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DECISION



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

FILE: B-203391.4

DATE: April 1, 1982

MATTER OF: IFR, Inc.

DIGEST:

1. Although IFB requirement for data establishing that bidders' radio test sets are commercial products does not fit within terms of regulation establishing descriptive data requirements, GAO has recognized validity of similar data requirements regarding commerciality and held that general rules regarding responsiveness of bids containing descriptive literature are applicable to such cases.
2. Since the wording of the provisions relating to the submission of data establishing the commercial nature of the test sets refers to the nature of the particular test set to be procured rather than to the bidders' capacity to produce such a product, the data provisions involve a matter of bid responsiveness.
3. Printed legend on sales brochure submitted with protester's bid, stating that protester reserves right to make design changes does not render bid nonresponsive because brochure was submitted only to establish that basic product bid be commercially available and bidder also submitted identical brochure with the same legend crossed out to show that item bid met technical requirements of IFB.

4. Restriction against disclosure of prices in bid requires that bid be rejected as nonresponsive because it is inconsistent with requirement for public opening of bids. Bid should be rejected even though the contracting officer disclosed the bid prices at opening contrary to the restriction in the bid.
5. Brochure submitted with bid to establish the commercial nature of item offered renders the bid nonresponsive when brochure indicates item does not meet the technical requirements for the basic commercial item set forth in the IFB.
6. Legend in commercial price list stating that prices are subject to change, contained in prospective awardee's bid, along with fact that its brochure described certain necessary features of item to be delivered under IFB as extra-cost options, did not render bid nonresponsive since brochure and price list related to description of basic commercial item while actual test set bid on was a modified version of the commercial item.

BACKGROUND

The United States District Court for the Southern District of Indiana has requested an advisory opinion from our Office with respect to a protest concerning invitation for bids (IFB) No. DAAB07-81-B-1576 issued by the United States Army Communications and Electronics Command, Fort Monmouth, New Jersey. The solicitation called for bids to provide radio testing equipment. Each of the two bidders, Cushman Electronics, Inc. and IFR, Inc., contends it is the low responsive and responsible bidder and entitled to the award.

On August 26, 1981, Cushman, whose bid was higher than IFR's, filed protest with this Office and suit against the Army in the United States District Court for the Central District of California (CV-81-4397RMT) contending that the Army (1) failed to give Cushman adequate notice of a significant solicitation amendment, (2) would not give that firm certain information given to a competing bidder, (3) refused to set aside a portion of the procurement for small businesses and (4) improperly altered a price escalation clause contained in the solicitation. Cushman urged the court to enjoin the Army from awarding a contract under the solicitation pending our determination of its protest. The court granted Cushman a temporary restraining order (TRO) which was vacated on September 20 pursuant to a stipulation between the Army and Cushman.

In the meantime, the Army determined IFR's bid to be nonresponsive because IFR had submitted with its bid commercial literature which stated that IFR reserved the right to make design changes in its equipment. On September 22, IFR filed an action (IP 81-998-C) in the United States District Court for the Southern District of Indiana for declaratory and injunctive relief. IFR obtained a TRO enjoining the Army from making an award. A hearing on IFR's motion for a preliminary injunction was held on October 12. Cushman voluntarily appeared and intervened as a defendant. On October 15, the court enjoined the Army from making an award, asked our Office to consider and resolve the protests of IFR and Cushman¹ and to submit to it our findings and recommendations.

We find that IFR's bid was nonresponsive because it specified in a cover letter included with its bid that portions of its bid could not be disclosed. We find that Cushman's bid was also nonresponsive because the commercial brochure submitted with its bid did not describe a commercially available test set that met the applicable IFB requirements.

¹Cushman has since withdrawn the protest filed with our Office and the Indiana court has agreed that the issues raised by the Cushman protest need not be resolved by our Office.

DISCUSSION

The procurement was limited to "commercial items" which were defined in the solicitation as privately developed products "currently or previously sold in substantial quantities to the general public, to industry or to the Government." The bidders were required to submit with their bids "factual and verifiable data" establishing that the items bid met the commercial item requirement and to attach "a copy of the catalog, or the appropriate pages covering price and published discounts or information that the catalog is on file in the buying office." Bidders were cautioned to delete from their commercial literature any terms and conditions conflicting with the terms and conditions of the solicitation. They were warned that any statements such as "Specifications are subject to change without notice" would render the bid non-responsive.

Attachment 3 to Section J of the solicitation contained minimum requirements which the commercial product was required to meet without modification; Attachment 1 to Section J contained additional requirements which the item as delivered to the Army had to meet. In other words, the solicitation provided that bidders' commercial products had to meet the minimum requirements in Attachment 3 without modification but that these products could be modified to meet the final, more stringent specifications in Attachment 1.

A cover letter included with IFR's bid stated that IFR would comply "with all terms, conditions, provisions, both general and special unless otherwise noted elsewhere in this offer." The letter further provided that certain portions of IFR's bid were considered proprietary and stated that these sections of the bid would be marked. IFR submitted its bid in 14 separate sections and attached to two of these sections a copy of its product brochure. Both brochures contained the following legend:

"The continuous improvement of its products is the intent of IFR, Inc., who reserves the right to make design changes without notice."

One brochure was attached to Section IV of the bid in connection with an IFB provision entitled "EXTENT OF ALLOWABLE MODIFICATION OF OFFERED COMMERCIAL ITEMS" which set forth the minimum characteristics the items had to meet without modification but which did not require submission of data. In this copy of the brochure, the legend was crossed out. That same legend was not crossed out in the other brochure, which was attached to Section VII of the bid in response to an IFB requirement that the product offered be established as a commercial item. The IFB required submission of a modified Standard Form DD 633-7 entitled "COMMERCIALITY DATA" which in turn contained a requirement to attach a "copy of the catalog, or the appropriate pages covering price and published discounts." In addition, IFR certified, as required by Section K-06 of the IFB, that the item it bid met the basic specification requirements of Attachment 3.

In addition, IFR included with its bid restrictions on its public disclosure. The Army ignored the restriction and publicly opened IFR's bid.

By letter dated September 14, the Army informed IFR that its bid was nonresponsive because the legend in its brochure submitted in response to the commerciality requirement, along with the statement in IFR's cover letter that IFR would comply with all requirements "unless otherwise noted," was "not an offer to perform without exception, the exact thing called for in the solicitation."

Responsiveness of IFR's Bid

(a) Brochure

IFR argues that its bid was improperly rejected. In general, the protester reasons that the brochure constituted unsolicited descriptive literature which should be disregarded under Defense Acquisition Regulation (DAR) § 2-202.5(f). Further, IFR states that since the sole purpose of requiring the literature was to establish the bidders' ability to market a commercial product, the issue of the legend in the brochure concerned IFR's responsibility, not the responsiveness of its bid. Moreover, IFR argues, the statement in its cover letter that it intended to comply with all of the IFB's terms, combined with the certification in its bid that the item met the Attachment 3 specifications and the deletion of the legend in its other brochure, conclusively demonstrated IFR's intent to comply with all the basic specification requirements of the IFB.

In addition, IFR contends that since its brochure did not affect price, quantity, quality or delivery of the items to be procured, the inclusion of the legend could have been waived as a minor informality under DAR § 2-405. IFR also argues that since the IFB contained performance rather than design specifications, the general responsibility for the design was left to the contractor and consequently the right to make design changes was not contrary to the terms of the IFB so long as the item's performance characteristics remained unaltered. In this regard, the protester notes that the brochure did not reserve to the bidder the right to change the performance characteristics of the test set.

In cases involving the standard requirement for descriptive literature² our Office has generally held that statements in such literature submitted by a bidder to the effect that specifications are subject to change provide a bidder with an option to deviate from the advertised requirements after award and are a material deviation rendering the bid nonresponsive. Big Joe Manufacturing Company, B-182063, November 14, 1974, 74-2 CPD 263. We have also stated that in such cases a blanket offer to comply with the specifications does not cure this deviation since the descriptive literature was required for the purpose of determining what the Government was binding itself to purchase. Big Joe Manufacturing Company, supra.

Although the IFB requirement for data does not fit precisely within the terms of DAR § 2-202.5, which pertains to literature needed by an agency to determine whether products offered meet specification requirements, data relating to commerciality was specifically solicited by this IFB and the data submitted cannot reasonably be considered as unsolicited literature. In this regard, we have recognized the validity of IFB requirements for literature from

²Such literature is most often used by an agency to determine whether a product offered is technically equal to certain salient characteristics of a particular manufacturer's product cited in the IFB. Most of our descriptive literature cases concern such situations.

bidders to enable agencies to determine the commerciality of offered items and we have indicated that the general rules regarding the responsiveness of bids containing descriptive literature solicited pursuant to DAR § 2-202.5 are applicable to such cases. James G. Biddle Company, B-196394, February 13, 1980, 80-1 CPD 129.

In this connection, we do not agree that the commercial product requirement in this case involves only a matter of bidder responsibility. The distinction IFR seeks to make on this point is important because the response to solicitation requirements which relate to matters of responsibility may be corrected or supplied after bid opening, while those relating to responsiveness generally permit no explanations or the submission of additional information after bid opening.

In general, matters relating to a bidder's capability and experience are matters of responsibility, while matters concerned with the history of the product to be furnished are matters of responsiveness. See 52 Comp. Gen. 647 (1973). In this case, the sections of the IFB which pertain to the commerciality requirement refer to the commercial history of the particular item to be procured rather than to the bidder's ability to furnish such an item. For example, in Attachment 2 to Section J, bidders were informed that they should submit data "establishing that the offered item meets the commercial item requirements of this solicitation." Attachment 19, entitled "Commerciality Data," stated:

"By submission of this form the offeror certifies that the item offered under this solicitation is a privately developed product currently or previously sold in substantial quantities to the general public, to industry, or to the Government at an established market or catalog price."

Thus, we believe these IFE provisions clearly involve a matter of bid responsiveness as they relate to the commercial history of the particular test set to be procured rather than to such things as the general line of commercial items of this type produced by the bidder. Further, although

not conclusive in itself, the IFB provides at Attachment 2 that the failure to submit the data requested will render the bid nonresponsive, which suggests that the agency viewed the requirement as one going to the history of the item being procured and not to bidder capability. See E.C. Campbell, Inc., B-203581, October 9, 1981, 81-2 CPD 295.

Although we view the data requirement as one involving bid responsiveness and although we disagree with many of IFR's arguments, we do believe that when read as a whole IFR's bid indicated that it intended to meet all specification requirements, and that the Army erred in finding the bid nonresponsive because of the legend in the brochure.

Bid responsiveness concerns whether a bidder has unequivocally offered to provide the requested item in conformance with the terms and specifications of the solicitation. Abbott Power Corporation, B-192792, April 30, 1979, 79-1 CPD 295. As noted above, we have generally held that the reservation in descriptive literature of the right to alter specifications renders a bid nonresponsive. Big Joe Manufacturing Company, supra. Where, however, it is reasonably clear that such a provision was not intended to reserve a right to change the offered product or to deviate from any material requirement, bid rejection is inappropriate. See, e.g., Arista Company, 53 Comp. Gen. 494 (1974), 74-1 CPD 34 and Burley Machinery, Inc., 55 Comp. Gen. 592 (1975), 75-2 CPD 411.

Here, it seems to us that had IFR intended to reserve the right in its bid to change the design of its basic test set, which all parties agree met all of the Attachment 3 requirements at the time of bid opening, it would have included such a reservation in the brochure it submitted to describe the technical characteristics of its item. It did not. Instead, it specifically crossed out the standard form reservation in that brochure, retaining it only in the brochure it submitted to establish that the test set offered was based on a commercially available product. The brochure with the reservation, we assume, is the one which commercial customers would receive.

We believe that the only reasonable way to interpret this IFR bid submission is to read the brochure with the legend crossed out as reflecting IFR's actual intent to furnish a product meeting the specification requirements and to read the other brochure as simply showing that the offered item is a commercial product and that IFR reserves the right to modify from time to time what it markets commercially but does not reserve such a right in connection with the item to be furnished the Army for this procurement. To read the bid as the Army does and as Cushman urges would be too mechanistic and would completely ignore the different purposes for which the two brochures were submitted. Although data or literature submitted with a bid for one purpose may be taken into account in connection with other elements of bid evaluation, see, e.g., Test Drilling Service Co., B-189682, September 15, 1977, '77-2 CPD 193, where data in connection with a bidder responsibility provision rendered the bid nonresponsive because it showed an intended deviation from the specifications, we believe some consideration must be given to the particular purpose for the submission of descriptive data as an aid in determining the bidder's intention. In that light, we think IFR's intention to meet specification requirements reasonably can be determined and that the bid is not ambiguous as the Army believes. Since we do not view the legend on the brochure as taking exception to the specification requirements, the statement in IFR's cover letter that it would meet the specifications unless "otherwise noted" is meaningless since neither the legend nor anything else in IFR's bid involves an exception to the specifications.

(b) Proprietary Legend

We nonetheless must conclude that IFR's bid is non-responsive because of the restriction on disclosure of the contents of IFR's bid contained in the title page submitted with that bid. The title page contained the following restriction:

"This data, furnished in connection with Request for Proposal No. DAAB07-81-B-1576, shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed in whole or in part for any purchase other than to evaluate the proposal; provided, that 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 duplicate, use or disclose the data to the extent provided in the contract. This restriction does not limit the Government's right to use information contained in the data if it is obtained from another source without restriction. The data subject to this restriction is contained in Sections II, IV, VII, and IX."

The cover letter to IFR's bid also contained the identical restriction with the following language added:

"Each page of these sections is marked as follows:

'Use or disclosure of proposal data is subject to the restriction on the Title Page of this proposal.'"

Section II of IFR's bid responded to Section B of the IFB and contained IFR's bid prices. Section IV responded to Section H (Special Provisions) pertaining to ceiling prices for support items, an option for increased quantities, economic price adjustments, etc. Section VII contained the modified Standard Form DD 633-7 requiring data to establish commerciality and Section IX contained a history of the product offered by IFR.

IFR states that the restrictive legend did not, in fact, prevent public disclosure because IFR's bid was publicly opened without objection from the IFR representative present and the prices read aloud and posted in the bid abstract which is a public document. In any event, IFR maintains that the language of the restriction which permitted disclosure in order to evaluate the bid was not inconsistent with a public opening of IFR's bid.

The Army contends these restrictions conflict with the requirement of 10 U.S.C. § 2305(c) (1976) that bids be opened publicly. Although IFR's bid was opened publicly and its prices read at the bid opening, the Army insists this did not cure the defect in the bid because responsiveness must be determined as of bid opening.

Our Office has interpreted the requirement for a public opening of bids to mean that the bid must publicly disclose the essential nature and type of products offered and those elements of the bid which relate to price, quantity and delivery terms. Computer Network Corporation, 55 Comp. Gen. 445 (1975), 75-2 CPD 297. The purpose of public opening of bids is to protect both the public interest and bidders against any form of fraud, favoritism or partiality and such openings should be conducted to leave no room for any suspicion of irregularity. Page Airways, Inc., et al., 54 Comp. Gen. 120 (1974), 74-2 CPD 99. Since the restrictive provision was included in the portion of IFR's bid which included its bid prices, the restriction clearly related to a portion of the bid which must be publicly available. Such a restriction renders a bid nonresponsive. Computer Network Corporation, supra.

IFR, however, contends that even if the bid could be considered nonresponsive because of the restrictive legend, no harm was done because the contracting officer ignored the legend and publicly disclosed IFR's bid price. In similar cases, we have upheld a determination of nonresponsiveness, notwithstanding the public opening of a bid containing a restrictive legend, since the responsiveness of a bid must be determined at the time of bid opening, and a bid with such a restricted legend precludes disclosure as required by law and regulation; neither the contracting officer nor the bidder is free, after opening, to modify that restriction. 53 Comp. Gen. 24 (1973); 1010 Incorporated of Alamogordo, B-204742, December 21, 1981, 81-2 CPD 486. Moreover, we have further pointed out that a bidder who restricts disclosure of its price would still have the option, even if its price is exposed, to accept or reject award of a contract because its bid was conditioned on nondisclosure of its price. Prime Computer, Inc., B-204848, January 7, 1982, 82-1 CPD 20.

We do not agree with IFR's position that, in any event, its legend was consistent with the public opening of bids because the restriction permitted disclosure for the purposes of evaluation. First, we do not believe this is a reasonable interpretation of the restriction because if IFR wished its bid prices exposed, the legend served no purpose. Second, there is no necessary correlation between the public opening of bids and the posting of prices and the agency's actual evaluation of those bid prices. Finally, the intent to restrict the disclosure of IFR's prices is obvious as the legend refers to the solicitation as a "Request for Proposals," a term used only in negotiated procurements and, in fact, the legend itself is identical with that set forth at DAR § 3-507.1 to be used only in connection with negotiated procurements. In such procurements, offers are not publicly opened and prices are not to be exposed. See DAR § 3-507.2.

Thus, we believe that the restrictive legend in IFR's bid was inconsistent with the requirement in advertised procurements for public opening of bids and rendered IFR's bid nonresponsive.

Responsiveness of Cushman's Bid

IFR argues that the Army did not evaluate both bids in a fair and even-handed manner. The protester maintains that while the Army rejected its bid as nonresponsive for some rather minor deficiencies, the agency ignored significantly more serious defects in Cushman's bid.

The Army contends IFR's allegations contained in its October 22, 1981 submission pertaining to the responsiveness of Cushman's bid are untimely under our Bid Protest Procedures, 4 C.F.R. Part 21 (1981), because they were not filed within ten working days after the basis for such allegations were known or should have been known. The Army recognizes that our timeliness requirements do not apply when our decision is in response to a court's request. Norton Company, Safety Products Division, B-201579, April 1, 1981, 81-1 CPD 250. The agency, however, argues that the court in this instance limited its request to a decision only on the responsiveness of IFR's bid. We do not agree with the Army.

The court order does not explicitly refer to the responsiveness of Cushman's bid. It appears from the record, however, that both the Army and IFR raised this issue before the court. We therefore believe it is encompassed in the court's request and should be considered

by us notwithstanding our timeliness requirements. Norton Company, Safety Products Division, supra.

IFR contends that Cushman's bid should have been rejected as nonresponsive because it included a commercial brochure which demonstrates that its basic test set as sold commercially does not meet the core specifications set forth in Attachment 3 of the IFB. Further, the protester states that this same brochure shows that two essential features are only available from Cushman as extra cost options and that a price sheet included with the bid carried the legend: "Prices subject to change without notice." These flaws, IFR urges, combined with Cushman's failure to meet the IFB's requirements for training data, also rendered the Cushman bid nonresponsive.

The Army insists that it used the same standard in evaluating both bids and that reading Cushman's bid as a whole there was nothing on the face of that bid which qualified or took exception to Cushman's offer to deliver a test set which fully complied with the specifications.

We do not agree with the Army. We find that while Cushman's bid was not flawed because of the optional features described in its brochure, the legend in its price list, or its response to the IFB training requirements, the test set described in Cushman's brochure did not meet the minimum requirements for a commercially available test set stated in Attachment 3.

(a) Technical Description in the Cushman Brochure

IFR lists five specification requirements included in Attachment 3 of the IFB which it maintains were not met by the test set described in the Cushman brochure. For example, paragraph 3.15.3 required that the bidder's commercially available unit have a power monitor capable of measuring the power of a signal up to 100 watts over a frequency range of 2 MHz to 1,000 MHz. The brochure's specification sheet with respect to power measurement reads as follows:

"Power Meter

Frequency	10 to 500 MHz (usable to 1000 MHz)
Ranges	1 to 10, 10 to 100 watts
Accuracy	<u>± 10%</u> "

This indicates the Cushman equipment does not measure power in the 2 MHz to 10 MHz portion of the frequency spectrum, and raises a question about just what the equipment can do between 500 and 1000 MHz. No one argues that the frequency requirements of the specification are not material. Thus, the Cushman equipment as described by its own brochure does not meet specification requirements. (In our opinion, other deviations from the minimum specifications referred to by IFR with respect to the spectrum analyzer the electrical power source, the audio generator and the speaker volume control are not material.)

Cushman admits that the commercial brochure description of its unit does not "coincide with the terminology of the minimum requirements of the solicitation" but argues that, in the areas specified, the actual test set meets or exceeds the minimum specifications without modification and notes that it so certified in its bid.

Similarly, the Army argues that it conducted a technical evaluation of Cushman's bid and concluded that the item offered met the technical requirements of Attachment 3 without modification. The Army's judgment was based on (1) the fact that Cushman certified in its bid that the item offered met the requirements of Attachment 3 without modification, (2) the actual knowledge of Army engineering personnel of Cushman's test set acquired prior to issuance of the IFB, (3) a demonstration test of one of Cushman's units made prior to the issuance of the IFB, the result of which was that the Cushman unit performed in such a manner that it "would have to meet most, if not all" the Attachment 3 requirements and (4) the Army's general knowledge that it is standard practice in the industry to rate equipment conservatively in commercial brochures.

The essence of the agency's position here is that even though the brochure submitted by Cushman depicted a test set which did not meet all of the requirements of Attachment 3, the bid was nonetheless acceptable because the agency "knew" that the actual equipment offered to the public met these requirements.

The basic rules cited before in connection with the evaluation of the brochure submitted by IFR are, of course, applicable to the evaluation of the Cushman bid. As we indicated before, a material deviation contained in descriptive data will render a bid nonresponsive and a blanket offer to comply with the specifications will not cure such a deviation. See Big Joe Manufacturing Company, supra.

Although the Army concedes that the general rule is that responsiveness must be determined from the bid itself, without reference to extraneous aids or explanations supplied after bid opening, it contends that this case falls within the exception to this rule which permits reliance on information not in the bid itself, but which is otherwise available to the Government and in existence prior to bid opening. See Pure Air Filter International, Thermal Control, Inc., 55 Comp. Gen. 608 (1977), 77-1 CPD 342. Under this exception, the agency concludes that it properly used the information it developed through its contacts with Cushman representatives and from its presolicitation testing to override the literature included with the bid and to determine that Cushman's commercial item actually met the Attachment 3 requirements as Cushman certified in its bid.

We do not agree that the exception applies here. The exception only applies to instances where the bid as submitted must be supplemented either because the descriptive literature called for by the solicitation is inadequate or because the bid includes a model number of similar designation and the agency needs to know just what the designated product is so it can determine if it will meet the specifications. In those situations, information already in its possession may be used to determine bid responsiveness as this information merely completes description of a compliant item.³ See 50 Comp. Gen. 9 (1970); Pure Air Filter et al., supra; Environmental Containers, Inc., B-188633, August 31, 1977, 77-2 CPD 166; Cummins-Wagner Co., Inc., Joy Manufacturing Company, B-188486, June 29, 1977, 77-1 CPD 462.

³We have found one case, 48 Comp. Gen. 306 (1968), where outside test data was relied on to determine a bid responsive where literature submitted with the bid indicated that the item did not meet an IFB requirement. In that case, however, the literature was unsolicited and the agency determined that the IFB requirement was not material.

In this case, the Army does not seek to "fill the gap" in Cushman's bid; rather, as the brochure submitted by Cushman clearly shows that its commercial test set did not meet at least one material requirement of the Attachment 3 specification, it seeks to use information outside the bid to negate what is in the bid itself. Such a situation is not encompassed by the exception the Army seeks to invoke; in fact, such an approach would constitute an impermissible correction of a bid to make it responsive.

Moreover, we point out that the Army's own information is hardly convincing in any event. The Army does not state that its test was comprehensive or that the Cushman product in fact operated in the below 10 MHz range. It states only that the unit "would have to meet most, if not all" specification requirements. This does not suffice to establish that Cushman's legal commitment, if its bid were accepted, would be to furnish equipment which does operate in the lower portion of the MHz range.

Thus, unlike the IFR bid, which we find to be free of ambiguity because it is reasonably clear that IFR did not intend its second brochure to qualify the rest of its bid, we find Cushman's bid to be ambiguous at best because while it certified in its bid that the equipment met the specifications, the one required brochure that it submitted indicated that it did not meet the requirements of the specification. Such an ambiguity, of course, renders the bid nonresponsive. Lektro Incorporated, B-202212, June 15, 1981, 81-1 CPD 484.

(b) Cushman Price List

We do not believe that the legend that its prices were subject to change contained in Cushman's commercial price list submitted with its bid rendered that bid non-responsive. The price list was submitted to show that Cushman's basic test set was sold commercially at an established price. The list does not contain a price for the modified item described in the purchase description in Attachment 1 of the IFB, which was the actual item upon which Cushman bid. Nor did the prices listed for those items in the bid schedule contain such a reservation. Thus, it would not be reasonable to interpret this legend as qualifying the prices bid by Cushman. See B-156416, May 13, 1965.

(c) Optional Features in Cushman Brochure

IFR further points out that the Cushman brochure showed that several capabilities required by the solicitation as an integral part of the item to be delivered were listed as option items at additional prices. For example, the specifications in Attachment 1 require that each radio test set must be furnished with an internal battery, but Cushman's brochure indicates that this "option" costs \$60 each which would add \$64,020 (\$60 times 1,067 units) to Cushman's price. Also, Cushman's brochure lists as an option a single side band capability at a price of \$285 each but this capability is also required by the specifications in Attachment 1. IFR states the acquisition of this capability from Cushman would add, at the least, \$304,095 to the Army's cost and that therefore, the Cushman bid price did not reflect the Army's total cost.

The Army states that Cushman's brochure which showed that particular features of its item offered to the public were options at prices in addition to the price for the basic item did not render its bid nonresponsive. The agency maintains the bid clearly obligated Cushman to supply at a firm price a modified version of its commercial item meeting all Government requirements including the features listed as options in the catalog.

We agree with the Army. The requirements for an internal battery and a single side band capability were set forth in Attachment 1 which were the specifications which had to be met at the time of delivery. They do not appear in Attachment 3, which contained the minimum specifications the product had to meet as a commercial item at the time of bid submission and before allowable modifications to comply with Attachment 1. Therefore, while Cushman indicated its current product did not comply with Attachment 3, it did not indicate that the Attachment 1 requirements for the battery and single side band capability would not be met at the time of delivery for the price bid for the modified product.

(d) Training Data

IFR also contends Cushman's bid was deficient with respect to the training data requirements and it lists several data requirements to which it responded with forms, milestone schedules, lesson plans, training materials and equipment lists. IFR alleges Cushman submitted no such materials with respect to such items but Cushman insists it supplied all required materials, forms, start or end dates, equipment lists, etc. The Army states the information submitted by Cushman and IFR was evaluated and each was found to be acceptable. It points out that the data requirements were spelled out in detail in the IFB and by the insertion of a price without taking exception to the requirements the bidder was obligated to provide the data exactly as called for in the IFB. Although IFR may have supplied more training data than Cushman, we find no basis for concluding that Cushman's data was less than required or that the Army applied a double standard in its evaluation of the training portion of the procurement.

CONCLUSION

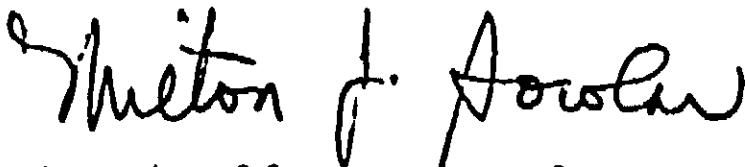
We deny IFR's protest of the Army's rejection of its bid as nonresponsive but we find merit in its contention that Cushman's bid, on its face, indicated that its commercial test set did not meet the minimum IFB specifications. Since the Army is thus left with no responsive bids, we recommend that the agency be instructed to cancel this solicitation and recompute its requirements.

In making this recommendation, we appreciate the urgency of the Army's needs and that the bid prices have been revealed. However, we believe these factors are outweighed by the fact that an award on the basis of the current bids to either party would be unfair to the other.

We believe that the problems which resulted in this protest were due, at least in part, to the confusing data requirements in the solicitation. In this regard, we do not understand why the solicitation contained two separate requests, at Attachment 2 and Attachment 19, for data regarding the commercial nature of the test sets, nor do we understand why in an advertised procurement the agency would need the detailed commercial pricing information required by the modified DD Form 633-7 included at Attachment 19. We hope that these matters are clarified in any

resolicitation and we trust that any subsequent solicitation will be structured so as to eliminate the confusing array of attachments, subsections and clauses in the current solicitation.

The protest is denied in part and sustained in part.

for 
Comptroller General
of the United States