



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tektronix, Inc.; Hewlett Packard Co.

File: B-227800; B-227800.2

Date: September 29, 1987

DIGEST

1. Bid that includes informational descriptive literature (not needed for bid evaluation) which describes two models of the required item, one of which does not meet a specification, may be accepted if the only reasonable view of the bid is that it is an offer of the conforming model.

2. The pre-printed legend "prices and data subject to change" included in informational descriptive literature does not render the bid nonresponsive if the bid otherwise establishes precisely what the bidder is offering and at what price.

DECISION

Tektronix, Inc., and Hewlett Packard Co., protest the award of a contract to any bidder other than Tektronix or Hewlett Packard, respectively, under invitation for bids (IFB) No. M00027-87-B-0019, issued by the United States Marine Corps for spectrum analyzers. Tektronix argues that the descriptive literature submitted by Hewlett Packard, the low bidder, qualified its bid and rendered it nonresponsive. Hewlett Packard argues that its bid is responsive and that, in any case, the descriptive literature submitted by Tektronix and Anritsu America, Inc., the third low bidder, render their bids nonresponsive.

We deny Tektronix's protest. Since Hewlett Packard thus is entitled to the award, we need not consider the responsiveness of the other two bids.

BACKGROUND

The IFB's cover sheet called attention to the inclusion in the solicitation of the standard clause defining descriptive literature that appears in the Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.214-21/(1985). The clause defines such literature as information submitted as part of

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a bid that is required to establish, for the purpose of evaluation and award, the significant details of the product offered as specified in the solicitation. It advises that descriptive literature, "required elsewhere in this solicitation," must be identified to show the items to which it applies, and cautions that failure of descriptive literature to show that the product offered conforms to the invitation's requirements will result in rejection of the bid.

Although the clause referred to descriptive literature "required elsewhere in this solicitation," the solicitation contained no additional references to the reason for or nature of the requirement for literature, nor did it explain how the literature was to be used in evaluating bids. Further, the Marine Corps states that the descriptive literature clause was, in fact, erroneously included in the solicitation. Because the IFB itself included detailed specifications and incorporated several publications containing detailed technical requirements, the Marine Corps asserts that it did not intend to solicit descriptive literature for evaluation purposes.

The Marine Corps received three bids, all of which included descriptive literature. Hewlett Packard submitted the low bid of \$1,395,460. Tektronix was the second low bidder at \$1,482,450.75. Anritsu was the third low bidder. Tektronix and Hewlett Packard protested to our Office before award, and, accordingly, the Marine Corps has not awarded the contract.

HEWLETT PACKARD'S BID

Tektronix points out that the descriptive literature submitted by Hewlett Packard describes two spectrum analyzers, one which conforms to the specifications, and one that does not, which Tektronix argues renders the bid ambiguous. Tektronix also asserts that the words "Prices and data subject to change" that are preprinted in Hewlett Packard's descriptive literature further render the bid nonresponsive.

Hewlett Packard responds, and the Marine Corps agrees, that because the IFB did not put bidders on notice as to what descriptive literature was required or for what purposes it was to be used, the literature was informational only, so that whatever literature was submitted should not be read as qualifying the bid involved.

We recognize that the literature in this case was, as a technical matter, "solicited," in that the invitation included the standard clause noted above; solicited descriptive literature must, according to the clause, affirmatively

establish conformance with the invitation's requirements. The literature requirement's mandate in that respect, however, effectively was rendered defective by the IFB's failure to alert bidders as to what literature was required and for what purpose. See Koch Corp., B-223874, Nov. 10, 1986, 66 Comp. Gen. _____, 86-2 C.P.D. ¶ 544, aff'd, Miami Wall Systems, Inc.--Reconsideration, B-223874, Jan. 8, 1987, 87-2 C.P.D. ¶ 27. This last point is confirmed by the fact that all three bidders evidently simply submitted their standard commercial literature with their bids. In these circumstances, we think the literature actually furnished should be considered akin to "unsolicited" literature, i.e., literature that is not needed for bid evaluation; indeed, the Marine Corps concedes it neither wanted nor needed literature for that purpose.

This does not mean that the literature submitted with a bid should have no effect at all, however. See McGraw-Edison Co. and ASEA Electric, Inc., B-217311, et al., Jan. 23, 1985, 85-1 C.P.D. ¶ 93; Brown Boveri Electric, Inc., B-209338, Apr. 1, 1983, 83-1 C.P.D. ¶ 342. While literature that is not needed for bid evaluation generally is considered informational only, so that the failure to furnish it with the bid is immaterial, any submitted literature will cause the bid to be nonresponsive if it establishes that the bidder intended to qualify its bid or if the literature reasonably creates a question as to what the bidder is offering. Brown Boveri Electric, Inc., B-209338, supra.

We find that Hewlett Packard's bid was responsive. We recognize that the descriptive literature submitted by Hewlett Packard describes two spectrum analyzers: model 8586A, which conforms to the specifications, and model 8586B, which does not include the required preselector. The intent of a bid, however, must be construed from a reasonable interpretation of its entire contents; we simply think it is not reasonable to conclude that Hewlett Packard's literature legitimately suggests that the firm might have been offering the nonconforming model. Moreover, the FAR requires rejection of a bid based on unsolicited descriptive literature only if it is clear from the bid or accompanying papers that the bidder's intention was to qualify the bid. FAR, 48 C.F.R. §§ 14.202-5(f) and 14.202-4(g). Nowhere in Hewlett Packard's bid is such an intent evident (for example, by some indication that the low bid price somehow might reflect the lack of a preselector).

We also do not think that the legends regarding prices and/or data being "subject to change" included in standard commercial descriptive literature that is not required for bid evaluation are material unless they reasonably can be viewed as qualifying the bid price or what the bidder is

offering. See Champion Road Machinery International Corp., B-211968, Oct. 4, 1983, 83-2 C.P.D. ¶ 416. We do not think it logical to conclude that the preprinted statements on the literature Hewlett Packard submitted, in themselves, so qualified the bid.

Accordingly, Tektronix's protest that Hewlett Packard's low bid should be rejected as nonresponsive is denied. Hewlett Packard's protest therefore is dismissed as academic.

Harry R. Van Cleve

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General Counsel