



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## Decision

**Matter of:** Orbit Advanced Technologies Ltd.

**File:** B-224603.2

**Date:** March 11, 1987

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### DIGEST

1. Where bidder submits unsolicited descriptive literature with its bid purporting to propose equipment designed for the solicitation and including a legend restricting disclosure of the literature, the bid violates the statutory requirement for public opening of bids and must be rejected as nonresponsive.

2. Where unsolicited descriptive literature submitted with a bid is ambiguous regarding whether the bidder intends to comply with material terms of the invitation for bids, the bid is nonresponsive and must be rejected.

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### DECISION

Orbit Advanced Technologies Ltd. protests the award of a contract to Contraves Goerz Corporation under invitation for bids (IFB) No. DAAD07-86-B-0029, issued by the Army's White Sands Missile Range for Kineto Tracking Mounts (KTM) and Mobile Cinetheodolite Mounts (MCM), both of which are used to track missiles in flight. The Army interpreted unsolicited descriptive literature that Orbit submitted with its low bid as taking exception in six instances to requirements of the IFB, and also regarded a legend restricting disclosure of the literature as violating the requirement for public disclosure of bids. For those reasons, the Army rejected Orbit's bid as nonresponsive. Orbit argues that the descriptive literature was intended only to show Orbit's capabilities and should not have affected the bid's responsiveness.

We agree with the agency that the literature was intended to be considered with the bid, that it contained an improper restrictive legend and that it did not clearly show that Orbit intended to meet all the solicitation requirements. Consequently, we also agree that the bid was therefore nonresponsive and deny the protest.

Orbit included a cover letter with its bid which stated "[a]s demonstrated by the enclosed technical proposal, the submitted proposal meets or exceeds the requirements of the purchase description." The literature described Orbit's AL-2837 KTM system, and further explained that the system was designed in accordance with the solicitation. The literature itself contained a cover page bearing the following legend:

"THIS PROPOSAL IS THE SOLE PROPERTY OF ORBIT ADVANCED TECHNOLOGIES LTD. THE INFORMATION CONTAINED HEREIN IS NOT FOR PUBLICATION, DUPLICATION OR USE IN WHOLE OR IN PART, WITHOUT THE CONSENT OF ORBIT ADVANCED TECHNOLOGIES."

The Federal Acquisition Regulation (FAR) provides that when a bid is accompanied by descriptive literature and the bid imposes a restriction preventing public disclosure of the literature, the restriction renders the bid nonresponsive if it prohibits the disclosure of sufficient information to permit competing bidders to know the essential nature and type of product offered and those elements of the bid that relate to price, quantity and delivery terms. FAR, 48 C.F.R. § 14.404-4 (1986). This provision implements 10 U.S.C. § 2305(b)(3) (Supp. III 1985), which requires the public opening of sealed bids. See VACAR Battery Mfg. Co., Inc., B-223244.2, June 30, 1986, 86-2 CPD ¶ 21. The regulation states, however, that the rule does not apply to unsolicited descriptive literature submitted by a bidder if such literature does not qualify the bid. FAR, 48 C.F.R. § 14.404-4.

Here, the express language of Orbit's cover letter purporting to submit a "technical proposal" describing a particular system allegedly designed "according to" the IFB, clearly indicates in our view that the literature submitted was intended to qualify Orbit's bid. See Carco Electronics, B-186747, Mar. 9, 1977, 77-1 CPD ¶ 172. Further, the disclosure restriction applied to all of the literature submitted by Orbit. That literature described the nature of the equipment it proposed to furnish. Consequently, the restriction on the Orbit literature which qualified its bid rendered it nonresponsive.

Moreover, in at least one respect, the descriptive literature created an ambiguity as to whether Orbit intended to offer KTM components complying with material requirements of the IFB. This ambiguity, notwithstanding the disclosure restriction, requires that the bid be rejected as nonresponsive because to be responsive, a bid must unequivocally offer to comply with

the material terms of the IFB. A bid which includes unsolicited literature that describes the offered equipment in terms that reasonably can be interpreted not to conform with a material requirement is nonresponsive because it does not constitute such an unequivocal offer. See McGraw-Edison Co. et al., B-217311 et al., Jan. 23, 1985, 85-1 CPD ¶ 93. Further, a bidder may not explain the meaning of its bid after opening because to permit such action would be tantamount to granting an opportunity to submit a new bid, one that could be responsive or nonresponsive at the bidder's option based on information available to the bidder after bid opening. Id.

The IFB's purchase description required at paragraph 3.4.3.2 that the sighting telescope shall be a dual power guide scope with optical powers of 8 and 24. Orbit's literature stated it could provide the item from two suppliers, one of which proposed complying equipment while the other proposed a telescope with optical powers of 4 and 20. The literature further explained that the second supplier could modify the item "to 8 and 20 power" but that "causes extra costs."<sup>1/</sup> The literature did not specify which supplier's telescope the bidder intended to furnish. Thus, it was not clear whether Orbit proposed to supply a telescope from the first supplier that conformed with the solicitation requirements or from the second supplier that possibly could be modified to conform, nor was it clear whether and to what extent it intended to increase its price to obtain conforming items from the second supplier. Where, as here, the literature describes a feature that may or may not conform to the solicitation, the effect of the literature is to render the bid ambiguous and nonresponsive. McGraw-Edison Co. et al., B-217311 et al., supra.

Further, we do not think that the ambiguity in the bid can be waived as a minor deviation that has only a negligible effect on price, quantity, or quality of the item offered. FAR, 48 C.F.R. § 14.404. It is clear that the possibility that Orbit would supply a telescope with optical powers of 4 and 20 in

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<sup>1/</sup>The alternate telescope as modified to optical powers of 4 and 20 would still not meet the solicitation requirement of 8 and 24. The protester claims that it intended to comply but "20" was inserted by error. Since we decide infra that the bid is ambiguous because it offered both compliant and noncompliant telescopes we need not decide the protester's claim that the insertion of "20" should be waived under FAR, 48 C.F.R. § 14.405 as a minor irregularity.

the face of a request for power of 8 and 24 would plainly affect the quality of the item offered and this does not meet the test for waiver. McGraw-Edison Co. et al., B-217311 et al., supra.

The protest is denied.

*for Seymour S. Friedman*  
Harry R. Van Cleve  
General Counsel