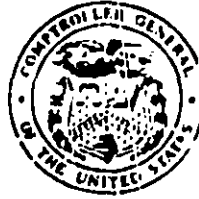


4249  
03951  
**DECISION**



*J. Hatopoulos*  
P. 2  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

**FILE: B-189502**

**DATE: October 21, 1977**

**MATTER OF: Warner Laboratories, Inc.**

**DIGEST:**

Where IFB leading to award of indefinite delivery type contract on basis of lowest aggregate bid, requires insertion of unit and extended prices for each line item, bid which imposes restriction against public disclosure of line item prices is properly rejected as nonresponsive since condition is contrary to requirement for public opening and examination of bids.

Warner Laboratories, Inc. (Warner) has filed this protest against the determination by the Department of the Interior's Bureau of Mines (BOM) that its bid under invitation for bids (IFB) No. S0376026 was nonresponsive and ineligible for award because it contained a provision prohibiting the disclosure outside the Government of the unit and extended prices for 19 line items required to be inserted in the schedule on pages 8(a) and 9(a) of the IFB.

The 19 line items each represented specific tests or combination of tests for analyzing coal samples. Award was to be made on an indefinite delivery type basis, with specified minimum and maximum quantities of each line item. For evaluation purposes, an estimated quantity was specified for each line item, with the required unit prices to be extended by the estimated quantity.

Four bids were received. Although the bid schedule did not provide for the insertion of total aggregate prices, Warner, the second low bidder, and Black Rock Testing Laboratories, Inc., the low bidder, totaled their extended prices and provided a line for that aggregate figure. Therefore, only that figure was read by the Bid Opening Officer. The other two bidders did not total their bids, and their unit prices were read aloud and then added. Black Rock's low bid was subsequently rejected when it was concluded that the firm lacked the capability to perform this particular work.

Warner placed an admonition on the cover page of its bid stating that its offer contained "confidential and privileged information." Just prior to pages 8(a) and 9(a) Warner inserted its own attachment to the bid package stipulating:

"The data on pages 3A and 9A and attachments are considered confidential or privileged, and not subject to mandatory disclosure under the Freedom of Information Act. This information shall not be disclosed outside the government and shall not be duplicated, used, or disclosed in whole or in part for any purpose other than to evaluate the proposal. If a contract is awarded to this offeror as a result of or in connection with the submission of this data the government shall have the right to reveal the aggregate total dollar value of the contract only. Use or disclosure of data on this page is subject to the restrictions of the title page."

In arguing that its bid is fully responsive, Warner points to Article III at page 13 of the IFB, which provides that bids must include unit prices for each item "in order that bids may be properly evaluated" and that "award shall be made to that responsible bidder whose total aggregate price is low." Warner contends that since unit prices are for evaluation purposes only and the basis for award is the low aggregate price, only that price is subject to public disclosure and therefore it could properly restrict the 19 price components as protected "trade secrets and commercial or financial information", which are exempt from disclosure under the Freedom of Information Act (FOIA) (5 U.S.C. § 552 (b) (4)).

In this regard, Warner's counsel cites RCI Microfilm, B-182169, April 10, 1975. 75-1 CPD 220, in which it was held that worksheets and other information submitted by the low bidder in support of an alleged mistake in bid need not be disclosed to competing bidders. Warner's counsel states that the 19 component unit prices "are very similar" to the worksheets in RCI Microfilm. Warner also alludes to Computer Network Corporation, 55 Comp. Gen. 445 (1975), 75-2 CPD 297, in which it was stated that the purpose of a public bid opening is to protect both the public interest and other bidders against any form of fraud, favoritism or partiality, and argues that the restriction on disclosure of unit prices could not give rise to any such consequences.

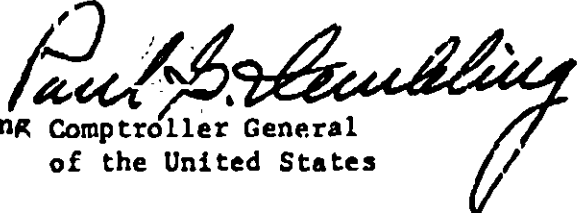
We find no merit to Warner's contentions. The public advertising statute, 41 U.S.C. § 253(b) (1970), requires that: "All bids shall be publicly opened at the time and place stated in the advertisement." In this regard, implementing Federal Procurement Regulations (FPR) 1-2.402(a) (1964 ed.) requires that bids be publicly opened, read aloud when practicable, and recorded. FPR 1-2.402(c) provides for the examination of bids by interested persons providing it does not interfere unduly with the conduct of Government business. The only permissible restriction upon public disclosure of a bid is limited to descriptive literature accompanying the bid upon which the bidder imposes a restriction (FPR 1-2.404-4), and even then such limited restriction will render the bid nonresponsive if it prohibits the disclosure of sufficient information to permit competing bidders to know the essential nature and type of products offered or those elements of the bid relating to quantity, price and delivery terms. Computer Network Corporation, supra; 53 Comp. Gen. 24 (1973). In short "it is the essence of formal advertising that sealed bids be opened in public with public examination permitted." Redifon Computers Limited - Reconsideration, B-186691, June 30, 1977, 77-1 CPD 463.

With regard to the instant situation, FPR 1-2.403 states that except in the case of a classified procurement (which is not the case here), "names of bidders, prices bid and any other information required for bid evaluation, shall be entered in an abstract or record" unless the items are too numerous to warrant the recording of all bids completely /emphasis added/. Such abstract or record "shall be available for public inspection." Obviously, the line item prices were expressly required for bid evaluation. Moreover, although award is to be made on the basis of total aggregate price, it is the individual line item unit prices that are the material, essential pricing elements of the resulting contract in view of the indefinite quantity nature of that contract. Thus, it cannot be said that the restriction in Warner's bid does not prevent the disclosure of price, quantity and delivery terms. Consequently, we do not agree that the failure to disclose Warner's unit prices would not result in apparent favoritism or partiality, and we do not agree that there is anything "similar" between Warner's unit prices, which are an essential part of its bid, and the worksheets submitted in RCI Microfilm, which merely were data extrinsic to the bid. As we said in that case:

B-189502

"\* \* \* a public opening has been interpreted to mean that the bid must publicly disclose to all competing bidders the essential nature and type of the products offered and those elements of the bid which relate to price, quantity, and delivery terms. 53 Comp. Gen. 24, 25 (1973). In our opinion, however, information submitted by a bidder after bid opening in support of a bid correction claim is not a part of the bid itself."

We find that Warner's bid was properly rejected as nonresponsive. The protest is denied.

  
Acting Comptroller General  
of the United States