



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Alerting Communicators of America  
File: B-227028; B-227029; B-227030  
Date: August 6, 1987

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### DIGEST

Where a bid is accompanied by the bidder's standard limited warranty with a letter stating that it is extending that warranty on the equipment offered and that warranty provides less coverage than required by the solicitation the bid is nonresponsive.

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### DECISION

Alerting Communicators of America (ACA) protests the rejection as nonresponsive of its bids under invitation for bids Nos. LF-839259, LF-839260 and LF-839269, which the Tennessee Valley Authority (TVA) issued for electromechanical sirens for its prompt notification systems at, respectively, TVA's Sequoyah, Watts Bar, and Browns Ferry nuclear plants.<sup>1/</sup> We deny the protest in part and dismiss it in part.

ACA submitted the low bid under each of the solicitations. The protester included brochures with each bid describing the products offered as well as a letter dated February 20, 1987, stating that it would "serve as an amendment to our standard equipment warranty." The letter stated: "We will extend our normal warranty from two years on electrical components and three years on mechanical components to five years on both . . . ." Also included with the bid package was a single-page printed form entitled "Limited Warranty" describing ACA's 2-year/3-year warranty.

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<sup>1/</sup> TVA contends that this Office is without jurisdiction to consider this protest. We considered the agency's arguments in support of this contention in prior cases and determined that we do have protest jurisdiction with respect to TVA procurements. SMIT Transformatoren B.V., B-222440, July 28, 1986, 65 Comp. Gen. \_\_\_\_\_, 86-2 CPD ¶ 118; Monarch Water Systems, Inc., 64 Comp. Gen. 756 (1985), 85-2 CPD ¶ 146.

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The agency rejected ACA's bids as nonresponsive primarily on the basis that the firm's limited warranty took exception to provisions contained in the solicitations. In its letter informing ACA that its bids had been rejected, TVA cited General Condition No. 29 of the solicitations, entitled "Warranty," which, among other things, required the contractor to warrant against latent or patent defects in design and permitted the TVA to make necessary repairs or replace defective items, at the contractor's expense, if it was not practical to wait for the contractor to do so. ACA's limited warranty extended only to defects in material or workmanship and stated that the buyer's sole and exclusive remedy against ACA would be the repair or replacement of defective items by ACA, provided the buyer returned the item to the firm's factory. The agency also cited the solicitations' General Condition No. 28, entitled "Limitations of Special or Consequential Damages," which provided that the contractor's liability for such damages would be limited to the amount of the contract price. ACA's limited warranty stated that the firm would not be liable at all for any incidental or consequential damages. In its report responding to the protest, TVA also notes that while General Condition No. 37 stated that the agency's rights and remedies under the contracts would be in addition to other rights and remedies provided by law, ACA's warranty expressly stated that it was to the exclusion of other warranties and that ACA disclaimed all other express or implied warranties.

ACA contends that its bids did not take exception to the solicitation requirements notwithstanding the terms of its limited warranty. The basis for this contention is a solicitation provision that reads as follows:

"CONFLICTING TERMS AND CONDITIONS. If the bidder submits its (or its supplier's) letterhead, quotation form, bulletins, catalogs, or drawings with its bid any terms or conditions printed thereon shall not be considered as a part of the bid or contract unless the bidder separately states in writing or otherwise clearly indicates, by express language, not preprinted, that such terms or conditions shall be considered a part of the bid or contract, in which case the Condition of Bid entitled Rejection of Bids shall apply. Any product description contained therein shall, however, be considered a part of the bid and contract unless it is clear from the bid that such description is not intended to describe the product being offered." (Emphasis in original.)

ACA argues that this provision required the agency to disregard any language in its limited warranty that conflicted with solicitation requirements because ACA did not expressly indicate that the limited warranty was intended to be part of its bids. The protester says that its normal practice is to include the printed limited warranty form in all catalogs sent to customers and that it did so here simply to illustrate the extended warranty period it offered. The protester argues that it offered the TVA more, not less, warranty protection than it required since the 5 years it offered is substantially longer than the 18-month warranty required by the solicitations.

To be considered responsive under a sealed bidding solicitation, a bid must constitute an unequivocal offer to comply with the material terms and conditions contained in the solicitation. Prosperity Dredging Co., Inc., B-225543, Mar. 30, 1987, 87-1 CPD ¶ 360. Warranty requirements are considered material, and therefore a bidder's exception to or qualification of those requirements renders the bid nonresponsive. California Mobile Communications, B-223137, Aug. 20, 1986, 86-2 CPD ¶ 203.

In this case, although the length of the warranty period offered by ACA exceeded the 18 months required by the solicitations, as described above, a number of other terms contained in the limited warranty clearly offered less than the solicitations required. Thus, the only issue is whether TVA properly read ACA's bids as incorporating those other terms. In our view, the protester's letters of February 20 were an express indication that the firm was offering its standard limited warranty, extended to 5 years. The only warranty referred to in the letters is ACA's standard 2-year/3-year warranty. The letters expressly state that it was this warranty that was being extended. There is no mention in the letters of the warranty requirements contained in the solicitations or that ACA agreed to be bound thereby.

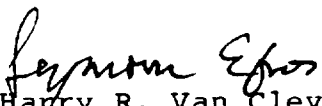
In its comments on the agency report, ACA alleges that the awardee under the solicitations also has a standard warranty that contains terms similar to those contained in ACA's limited warranty. ACA says that it does not know whether the awardee submitted this limited warranty with its bids. The agency has informed us, however, that it did not.

ACA also now contends that the specifications favored the awardee and that the awardee had a role in drafting them, an act that ACA alleges constitutes a violation of a 1979 consent decree issued by the Federal Trade Commission restraining the awardee from such activities. This allegation involves an apparent solicitation defect and

therefore should have been raised prior to bid opening. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1987). We dismiss this aspect of the protest.

Finally, in its letter notifying ACA that its bids had been rejected the agency noted that ACA had offered an integrated-type siren even though the solicitations required a modular design. The protester contends that the solicitations only required sirens capable of a specified level of performance and did not require any particular design. The agency now concedes that the solicitations did not expressly require a modular design, but notes that as a result of a technical evaluation undertaken in response to ACA's protest the agency's engineers have concluded that ACA's equipment is not capable of the required performance. ACA takes issue with this assessment.

It is not necessary for us to resolve this technical dispute. The agency report makes clear that TVA decided to reject ACA's bids based on the exceptions contained in the firms's limited warranty rather than on technical grounds. Thus, we need not consider the agency's subsequently discovered grounds for determining the bids to be nonresponsive since we have concluded that the reason cited initially by the agency supports the action taken.

*for*   
Harry R. Van Cleve  
General Counsel