

01597

DECISION



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

T. Sarno
Proc II

FILE: B-186747

DATE: March 9, 1977

MATTER OF Carco Electronics

DIGEST:

1. Where agency's position was favorable to protester until August 24, 1976, protest filed within 10 working days of this date is timely and protester did not have to file prior "defensive" protest.
2. Experience requirement for "list of simulators delivered with organizations, addresses and names of individuals that may be contacted" pertains to simulators in general previously produced by bidder and therefore goes to bidder's capacity to perform (responsibility) rather than obligation to perform (responsiveness). Experience data pertaining to responsibility may be submitted by bidder subsequent to bid opening.
3. Where bidder's cover letter proposed to supply Government with model 53M-2 simulator, cover letter must be considered as part of bid itself. Unsolicited insertion of manufacturer's model number in bid creates ambiguity as to whether bidder agreed to supply items conforming to IFB specifications rendering bid nonresponsive in absence of express statement by bidder that model complies with specifications.
4. Bidder's unsolicited design and specification brochure may not be disregarded where it appears bidder is offering model described therein and where model does not comply with Government's stated requirements bid must be rejected as nonresponsive. Moreover ASPR § 2-404.4 precludes consideration of bids accompanied by unsolicited literature qualifying bid and restricting disclosure of literature.

By letter dated September 30, 1976, Carco Electronics (Carco) protested the prospective award of a contract for the procurement of 2 three-axis flight motion simulators and related manuals and drawings to the Contraves-Coerz Corporation (C-G), the low bidder, under invitation for bids (IFB) F29651-76-00089 issued by Holloman Air Force Base. Previously, by letter dated June 17, 1976, C-G protested the rejection of its bid as nonresponsive by the Air Force for failure to submit experience data required by the IFB. However, on July 26, 1976, the Air Force sustained C-G's protest. Thereafter, on September 3, 1976, Carco protested to the Air Force C-G's restrictive legend on what Carco describes as descriptive data submitted by C-G with its bid.

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Counsel for C-G questions the timeliness of Carco's protest, arguing that the basis of the protest should have been known to Carco at the time of bid opening on June 11, 1976. Thus, counsel contends Carco's protest to the Air Force on September 3, 1976, was in excess of the 10 working days permitted by the Bid Protest Procedures, 4 C.F.R. § 20.2 (1976).

In our view, however, Carco had no reason to file a protest prior to September 3, 1976. Before this, the Air Force's position was favorable to Carco, the Air Force having initially found C-G's bid to be nonresponsive. Though Carco was advised by the Air Force by letter dated August 3, 1976, that C-G's protest was upheld, the record shows that subsequent to this date the contracting officer was actively trying to get C-G to remove its restrictive legend. Not until C-G's August 24, 1976, response to the contracting officer was it clear that C-G would not acquiesce in the contracting officer's request and remove its restrictive legend. Carco's September 3, 1976, protest to the Air Force was within 10 working days of this date. We believe that to adopt counsel's position would be to place the burden upon bidders to file "defensive" protests, a practice which we specifically disapproved of in Action Manufacturing Company, B-186195, November 17, 1976, 76-2 CPD 424. Thus, we find Carco's protest to be timely.

The Air Force reports that at bid opening on June 11, 1976, bids were received from C-G, Carco, and the Benton Corporation. C-G and Carco were the low and second low bidders, respectively.

Under the heading "BID SUBMITTALS," the subject IFB provided:

"Bids will be accepted only from bidders who have built similar simulators. Information submitted with bids shall include a list of simulators delivered, with organizations, addresses and the names of individuals that may be contacted. Information shall also be sufficient to allow bids to be evaluated to determine compliance with these specifications."

With its bid, C-G submitted the following cover letter quoted in pertinent part:

"Contraves-Goerz is pleased to submit our bid in response to the Air Force request for a Three-Axis Flight Motion Simulator F29651-76-00089.

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"As you are aware, Contraves-Goerz has supplied similar equipment not only to Holloman AFB but to most government and commercial aerospace facilities for a number of years.

"The Model 53M-2 proposed is one of a family of standard simulators designed and built by Contraves-Goerz. As such, Contraves-Goerz believes there is no technical or scheduling risk involved with selection of this mount.

* * * * *

"In addition to the required documentation, we have also included a description and specification for the Model 53M-2 Three-Axis Flight Simulator, P-4544."

The cover page of C-G's description and specification brochure contained the following restrictive legend:

"The information contained herein is made available as the property of, and for the purposes of, CONTRAVES-GOERZ CORPORATION, Subsidiary of CONTRAVES AG, OERLIKON-BUHRLE HOLDING. It cannot be lawfully reproduced in any form nor divulged to any Third Party, nor used for any purpose other than that for which it is being made available to you, without the specific written consent of CONTRAVES-GOERZ CORPORATION."

After reviewing C-G's description and specification brochure, the contracting officer, in a letter to C-G dated August 12, 1976, requesting clarification, noted seven instances in which C-G's specifications varied from those in the IFB. In response to this, in a letter to the contracting officer dated August 24, 1976, C-G stated that it was obligated to perform in "strict accordance" with the specification contained in the IFB and that its brochure was submitted pursuant to the IFB's experience requirement.

C-G did not submit further data on its experience in producing simulators until June 15, 1976, four days subsequent to bid opening, when it supplied a list of simulators previously delivered and names of customers. Based on C-G's failure to submit experience data with its bid, the contracting officer rejected the bid as nonresponsive and C-G protested.

The Air Force sustained C-G's protest on the ground that a finding of nonresponsiveness for failure to submit experience data must be based on a requirement for data relating to experience with an identical item and not a similar item, as in this case. It is the Air Force's position that a requirement for experience data which pertains to similar items is a matter of bidder responsibility and therefore cannot be used for purposes of bid evaluation. Thus, the Air Force contends that data of this nature may be supplied by a bidder subsequent to bid opening and a cautionary statement to this effect must first appear in the solicitation before a bidder may be found nonresponsive because of its failure to submit such data. A bidder is contractually bound, the Air Force further contends, to supply a product which conforms to the specifications set forth in the IFB. The basis for this statement is that the item description in the IFB bid schedule calls for a simulator "in strict accordance with specifications listed in section F (specification section)."

It is Carco's position that the IFB provision entitled "BID SUBMITTALS" quoted above, in effect pertains to descriptive data of the type necessary to evaluate the suitability of the item offered and therefore under past decisions of our Office goes to the matter of bid responsiveness. See Lansmont Corporation, B-184734, October 9, 1975, 75-2 CPD 227. Thus, Carco argues: (1) C-G's failure to furnish adequate technical data upon which its bid could be evaluated to determine compliance with the IFB's specifications renders it nonresponsive and to waive the requirement for the evaluation of such data would be prejudicial to other bidders; (2) C-G's failure to furnish experience data with its bid likewise renders its bid nonresponsive and the waiver of such requirement is prejudicial to Carco and; (3) if despite C-G's assertion (that the brochure was submitted solely for the purpose of determining bidder responsibility) the Air Force considered the brochure for the purpose of bid evaluation, the restrictive legend on the face of the brochure renders C-G's bid nonresponsive pursuant to Armed Services Procurement Regulation (ASPR) § 2-404.4 (1976 ed.) which provides:

"When a bid is accompanied by descriptive literature (as defined in 2-202.5(a)), and the bidder imposes a restriction that such literature may not be publicly disclosed, such restriction renders the bid non-responsive if it prohibits the disclosure of sufficient information to permit competing bidders to know the essential nature and type of the products offered or those elements of the bid which relate to quantity, price and delivery terms. The provisions of this paragraph do not apply to unsolicited descriptive literature submitted by a bidder if such literature does not qualify the bid (see 2-202.5(f))."

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In response to Carco's contentions, counsel for C-G asserts that the bid submittal clause relates to the matter of bidder responsibility in its entirety.

From our examination of the "BID SUBMITTALS" clause, we believe that it is clear that the requirement for " * * * a list of simulators delivered, with organizations, addresses and the names of individuals that may be contacted" does not pertain exclusively to the item being procured but includes simulators, in general, previously produced by the bidder. Such an experience requirement therefore pertains to a bidder's capacity to perform (responsibility) rather than its obligation to perform (responsiveness). See 52 Comp. Gen. 647 (1973). In this regard, we have held that a bidder may properly submit data pertaining to its responsibility subsequent to bid opening. James E. McFadden, Inc., B-186180, June 17, 1976, 76-1 CPD 393. Thus, we cannot object to C-G's submission of its experience data subsequent to bid opening.

However, we do not believe that it is necessary to decide whether the requirement for "[i]nformation * * * sufficient to allow bids to be evaluated to determine compliance with these specifications" goes to the matter of responsiveness or responsibility in order to resolve this protest.

We have held that a cover letter to a bid must be considered as part of the bid itself. New England Engineering Co., Inc., B-184119, September 26, 1975, 75-2 CPD 197. Thus, C-G's cover letter in which the model 53M-2 is "proposed" must be read as an offer to supply the Government with C-G's model 53M-2 simulators. In this regard, our decisions have held that the unsolicited insertion of a manufacturer's model number in a bid creates an ambiguity as to whether the bidder has agreed to supply items conforming to the IFB specifications and renders the bid nonresponsive in the absence of an express statement by the bidder that the specified model number complies with the IFB specifications. See 50 Comp. Gen. 8 (1970); Huey Paper and Material, Stacor Corporation, B-185762, June 16, 1976, 76-1 CPD 382. Since no such express statement appears in C-G's bid, it is nonresponsive.

Further, as noted above, C-G's design and specification brochure furnished "in addition to the required documentation" has been found to contain exceptions to the IFB specifications. We have held that a bidder's unsolicited descriptive literature may not be disregarded where it appears the bidder is offering the model described therein and when the model does not comply with the Government's stated requirements.

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Dominion Road Machinery Corporation, B-186737, February 4, 1977, 56 Comp. Gen. _____. Thus even assuming arguendo that the requirement in question goes to the matter of bidder responsibility, as counsel for C-G contends, and that C-G's brochure may therefore be viewed as unsolicited descriptive literature, we believe that C-G's design and specification brochure renders its bid nonresponsive. For that reason and because in addition ASPR § 2-404.4, supra, precludes the consideration of bids accompanied by unsolicited literature qualifying the bid and restricting the disclosure of the literature, the C-G bid should be rejected.


Acting Comptroller General
of the United States