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DECISION



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

[Request for Determination of Bid Acceptability]

FILE: B-197531

DATE: March 27, 1980

MATTER OF: Dohrmann Division, Envirotech Corporation *D2604229*

DIGEST:

Low bid containing bidder's preprinted standard commercial terms and conditions, which are at variance with requirements of IFB, may be considered for award in view of inclusion in IFB of "Waiver of Preprinted Information" clause which permits disregarding of preprinted information under conditions applicable here. However, GAO recommends clause not be utilized in future as it constitutes arbitrary convention which permits ignoring clear language of bid.

The Department of the Navy, Naval Regional Contracting Office, Washington, D.C., has requested an *D2604229* advance decision regarding the acceptability of the low bid of Dohrmann Division, Envirotech Corporation (Dohrmann), submitted in response to invitation for bids (IFB) No. N00600-80-B-0378.

The IFB was for one microcoulometric titrating system to be used to evaluate and certify atmospheres of manned deep submergence vehicles. The specifications required either Dohrmann components, Antek Instruments, Inc., components or equal be furnished.

While the IFB did not require the submission of descriptive literature, it did contain the following clause:

"WAIVER OF PREPRINTED INFORMATION.
Signature on the Invitation for Bids constitutes a waiver of preprinted terms and conditions appearing on any company letterhead or other document submitted with the bid unless the bidder states in

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either handwritten or typewritten form that such preprinted terms and conditions apply to his bid."

Dohrmann submitted with its bid eight brochures describing its equipment and a page of clauses entitled "Standard Conditions of Sale." The technical brochures submitted with the bid present no controversy as they show compliance with the specifications. However, the "Standard Conditions of Sale," which appear to be Dohrmann's standard commercial terms, are at variance with numerous terms and conditions of the IFB and, if considered part of Dohrmann's bid, would render the bid nonresponsive.

The Navy requests our decision as to whether the bid of Dohrmann is acceptable under the "Waiver of Preprinted Information" clause. The Navy states it is unclear as to the proper disposition of Dohrmann's bid because of two decisions of our Office, which it views as reaching conflicting results.

In 49 Comp. Gen. 851 (1970), we made the following statement at page 852:

"Award of a contract pursuant to formal advertising may be made under 10 U.S.C. 2305(c) only to the low responsible bidder whose bid conforms to the invitation. We do not believe that statutory requirement may be negated by a regulatory provision, such as Armed Services Procurement Regulation 2-202.5(f), which presumes a bid to conform or be unqualified where the intent of the bidder is ambiguous. Cf. B-166284, May 21, 1969. Nor do we believe that the invitation for bids may establish any arbitrary conventions which provide that the clear language of the bid will be ignored unless presented in a particular form."

The above reasoning expresses disapproval of the type of waiver clause employed here. However, 49 Comp. Gen., supra, was a reconsideration of B-169057, April 23, 1970, wherein we noted the solicitation contained the

"Waiver of Preprinted Information" clause and concluded "We feel this clause lends substantial weight to the holding here that the mere transmission of catalog information, with nothing more, is not fatal to the consideration of the bid."


The other decision which gives the Navy concern is Searle CT Systems, B-191307, June 13, 1978, 78-1 CPD 433. In Searle, a bidder submitted a cover letter with its bid, the reverse side of which contained preprinted terms and conditions varying the terms of the solicitation. We found the bid to be nonresponsive because the bidder had incorporated by reference at least one of the preprinted terms limiting its liability. However, the decision appears to imply to the Navy that if the bidder's standard terms had not been altered in violation of the waiver clause, the clause would have been for application.

We believe these two decisions can be reconciled. In 49 Comp. Gen., supra, we were attempting to clear away confusion in the procurement community respecting our Office's position concerning unsolicited descriptive literature and state our basic belief that arbitrary conventions should not be included in solicitations which permit the ignoring of the clear language of a bid. Therefore, we indicated that we did not believe clauses such as the "Waiver of Preprinted Information" should be included in solicitations as they tend to undermine the mandate of 10 U.S.C. § 2305(c).

We did refer to the waiver clause in Searle. We did not consider if waiver would have been proper. That was unnecessary since we found that certain waiver requirements in the clause were not present in the bid in question and we ruled that the bid was nonresponsive for the reason stated above.

As indicated above, we have reservations about using the clause in solicitations. However, once the clause has been inserted in a solicitation and bids have been received under the solicitation, we believe it would be inappropriate to disregard the clause in the evaluation of bids. See our secondary reliance upon the clause in B-169057, supra.

Accordingly, while we recommend the clause not be used in the future, we have no objection to consideration of Dohrmann's bid for award, since under the clause, the offending preprinted terms and conditions can be waived.

A handwritten signature in cursive script, reading "Milton J. Fowler".

For the Comptroller General
of the United States