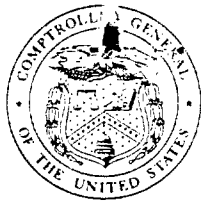


12478 PL-11
Mr. Baskin



DECISION

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

FILE: B-196432; B-196432.2 DATE: January 9, 1980

MATTER OF: Fisher Berkeley Corporation;
International Medical Industries

DIGEST:

1. Where bidder fails to submit required certification documents that its equipment has been tested by nationally recognized laboratory, if bid indicates equipment has in fact been tested and meets solicitation requirements, deficiency can be waived after bid opening.
2. Ability to comply with solicitation requirements is matter of responsibility. Information concerning responsibility may be supplied after bid opening.

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Fisher Berkeley Corporation (Fisher Berkeley) and International Medical Industries (IMI) protest the award of a contract to Technical Industries, Inc. for a nurses call system under invitation for bids 546-23-79, issued by the Veterans Administration Medical Center, Miami, Florida. Fisher Berkeley, a supplier of nurse call equipment, protests on behalf of its dealer, Tenavision, Inc., whose bid was rejected for failure to comply with a solicitation requirement to provide documents issued by a nationally recognized testing laboratory certifying that the equipment meets a certain standard. IMI also protests its rejection for the same reason. IMI's protest was untimely filed, but the issues it raises will be resolved by our consideration of Fisher Berkeley's protest.

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Tenavision was rejected as nonresponsive because its bid failed to include certification documents in accordance with paragraph 862.4(c) of the IFB, which states:

[Protest Against Contract Award]

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"Where a UL standard is in existence for supplies, equipment or materials to be used in completion of this contract, a test must be conducted to certify the supplies, materials or equipment meet the UL standard. This test must be conducted by Underwriters Laboratory or a nationally recognized testing laboratory, which makes periodic inspections of the production of such supplies, materials and equipment. The bidder, or offeror shall provide with their proposal, certification documents supplied by the testing laboratory for each piece of equipment, supplies or materials to be furnished for the project, that indicates the items conform to UL standards, where such standards exist. The equipment, supplies or material to be installed under this contract must bear the label or seal of the testing laboratory that warrants the equipment, supplies or material have been tested in accordance with, and conforms to the specified standards. FAILURE TO PROVIDE CERTIFICATION DOCUMENTS WITH THEIR PROPOSAL WILL RESULT IN THE BID OR PROPOSAL BEING DECLARED NON-RESPONSIVE." (Emphasis in the original.)

Fisher Berkeley contends that what Tenavision submitted with its bid met the solicitation requirements. The VA argues that the IFB required certification documents supplied by the testing laboratory and that Tenavision's documents, while containing the UL symbol, were printed by Fisher Berkeley and not issued directly by a testing laboratory as required.

The test to be applied in determining the responsiveness of a bid is "whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation, and upon acceptance will bind the contractor to perform in accordance with all the terms and conditions thereof." 49 Comp. Gen. 553, 556 (1970). We have also held that, in some cases,

the required commitment need not be made in the manner specified by the solicitation; all that is necessary is that the bidder, in some fashion, commit itself to the solicitation's material requirements. A. A. Beiro Construction Company, Inc., B-192664, December 20, 1978, 78-2 CPD 425. Furthermore, a solicitation requirement is not necessarily material simply because it is accompanied by a warning that failure to comply will result in rejection of the bid. 39 Comp. Gen. 595 (1960).

In this case, Tenavision's bid was accompanied by Fisher Berkeley descriptive literature which contained the UL symbol and referred to the specific UL standard with which compliance was required. In the same manner, IMI's bid indicated an intent to furnish UL-approved equipment. The VA argues that this is insufficient to satisfy the certification requirement because a company might include equipment and the UL symbol on data sheets it prints itself when the equipment is not in fact approved by UL. Only by the submission of cards issued directly by UL, the VA asserts, can it be certain that offered equipment actually has been UL-approved.

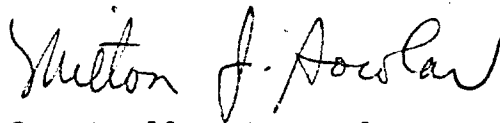
We think the VA's position is too rigid. We understand that the UL symbol is a registered trademark and may only be used in connection with a product if UL has tested and approved the product. Thus, we think it unlikely that a bidder's literature would falsely indicate UL approval. In any event, when a bidder submits with its bid documents indicating that the equipment it proposes to furnish is UL tested and approved, acceptance of that bid would result in the bidder's legal commitment to furnish UL-approved equipment. Since the purpose of IFB paragraph 862.4(c) is to secure a commitment that the proposed equipment has been tested to and meets the specified UL standard, we believe Tenavision's and IMI's bids clearly complied in all material respects, with paragraph 862.4(c) and that their failure to submit the listing cards with their bids may be waived. See Worcester Electrical Associates, B-193064, April 5, 1979, 79-1 CPD 236.

Of course, if the VA has any question as to the ability or intention of a bidder, such as Tenavision or IMI in this case, to actually furnish a UL-approved product and believes that UL listing cards will evidence that ability or intention, it may pursue that matter as part of the requisite determination of bidder responsibility. Documentation bearing on bidder responsibility may be furnished after bid opening. 52 Comp. Gen. 389 (1972).

The VA informs us that no work has been done on the contract pending resolution of this protest. Accordingly, we recommend that if either of the bidders is otherwise acceptable, the VA should terminate the contract awarded to the third low bidder and make an award to the lowest responsive, responsible bidder.

In light of our decision, we need not examine Fisher Berkeley's allegation that the equipment Technical Industries intends to furnish does not meet solicitation requirements.

The protests are sustained.

A handwritten signature in cursive script, reading "Milton J. Rowland".

For The Comptroller General
of the United States