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COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON, D.C. 20548

B-176896

January 19, 1973

Caterpillar Tractor Company
Industrial Division
Peoria, Illinois 61602

Attention: Mr. John W. Tschantz

Gentlemen:

Further reference is made to your letters of August 29 and October 25, 1972, protesting against award of a contract to International Harvester Company (International), under invitation for bids (IFB) No. DSA-700-72-B-2668, issued June 5, 1972, by the Defense Construction Supply Center (DCSC), Columbus, Ohio.

The IFB as amended called for a total quantity of 15 scraper-tractors (items 1 and 2), plus related data, and first article testing (items 3-6). The invitation on page 33 (General Requirements) included the following clause:

"Standard Product. The equipment covered by this specification, except as modified herein, shall be the manufacturer's standard commercial product including all standard features, components and accessories as currently applied on the manufacturer's standard current production unit of type and size specified. The equipment, all components and accessories shall conform to current engineering and manufacturing practices relative to design, strength, quality of materials and workmanship."

Four bids were opened on July 21, 1972, and it was found that International was the lowest bidder on all items and that the Caterpillar Tractor Company (Caterpillar) was the second lowest bidder. By telegram of July 21, 1972, to the contracting officer you contended that Caterpillar was the lowest responsive bidder because International did not meet the requirements of the above-quoted provision. However, a pre-award survey of International, dated August 9, 1972, as supplemented on August 17, 1972, recommended complete award to that firm and expressly concluded that its Model 433, which the survey team determined that the bidder proposed to furnish, met the requirements for a "standard product"

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as set forth in the IFB. On August 22, 1972, you were informed that International was evaluated as the lowest responsive bidder. In your protest of August 29, 1972, to our Office you contend that International's bid was not responsive because that company does not currently produce a commercial item which complies with the "standard product" provision. You maintain that Model 433 offered by International is not currently in production and differs radically from anything currently available from International on a commercial basis as it is International's first attempt to market a tandem-powered, wheel tractor-scraper and incorporates major design changes, including a new transmission, engine, hitch arrangement, and scraper frame. Therefore, you contend that International did not comply with the Standard Products clause which must be properly interpreted as requiring that the item bid upon must be a commercial product of the type and size specified in actual production at the time of bidding.

Since International took no exception to, or otherwise manifested an intention in the bid not to be bound by, any provision of the solicitation, including the Standard Products clause, it is our view that the issue in the present case is one of responsibility, that is, International's capability to produce and deliver a product in accordance with these specifications. See 49 Comp. Gen. 553, 556 (1970). Therefore, since the issue in the instant case involves the matter of a bidder's responsibility, it may properly be resolved on the basis of information developed after bid opening. See 43 Comp. Gen. 77, 81 (1963). Also, we have held that where the question involves the capability of a prospective contractor to perform in accordance with the specifications, the critical time for the determination of such capability may be as late as the time scheduled for performance or, in the present case, delivery of the equipment. 42 Comp. Gen. 532 (1963).

In regard to the matter of International's responsibility, DSA points out that the information obtained in both the original and subsequent pre-award surveys confirms that International is capable of complying with the specifications, including the standard commercial product requirement. In this connection, the request to the cognizant office for a pre-award survey included the specific instruction to ascertain whether the equipment proposed complied with the Standard Product clause. The information developed and confirmed revealed that International intended to furnish its Model 433; that the proposed equipment is an updated version of its Model 270, which had previously been sold both commercially and to the Government; that a preproduction model of the 433 was manufactured more than three years previously; that the preproduction model had undergone thousands of hours of operation at International's proving

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grounds and at a private contractor's job site; that the decision to release the equipment commercially in November 1972 was made in August 1972; that engineering drawings have been released, assembly areas prepared, production tooling installed with components being manufactured therefrom; that production schedules have been planned, commercial manuals and literature are being prepared, and materials and components from outside sources have been ordered, with some having been delivered and inventoried; that the equipment will be in commercial use several months before the first article is due 210 days after date of award; and that the Model 433 meets or exceeds the specifications in the subject invitation.

In support of your argument that the International bid must be rejected as nonresponsive, you have cited our decision, B-164885, January 15, 1969. Although we concluded in the cited case that a provision of the invitation similar to the one involved here should have required rejection of a bid as nonresponsive, we believe the cases are distinguishable. In the cited case the bid in question included information indicating that the bidder proposed extensive modifications to its standard model in order to conform its equipment to the specification design requirements. In view of the modifications proposed, we concluded that the equipment did not meet the specification requirement for a "current commercial model." In the instant case there was nothing in the bid indicating any exception to the requirement to furnish a "standard commercial product."

In these circumstances, there is no legal basis for our Office to object to the proposed award.

Very truly yours,

Paul R. Dabbling

For the Comptroller General
of the United States