

DECISION

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

FILE: B-211968

DATE: October 4, 1983

MATTER OF: Champion Road Machinery International Corporation

DIGEST:

1. Protest that proposed awardee will not deliver equipment meeting specification is a matter of contract administration which is the function and responsibility of the contracting agency and not for consideration under GAO Bid Protest Procedures.
2. An unsolicited submission of a product information bulletin which contains statement that equipment is "subject to change" without notice may be ignored in evaluating bid, where bid, read as a whole, indicates bidder's intention to furnish product conforming to all specifications and the literature was not required for evaluation purposes.

Champion Road Machinery International Corporation (Champion) protests the proposed award of a contract to Craig Taylor Equipment Company (Craig Taylor) under invitation for bids (IFB) No. DTFall-83-B-00025, issued by the Department of Transportation, Federal Aviation Administration (FAA), for a road grader.

We dismiss the protest in part and deny it in part.

The solicitation, at paragraph 1.1, contained the following specification:

"General. It is the intent of this specification to describe one (1) new diesel powered, Type IV (6-wheel drive, all wheel steer), Size 6 Road Grader of the manufacturer's latest design and construction."

Bidders were required to indicate the manufacturer, brand and model number of the equipment offered; however, the solicitation contained no requirement that bids be accompanied by descriptive data. Craig Taylor listed John Deere model number 772A, without any year designation. Three bids were received at the May 26, 1983, bid opening. Craig Taylor, a John Deere and Company dealer, was the low bidder and Champion was the second low bidder.

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Champion argues that Craig Taylor's bid is nonresponsive because: (1) it failed to comply with the above specification requiring that the road grader be of the manufacturer's latest design and construction; and (2) Craig Taylor submitted descriptive data with its bid which contained the statement, "Specification and design subject to change without notice."

With regard to the first basis of protest, Champion alleges that Craig Taylor, in order to underprice other bidders, bid on a 1982 model John Deere road grader rather than on the 1983 model. Champion explains that the 1982 equipment was replaced in 1983 by a new model which incorporated several substantial changes in design features. In support of this contention, Champion states that in April 1983 (several weeks before the May 26 bid opening), it received a John Deere product bulletin showing the changes.

Concerning its second basis of protest, Champion cites several of our cases which hold that the inclusion of statements in descriptive literature to the effect that production specifications are subject to change without notice provides a bidder with an option to deviate from the advertised specifications after award and is a material deviation requiring bid rejection. See B-156102, February 24, 1965; B-177390, March 8, 1973; and B-158809, June 2, 1966.

Champion's first basis of protest is that Craig Taylor will not perform in accordance with paragraph 1.1 of the above-cited specification. In its bid, Craig Taylor took no exception to the above specification and, therefore, agreed to provide the equipment meeting the terms and conditions of this clause. Moreover, whether the equipment eventually supplied by Craig Taylor complies with FAA specifications is a matter of contract administration which is a function of the procuring activity. We do not consider such matters under our Bid Protest Procedures, 4 C.F.R. part 21 (1983), which are reserved for determining whether an award of a contract complies with statutory, regulatory and other legal requirements. See Sprayfoam Southwest, Inc., B-201071, July 16, 1981, 81-2 CPD 41; Arc Com Fabrics, Inc., B-201181, December 15, 1980, 80-2 CPD 432. Therefore, we will not consider this portion of the protest on the merits. We note, however, for informational purposes, that the procuring activity submitted documentation to this Office from John Deere which verifies that Craig Taylor did, in fact, bid on the current John Deere model number 772A road grader.

This portion of the protest is dismissed.

Champion's second basis of protest is that Craig Taylor's bid is nonresponsive because a product information bulletin submitted with the bid contained a preprinted reservation stating that the product is "subject to change" without notice.

In Arista Company, 53 Comp. Gen. 499 (1974), 74-1 CPD 34, we reviewed a similar protest. In Arista, the procuring activity determined the protester's bid to be nonresponsive because the protester submitted unsolicited descriptive literature with its bid which contained the statement, "This information is subject to change without notice." Additionally, in Arista, just as in this case, the literature described the specific items that the bidder proposed to furnish. However, in that case, we held that the general rule requiring rejection of a bid where accompanying literature contained a "subject to change without notice" provision need not be followed where the literature was not necessary to evaluate the bid. We stated:

" . . . we see no reason to follow such a rule where, as here, the descriptive data is not required by the agency to evaluate the bids. In such a case the agency does not need to establish exactly what the bidder is proposing to furnish. Rather, the bidder is merely required to agree to the specification requirements." Arista, supra, at pp. 501-502.

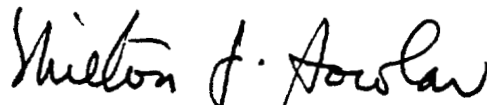
Thus, we concluded that if a bidder submits descriptive literature as part of its bid under these circumstances, the inclusion of a qualifying statement on the bidder's literature sheet to the effect that the data contained is subject to change without notice does not require the conclusion that the bidder has reserved the right to deviate from the advertised specifications, assuming that the data submitted otherwise conforms to the advertised specifications. See, also, Burley Machinery Inc., 55 Comp. Gen. 592 (1975), 75-2 CPD 411.

We find that our decision in Arista applies to the present case. Here, just as in Arista, descriptive literature was not necessary to evaluate the bids. Instead, the solicitation merely required that bidders agree to the

specifications and, as discussed above, Craig Taylor took no exception to any of the advertised specifications. Moreover, we have reviewed the literature submitted and find that the fact that it actually describes equipment consistent with the specifications provides further assurance of Craig Taylor's intention to meet the specifications. Therefore, we do not believe Craig Taylor's bid should be rejected on this basis.

Finally, we have reviewed the cases Champion submitted in support of its argument, cited above, and point out that our decision in B-156102, February 24, 1965, the only case cited by the protester involving circumstances similar to the present, was considered in Arista, supra, and we stated it would no longer be followed.

Accordingly, this portion of the protest is denied.

for 
Comptroller General
of the United States