

6709
DECISION



Paul Lieberman

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

FILE: B-191307

DATE: June 13, 1978

MATTER OF: Searle CT Systems

DIGEST:

1. Where bidder's cover letter included in bid package contained on reverse side modified standard commercial terms in conflict with IFB requirements, and letter specifically incorporated by reference one such term, bid is nonresponsive despite bidder's general language in cover letter stating offer to be fully compliant with IFB.
2. GAO will not require contracting agency to cause work in awarded contract to be stopped until propriety of award has been decided.

Searle CT Systems (Searle) protests the award by the Naval Regional Procurement Office, Washington, D.C. (NRPO), of a contract to General Electric under invitation for bids (IFB) N00600-77-B-1876 for furnishing two whole body computed tomography systems for use by the National Naval Medical Center, Bethesda, Maryland, and the Naval Regional Medical Center, Portsmouth, Virginia.

Searle contends that the contracting officer incorrectly considered the terms of a standard commercial form included on the reverse side of Searle's bid cover letter as rendering its bid nonresponsive. For the following reasons, we concur with the contracting officer's finding that Searle's bid was nonresponsive to the IFB.

The IFB was issued on September 2, 1977, and was amended four times, amendments 1 through 3 extending the bid opening date, and amendments 2 and 4 revising the specifications. Bids were opened on November 16, 1977, with the following proposed total prices:

Artronix	\$1,027,040
Searle	1,144,900
General Electric	1,360,000
Ohio Nuclear	1,420,000
EMI Medical	1,498,068

Artronix was found nonresponsive because it took exception to the IFB "Time-of-Delivery" clause. Searle was determined to be nonresponsive because its bid included a cover letter which contained standard commercial terms at variance with Armed Services Procurement Regulation (ASPR) provisions contained in the IFB.

The contract award was made to General Electric on January 26, 1978. Searle was advised by a letter from NRPO dated February 7, 1978, that its bid was determined to be nonresponsive, and Searle timely filed this protest.

Searle's bid, dated September 16, 1977, was submitted on standard form 33, accompanied by a signed cover letter, conceded by Searle to constitute a part of its bid. The letter states:

"Searle CT systems has thoroughly reviewed the specifications and requirements as received from the [NRPO] in Solicitation No. N00600-77-B-1876 * * * and is compliant without exception to those specifications and requirements."

However, the reverse side contains Searle's standard commercial terms. These terms, entitled "additional provisions," purport to "attach to and form part of this Quotation." While the terms are preprinted, they contain various modifications including deletions and typewritten changes and additions. The terms encompass, among other things, "Delivery, Excusable Delays," "Transfer of Title and Risk of Loss," "Cancellations," "Other Provisions," "Other Forms," and "Limited Warranty."

We have held in Williamsburg Steel Products Company, B-185097, January 23, 1976, 76-1 CPD 40, that:

"* * * It is a basic principle of Federal procurement law that to be considered for award, a bid must comply in all material respects with the invitation for bids so that all bidders will stand on an equal footing and so that the integrity of the competitive bidding system will be maintained. * * * material deviations * * * may result from statements on letterheads accompanying bids, 36 Comp. Gen. 535, * * * or from references in such letters to a bidder's standard conditions of sale. 37 Comp. Gen. 110, * * *."

Here, the commercial form terms are specifically noncompliant and Searle contends that the general statement of "compliance" cures this deficiency. However, the general contract rule is that, in the case of such conflict, the matter is normally resolved by adopting the meaning of the more specific provision. See 4 WILLISTON, CONTRACTS § 619 (page 743) (3d edition). Moreover, we have specifically held that a blanket offer such as this will not remedy noncompliance with specifications and requirements. 36 Comp. Gen. 415 (1956); 40 Comp. Gen. 132 (1960); 46 Comp. Gen. 1 (1966).

An overall offer to conform can cure specific deviations if the "promise or offer makes it patently clear that the offeror did in fact intend to so conform." B-169480, May 26, 1970. The bidder must have "unequivocally offered to provide the requested items in total conformance with the terms and specification requirements of the invitation." Lift Power Inc., B-182604, January 10, 1975, 75-1 CPD 13. No such clear intention is evident in the instant fact situation.

Searle argues alternatively that, even if the cover letter does not evidence its intention to comply with the terms and conditions of the IFB, the "WAIVER OF PRE-PRINTED INFORMATION (1968 MAY)" clause in the IFB renders Searle's intent, and the commercial terms in question, irrelevant. This clause states:

"Signature on the Invitation for Bids constitutes a waiver of pre-printed terms and conditions appearing on any company letterhead or other document submitted with the bid unless the bidder states in either handwritten or typewritten form that such pre-printed terms and conditions apply to his bid."


Searle's argument is flawed in two respects. First, the terms are not merely "pre-printed" but, as previously indicated, have been modified, apparently in conjunction with the instant bid. Second, even if these terms could be considered "pre-printed," within the meaning of the "waiver" clause, nevertheless at least one term concerning "Limited Warranty" has been made specifically applicable to this bid. The signed front specifications page of the cover letter specifies a 12-month warranty with the stipulation "12 month system warranty as detailed. (See Terms and Conditions on reverse side, Paragraph 6.)" At a minimum, the bidder's incorporation by reference states that this pre-printed term applies to the bid. If only the "Limited Warranty" provision is made applicable to the bid, it is rendered nonresponsive. A bid provision which limits or reduces the bidder's liability is a material qualification which renders the bid nonresponsive. 42 Comp. Gen. 96 (1962); Allied Asphalt Paving Co., B-189843, December 9, 1977, 77-2 CPD 450.

Searle has made reference to the fact that the IFB was amended four times in response to protests by other bidders and that despite the requirements of ASPR § 2-407.8(a)(3) (1976 ed.), Searle was not provided with copies of the protests nor given an opportunity to comment. The contracting officer has indicated that all the amendments in question resulted from NRPO's responses to technical questions and requests for clarifications of specifications by the bidders and did not involve protests. According to the contracting officer, the only protest which was filed was one by Ohic Nuclear on November 15, 1977, alleging that the specifications were overly restrictive. The contracting officer states that no copies of this protest were provided because it was quickly resolved with no changes in the IFB or the procurement process.

It does not appear that Searle was prejudiced or affected in any way by the failure to receive a copy of this protest. In fact, Searle does not allege that this had any effect on the procurement process. Therefore, we need not reach this question.

Searle also requested in its protest that we direct the contracting officer pursuant to ASPR § 2-407.8(c) (1976 ed.) to seek a mutual agreement with General Electric to suspend performance of the contract until this protest is resolved or, alternatively, to terminate the contract pending the resolution of the protest. However, our Office has consistently taken the position that we will not require the contracting agency to cause work to be stopped until we have decided the propriety of the award. 46 Comp. Gen. 53 (1966); Tymshare, Inc., B-18(858, January 23, 1978, 78-1 CPD 56.

Accordingly, the protest is denied.


Acting Comptroller General
of the United States