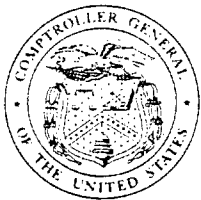


E. Fitzmaurice



**DECISION**

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

8896

FILE: B-192565

DATE: January 19, 1979

MATTER OF: Picker Corporation;  
Ohio-Nuclear, Inc.

DIGEST:

*[Bid That Meets Literal Requirement of IFB is Responsive]*

1. Section 20.2(b)(1) of GAO Bid Protest Procedures requires protests based upon alleged improprieties apparent from the face of solicitation to be filed prior to bid opening. Protest alleging restrictive specification is untimely whether or not protester's letter to agency is considered protest validly filed with contracting agency since (i) if it was not protest, then any subsequent protest to GAO is untimely under section 20.2(b)(1) and (ii) if letter is considered protest, subsequent protest filed with GAO more than 10 days after initial adverse agency action (bid opening) is untimely.
2. Bid that meets literal requirement of IFB that x-ray scanner be capable of 360-degree rotation is responsive and should be accepted unless agency determines that specification does not accurately state Government's minimum needs and cancels IFB and readvertises. ①

CNG-00418

This decision is in response to separate protests filed by the Picker Corporation (Picker) and Ohio-Nuclear, Inc. (Ohio-Nuclear), each company having had its bid found nonresponsive under invitation for bids (IFB) No. M6-3-78 issued by the Veterans Administration Marketing Center (VA), Hines, Illinois. The VA proposes to award the contract to next low, responsive bidder. DLG-00676 DLG-00677

The IFB was issued on March 17, 1978, requesting bids for three computerized Tomography (Whole Body, Single Gantry) Scanners--sophisticated x-ray machines--to be supplied the Department of Defense. Seven bids

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were received. When bids were opened on April 18, 1978, Picker was the apparent low bidder with Ohio-Nuclear the second low bidder.

Included as a part of the IFB requirements was a document dated October 17, 1977, and entitled "Army Medical Department Purchase Description for Computerized Tomographic Systems." The purpose of this document was to set out certain criteria which the requested scanners had to meet. Accordingly, Item 1f of that Purchase Description stated that the scanners "[s]hall be capable of 360 degree rotation." Both the Picker and Ohio-Nuclear bids were found nonresponsive for failure to satisfy this criterion, and it is this determination that both companies protest.

The Ohio-Nuclear bid was found nonresponsive because the scanner offered did not rotate 360 degrees but only 212. Prior to bid opening, Ohio-Nuclear sent a letter dated April 7, 1978, to the contracting officer questioning the need for a 360-degree rotation. Ohio-Nuclear argued that even though its scanner only rotates 212 degrees, it nonetheless provides an x-ray image of the same high quality as any competitive system performing a 360-degree scan.

VA then brought Ohio-Nuclear's claim to the attention of the United States Army Medical Department (the author of the Purchase Description and Item 1f) which informed VA that the Army requires a 360-degree rotation capability in all such scanners purchased for its use since a 360-degree rotation results in a lower dose of radiation to the skin than does a 180- or 212-degree arc using the same amount of radiation.

Upon receipt of this information, the contracting officer notified Ohio-Nuclear that the 360-degree rotation requirement would remain in the solicitation. The record indicates that Ohio-Nuclear made no further attempt to challenge this requirement, but merely submitted a bid dated April 14, 1978. As a result, VA notified Ohio-Nuclear by letter dated July 27, 1978, that its bid was rejected as non-responsive for failure to meet this specification.

Ohio-Nuclear then filed a protest with our Office-- received on August 14, 1978--arguing that the specification was restrictive and that, therefore, the VA determination of nonresponsiveness was arbitrary and discriminatory.

Our Bid Protest Procedures, 4 C.F.R. Part 20 (1978), require that protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be "filed" prior to bid opening. 4 C.F.R. § 20.2(b)(1). The term "filed" as used in 4 C.F.R. § 20.2 means receipt in the contracting agency or the General Accounting Office, as the case may be.

Here, VA maintains that Ohio-Nuclear's protest is untimely since the question of whether this 360-degree rotation requirement is restrictive was not "formally" raised prior to bid opening through its April 7, 1978, letter to VA.

It is unclear from the letter of April 7, 1978, whether Ohio-Nuclear was in fact protesting the 360-degree rotation requirement or merely trying to convince VA that such a requirement was unnecessary. Ohio-Nuclear's actual purpose in sending this letter is further confused by the fact that after being informed that VA would not remove the requirement, it made no further attempt to protest the decision or have it changed, but merely submitted a bid offering a scanner which clearly did not meet one of the IFB's specifications.

Therefore, there is a strong argument that Ohio-Nuclear did fail to file a protest prior to bid opening as required by 4 C.F.R. § 20.2(b)(1). However, assuming without deciding that Ohio-Nuclear's letter of April 7, 1978, was a protest timely filed with the contracting agency, its protest to our Office is nonetheless untimely.

We reach this conclusion based on the provisions of 4 C.F.R. § 20.2(a) which require that if a protest is initially filed with the contracting agency in a

timely manner, in order for any subsequent protest to our Office to be timely, it must be filed within 10 days of initial adverse agency action. The crucial date for Ohio-Nuclear, therefore, is April 18, 1978. When VA opened bids on that date without having removed the 360-degree rotation requirement from the IFB, Ohio-Nuclear was put on notice of adverse agency action. Accordingly, Ohio-Nuclear had 10 days from that date to file a protest with our Office. Yet, we did not receive the Ohio-Nuclear protest until August 14, 1978, well beyond the 10-day time constraint established by 4 C.F.R. § 20.2(a).

Therefore, regardless of whether the Ohio-Nuclear letter of April 7, 1978, is considered a protest to the agency or not, we must conclude that its protest to our Office is untimely and thus not for consideration on the merits.

Picker's bid, on the other hand, did offer VA a scanner which rotates 360 degrees. Yet, VA found its bid nonresponsive because the scanner offered will not collect data during the entire rotation process. Picker, however, emphasizes that Item 1f of the Purchase Description only says that the scanner "[s]hall be capable of 360 degree rotation" and nothing more. Thus, in Picker's opinion, VA cannot reasonably interpret this specification as requiring a scanner with the capability of collecting data throughout the entire rotation cycle, but only as requiring one that performs a 360-degree rotation while otherwise conforming with the IFB. Accordingly, Picker contends that it should be awarded the contract as the lowest responsive and responsible bidder. In the alternative, Picker asserts that Item 1f is ambiguous and that, therefore, the IFB should be canceled and the solicitation readvertised.

VA, however, relies on an Army interpretation of this requirement which it received after bid opening. Using this interpretation, VA argues that there is no point in requiring a scanner to rotate 360 degrees unless it is also capable of collecting data throughout the full rotation cycle. Thus, VA

concludes that because Picker only offered a scanner capable of acquiring data over a 230-degree arc, its bid was nonresponsive and, therefore, properly rejected.

If, as VA argues, its interpretation of Item 1f is the only one reasonably possible, then Picker's bid is clearly nonresponsive and VA was within its authority in rejecting it. Picker, on the other hand, maintains that only its interpretation is reasonable.

In support of its interpretation, VA maintains that, while on the surface Picker's arguments may appear logical, there would be no point in requiring the scanners to rotate 360 degrees unless they were also capable of collecting data throughout the rotation process. Yet, Picker contends that even though its scanner does not collect data throughout the entire rotation, there is still an important reason for the scanner to be able to complete a full 360-degree rotation. This reason, Picker explains, is to ensure that the scanner has the "fast scan capability" also required by the IFB.

The record indicates that the ability to make a scan in a matter of seconds (a fast scan capability) is necessary to minimize the risk of a patient moving during the scanning process and causing the image obtained to be blurred. The Picker system, therefore, uses a 360-degree rotation to accelerate the x-ray tube to the proper speed prior to reaching the point of initial data acquisition and then to decelerate the tube after the data has been obtained. It is through this method then that Picker achieves a fast scan capability.

Thus, having shown a purpose for the 360-degree rotation requirement other than just data acquisition, Picker contends that it has also demonstrated the reasonableness of its interpretation of Item 1f. Moreover, Picker claims that the reasonableness of its interpretation is further supported by the findings reached by the procurement officials who inspected the Picker system after bid opening.

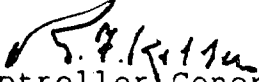
The findings referred to are those of the VA Marketing Center representatives who, after witnessing a demonstration of the Picker machine, reported to the VA Central Office in Washington, D.C., that they believed that this device satisfied the 360-degree rotation requirement. This conclusion rested on the concept that it would be improper to find Picker's bid nonresponsive for failure to meet a data acquisition requirement which the Army did not make known until after bid opening and as a result was never specifically stated in the IFB. Notwithstanding this recommendation, the contracting officer's superiors considered the data acquisition capability to be an essential element of the solicitation and, therefore, directed the contracting officer to declare the Picker bid nonresponsive for failure to meet the requirement.

From the foregoing, it is apparent that even among themselves VA personnel could not agree on the correct interpretation of Item 1f. This disagreement is even evident in VA's report to our Office in which the Director, Supply Service, concludes that Picker's bid was nonresponsive and properly rejected while the contracting officer concludes that Picker's bid did satisfy the 360-degree rotation requirement and thus recommends that Picker receive the award.

Although the drafting of specifications to meet the Government's minimum needs and the determination whether the items offered meet the specifications are properly the functions of the procuring agency, our Office will determine whether the interpretation of a specification is reasonable where, as here, the procuring agency and the protester reach different interpretations of the same specification. See, e.g., Air, Inc., B-191665, September 11, 1978, 78-2 CPD 185. As the contracting officer points out, Picker's bid does comply with the literal requirements of the specification. Moreover, Picker has shown that data acquisition is not the only reason for a 360-degree rotation capability. Therefore, we conclude that Picker's machine meets the specification and that its bid is responsive. VA should

either accept Picker's bid or, if it determines that the specification does not accurately state the Government's minimum needs, cancel the solicitation and readvertise. By separate letter of today, we are advising the Administrator, VA, of this recommendation.

Accordingly, the protest is sustained.

  
Deputy Comptroller General  
of the United States