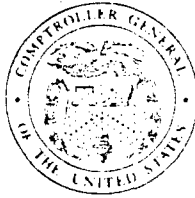


DECISION



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

51037

FILE: B-183799

DATE: September 23, 1975

MATTER OF: Abbott Laboratories

97429

DIGEST:

1. Unsolicited descriptive literature accompanying bid containing unsolicited model number must be considered to determine responsiveness of bid.
2. Where it was implicit in IFB that analyzers were to be capable of maintaining incubation at 30° C when operating at higher ambient temperatures and cooling accessory was listed as optional feature in bidder's unsolicited literature, failure to indicate in bid that accessory would be furnished was material omission.
3. Where unsolicited literature provided with bid showed compliance with calcium requirement in IFB specification bid was responsive on that point and doubt that bidder would be able to develop equipment with calcium capability within delivery requirement of IFB because of bidder's letter to customers dated day before bid opening advising that equipment was not presently adaptable to calcium reagents actually related to bidder's responsibility.
4. While it is initial responsibility of Government to state what is required in reasonably clear terms, bidders are expected to scrutinize carefully the whole solicitation to ascertain the Government's requirements.
5. Doctrine of equitable estoppel is not for application when communications upon which protester allegedly relied were not from officials with authority to bind Government and protester was not justified in acting on strength of official's apparent authority.

Invitation for bids No. F49642-75-00121 was issued for the procurement of 24 automated clinical microchemical analyzers by the Air Force Washington Area Procurement Center, Andrews Air Force Base, on December 31, 1974. Bids of \$417,576 and \$425,580 were received from Abbott Laboratories (Abbott) and Gilford Instrument Laboratories, Inc. (Gilford), respectively. The bids were evaluated in concert with technical representatives and the Abbott bid was found to be acceptable. Preparations for award to Abbott proceeded until Gilford filed a protest with the contracting officer.

The bases of the Gilford protest, in pertinent part, were: (1) that the analyzers offered by Abbott were not presently adaptable to calcium reagents as required by the specifications, and (2) that the analyzers offered by Abbott did not have cooling systems as required by the specifications.

The contracting officer rejected Abbott's bid and awarded the contract to Gilford. The decision to reject Abbott's bid was based on the following findings. First, the contracting officer found that the ABA-100 offered by Abbott did not have an assured calcium capacity, although a calcium test was being developed. Second, it was found that the ABA-100 cannot control the temperature in the test reaction chamber to 30° C, as required by the specification, when the outside temperature is in excess of 30° C.

Abbott appealed the decision of the contracting officer to the Secretary of the Air Force. The Assistant General Counsel of the Air Force responded for the Secretary and rejected the Abbott protest on two grounds. First, Abbott included a particular model number in its bid which raised the possibility that Abbott was offering a particular machine rather than offering to provide a machine that would conform to the Government specifications. Second, the bid was nonresponsive since the ABA-100 had no refrigeration system to regulate the temperature in the reaction chamber.

Following the decision of the Assistant General Counsel, Abbott protested to this Office. While the protest was pending, Abbott instituted an action in the United States District Court for the District of Columbia. The district court denied Abbott's request for a preliminary injunction; and, subsequently, Gilford completed performance of the contract awarded to it by the Air Force. However, the district court has indicated that it will defer consideration of the merits of the case pending a decision by this Office.

A major issue in this protest is the effect of Abbott's inclusion in its bid of an unsolicited model number. This Office has held that the unsolicited listing of a model number in a bid creates an initial ambiguity. See Lift Power, Inc., B-182604, January 10, 1975, 75-1 CPD 13; B-174025, March 31, 1972; 50 Comp. Gen. 8 (1970). When a model number is included in the bid it is not clear whether the bidder is offering to supply material in complete conformance with the specifications in the IFB or merely offering to supply a particular model which may or may not conform to the specifications. Unless it is shown that the model listed conforms to the specifications, the bid must be rejected as non-responsive to the invitation for bids. As we stated in Lift Power, Inc., supra, "The question of responsiveness of a bid concerns whether a bidder has unequivocally offered to provide the requested items in total conformance with the terms and specification requirements of the invitation." (Emphasis supplied).

The initial ambiguity as to whether the bidder is offering an item that conforms to the specifications may be clarified by the presence of an express statement in the bid that the model indicated conforms with all the requirements listed in the IFB. See B-178046, July 25, 1973. Such an express statement that the specifications would be complied with was included in Gilford's bid but was absent from Abbott's bid.

Another method by which the initial ambiguity may be clarified is by the contracting officer's evaluation of data, available prior to bid opening, which indicates conformity of the offered model to the specifications in the IFB. B-178046, supra. Only the material available at bid opening may be considered. Reliance on information supplied by a bidder after bid opening is not permissible, since such a practice would allow the bidder an option to affect the responsiveness of his bid. Waukesha Motor Company, B-178494, June 18, 1974, 74-1 CPD 329; Sheffield Building Company, Inc., B-181242, August 19, 1974, 74-2 CPD 108.

Abbott's bid included a reference to a list number which identified the ABA-100 analyzer in the unsolicited literature attached to the bid. The unsolicited literature also described the ABA-100 analyzer. Unsolicited descriptive literature accompanying a bid containing an unsolicited model number must be considered by the

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contracting officer to determine the intent of the bid. See B-171833, April 22, 1971. If the contracting officer can determine that the model listed conforms in all material respects to the specification in the IFB, then the inclusion of the model number is inconsequential with respect to the issue of bid responsiveness.

The literature attached to Abbott's bid described the ABA-100 analyzer and accessories. A footnote to a price list included in the literature stated:

"NOTE: Cooling accessory available to facilitate 30° C operation at elevated ambient temperature. Price on request. * * *"

From the note, it is apparent that the cooling accessory is an optional feature for the ABA-100 analyzer. There is nothing in the Abbott bid indicating that the cooling accessory is a part of the offered equipment. This omission is a material defect unless the ABA-100 meets the specifications without the cooling accessory.

While it is the province of the officers of the contracting agencies to draft specifications and determine factually whether the items offered meet those specifications, this Office will resolve questions concerning the interpretation of specifications. 38 Comp. Gen. 190 (1958).

In this case, the IFB specification provided:

"Incubation at 30° C shall be provided by heating and cooling systems, with temperature regulation not to exceed 0.1° C."

Abbott contends that its ABA-100 analyzer, which employs fan cooling, complies with the specifications in that the specifications did not expressly state that the analyzer must be capable of operating at an ambient temperature higher than 30° C. However, the IFB required shipment of a number of the analyzers to destinations in warm climates where the ambient air temperatures may exceed 30° C. It is reasonable to assume that the Government would desire analyzers that would function when air conditioning had broken down or was nonexistent, or where it was necessary for the laboratory to be kept at a temperature in excess of 30°C.

Therefore, we believe that it was implicit that the analyzers were to be capable of maintaining incubation at 30° C when operating at a higher ambient temperature. Accordingly, the failure to indicate that the cooling accessory would be furnished was a material omission.

Another basis the contracting officer relied upon for refusing to accept Abbott's bid was that the ABA-100 did not have the capability to perform a calcium test although a test was in the process of development. The calcium test requirement was a part of the IFB specifications. The literature furnished by Abbott with the bid represented that the ABA-100 performs calcium tests. However, the Gilford protest brought to the contracting officer's attention an Abbott letter to customers dated the day before bid opening in which it advised that ABA systems were not presently adaptable to calcium reagents. Abbott responded that a calcium procedure was being developed for the ABA-100 and that it expected it would be available by the time the analyzers were to be installed. The contracting officer concluded that the bid was contingent upon the calcium procedure being developed and therefore considered it nonresponsive. No contingency was stated in the Abbott bid. Moreover, since the literature provided with the bid showed compliance with the calcium requirement, the bid was responsive on that point. The doubt that Abbott would be able to deliver analyzers with a capability for calcium tests within the delivery requirements of the IFB actually related to the responsibility of Abbott. BOW Industries, Incorporated, B-181828, December 12, 1974, 74-2 CPD 330; B-174919, April 17, 1972. In that regard, although the contracting officer considered the bid nonresponsive because the ABA-100 was considered to have failed to meet the calcium procedure of the specification, the record indicates also that Abbott was unable to assure the contracting officer that the ABA-100 would have an approved calcium procedure prior to the time required for delivery. Thus, in essence, the contracting officer also determined that Abbott was not a responsible bidder on the subject contract. In the circumstances, we are unable to disagree with the rejection over the calcium procedure.

As an alternative basis for protest, Abbott alleges that the IFB was ambiguous; and therefore, a valid award could not be made under it. The Armed Services Procurement Regulation (ASPR) provides for purchase descriptions setting forth "essential physical and functional characteristics." These characteristics specifically include "restrictive environmental conditions" and "essential operating conditions." ASPR § 1-1206.1 (a)(vi) and (vii)(B) (1974 ed.).

It may be that the specifications in the IFB could have been more detailed. However, for the reasons indicated above, it could fairly be understood from the IFB, even though not expressed therein, that the operating temperatures could well be in excess of 30° C. In any event, the test is not whether, with the additional wisdom gained through hindsight, the Government might have been more precise and exhaustive in describing its requirements. While it is the initial responsibility of the Government to state what is required in reasonably clear terms, bidders are expected to scrutinize carefully the whole solicitation to ascertain the Government's requirements.

Abbott contends that the Government is estopped by its prior conduct to deny the responsiveness of the Abbott bid. Although denied by the Air Force officers involved, Abbott contends that Air Force personnel gave assurances to Abbott's officers that the ABA-100 conformed to Air Force needs.

In United States v. Georgia-Pacific Company, 421 F.2d 92 (9th Cir. 1970), the court propounded four elements that must be present in order to establish an estoppel:

- (1) the party to be estopped must know the facts;
- (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;
- (3) the latter must be ignorant of the true facts;
- (4) he must rely on the former's conduct to his injury.

The information that Abbott relied on allegedly was given by Air Force medical personnel who had participated in the presolicitation evaluation of the analyzers. However, the responsibility for the procurement rested with the contracting officer, not with the medical personnel. Therefore, Abbott would not be justified in relying upon the medical officers' apparent authority. See Prestex, Inc. v. United States, 320 F.2d 367 (1963). Furthermore, it has been consistently held that the United States is not liable for the erroneous acts or advice of its officers, agents or employees even if committed in the

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performance of their official duties. See Flippo Construction Co., Inc., B-182730, May 20, 1975, 75-1 CPD 139; A. D. Roe Company, Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD 194; 46 Comp. Gen. 348 (1966); 44 Comp. Gen. 337 (1964); Prestex, Inc. v. United States, supra. Therefore, the statements allegedly made by Air Force medical personnel cannot act to estop the Government from rejecting Abbott's bid as it was required to do by law. See A. D. Roe Company, Inc., supra.

Consequently, valid legal bases existed for the rejection of Abbott's bid and the protest is therefore denied.


Deputy Comptroller General
of the United States