We disagree and find Tennessee Valley distinguishable. In that case, the original bid package contained an Addendum No. 1, dated February 25 1976, to the specifications which the bidder acknowledged as amendment No. 1, February 25, 1976. The bidder did not reference anything in its bid deviating from the requirements of the original bid package, but merely confused the word "addendum" with the word "amendment".

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At the very least, the reference in Lieb-Jackson's bid to the prior amendment containing different specification requirements rendered the bid ambiguous to a certain degree. It became less than sufficiently clear whether Lieb-Jackson intended to furnish an electrostatic precipitator in accordance with the specification requirements of Amendment 0001 or those of IFB-0080. Where a bid is subject to two reasonable interpretations, under one of which it would be responsive and under the other nonresponsive, the bid must be rejected as ambiguous. M.A. Barr, B-189142, August 3, 1977, 77-2 CPD 77; Rix Industries, B-184603, March 31, 1976, 76-1 CPD 210. Lieb-Jackson's bid falls short of an unequivocal offer to provide, without exception, the requested items in total conformance with the terms and specification requirements of the invitation.

Lieb-Jackson also argues that the electrostatic precipitator it intends to furnish would meet the specification requirements of both IFB-0080 and Amendment 0001. It has been the consistent position of this Office that the responsiveness of a bid, that is, the bidder's intention to comply with all IFB specifications, must be determined from the face of the bid itself at the time of bid opening. Transport Engineering Company, Inc., B-185609, July 6, 1976, 76-2 CPD 10. Further, a bidder may not explain the meaning of its bid after opening as such action would serve to undermine the integrity of the bidding system and cause overall harm to the system of competitive bidding despite the immediate advantage gained by a lower price in the particular procurement. 40 Comp. Gen. 393, 397 (1961).

Accordingly, the protests are denied.

  
Deputy Comptroller General  
of the United States