



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

R-178746

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OCT 9 1973

In-Trol Division
ASEECO Corporation
1830 W. Olympic Boulevard
Los Angeles, California 90006

Attention: Mr. Michael M. Denson

Gentlemen:

Reference is made to your letter of May 25, 1973, and subsequent correspondence, protesting an award of a contract to anyone other than yourselves, under invitation for bids (IFB) DACW25-73-B-0025, issued by the Department of the Army, Corps of Engineers, Rock Island, Illinois.

On April 18, 1973, the procuring activity issued the instant solicitation on 10 diesel-driven electric generator sets. The solicitation required that the generator sets conform to the applicable provisions of military specification MIL-G-19826C(YD) for Type I generators. Although paragraph 6.3 of the military specification stated that the procurement document should include certain paragraphs requiring each bidder to furnish operating experience data on the articles being procured, the IFB did not solicit such information from each bidder.

Bids were opened on May 16, 1973, at which time your company submitted the third lowest bid. After the bid opening, but on the same day, a teletype message was received from your company which furnished certain operation experience information.

In a letter dated May 16, 1973, to the Corps of Engineers, your Company indicated that it would protest against an award of the contract to either the first or second lowest bidders on the ground that neither of them furnished data relative to operating experience and were, therefore, nonresponsive. Your company asserted that the information called for by paragraph 6.3 of the military specification was mandatory on all bidders and since yours was the only bid to comply with the requirement, the Corps of Engineers should be restrained from awarding the contract to either of the two lower bidders and award the contract to In-Trol.

On May 22, 1973, your company was advised by the Corps of Engineers that your protest was rejected on the ground that the operating experience

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information was not required by the solicitation, and, therefore, the failure of any bidder to furnish such information was not grounds for rejecting its bid. The basis for the rejection of the protest was twofold. It was presumed that the authors of paragraph 6.3 of the military specification determined that it was only desirable to obtain operating experience information, not mandatory; for otherwise, they would have stated that the paragraphs calling for that information "shall," rather than "should," be included in the solicitation. Since the solicitation document did not expressly include the language of paragraph 6.3, such data was not required. Secondly, the Army took the position that the information called for was descriptive literature and that since the IFB did not contain the standard descriptive literature clause prescribed by Armed Services Procurement Regulation (ASPR) 2-202.5(d)(2), operating experience data was not required.

Our Office has held that experience requirements which are directed primarily to the performance history of the item being procured, rather than to the experience of the prospective contractor, concern bidder responsiveness, while the experience of a bidder is a matter of bidder responsibility. 49 Comp. Gen. 9, 11 (1969); 48 Comp. Gen. 291, 297 (1968). To ensure that the Government has the benefits of free and open competition (10 U.S.C.A. 2305), it is mandatory that awards of contracts be made upon the basis of the advertised specifications and that only inconsequential or immaterial defects or variations which do not affect the price, quantity, quality, or delivery of the articles offered may be waived. B-160294, December 9, 1966; 30 Comp. Gen. 179 (1950). Therefore, since an award must be made to the lowest responsive and responsible bidder whose bid conforms to the invitation and will be most advantageous to the Government (10 U.S.C.A. 2305(c)), the critical question to be resolved in this case is whether the operating experience information required to be furnished by paragraph 6.3 of the military specification, but omitted from the IFB by the Army, was mandatory on each bidder.

With regard to this point, we concur with the presumption propounded by the Army that the authors of paragraph 6.3 felt it was desirable to obtain operating experience information, but not mandatory. Otherwise, they would have stated that the paragraphs calling for such information "shall," rather than "should," be included in the solicitation. This dichotomy between the meaning and implications of the words "should" and "shall" has been the subject of numerous decisions, both in our Office and in the courts. In a previous case, B-176184, September 22, 1972, the solicitation in question provided that: "Both the information system and the monitoring system should be secured from the same vendor * * *." Even though the contractor did not comply with the above provision, he was deemed responsive to the solicitation, since the provision

B-178746

merely expressed the Government's preference and was not a mandatory requirement. Similarly, by employing the term "should" in paragraph 6.3, the authors thereof were indicating only their desire and/or preference and not imposing a mandatory requirement that all procurement documents require bidders to furnish operating experience information with their bids. To the contrary, the use of the word, "shall," in a provision has been construed as being mandatory in nature, inconsistent with the idea of discretion, and suggesting a mandatory duty. B-164031(2), September 22, 1972; B-146333, August 14, 1972.

Therefore, on the basis of the foregoing considerations, we must conclude that the contracting officer's determination that your protest be denied is correct. In view of this conclusion, we need not, and do not, reach the other questions concerning your protest which were decided against you by the contracting officer.

Sincerely yours,

Paul G. Deabling

For the ^{Comptroller} General
of the United States