



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

31187

B-173140

JUL 16 1973

The Cadre Corporation
2245 Clearview Place
Atlanta, Georgia 30340

Attention: Mr. Gerald R. Smith
President

Gentlemen:

Reference is made to your letter of June 15, 1973, and prior correspondence, protesting against the rejection of your bid as nonresponsive and against the subsequent award of a contract to Vertex Systems, Incorporated, under invitation for bids (IFB) No. N00612-73-R-0016, issued December 29, 1972, by the Naval Supply Center, Charleston, South Carolina.

The invitation requested bids for services, labor and material for installation of an automated fuel handling system at the Center. The IFB, in paragraph C3, required the inclusion of descriptive literature to establish, for the purposes of bid evaluation and award, details of the system the bidder proposed to furnish. Failure to furnish such descriptive literature was stated to be a basis for rejection of one's bid.

By February 13, 1973, the date set for bid opening, five bids had been received. After bid opening, all bids and descriptive literature were publicly displayed for approximately 20 minutes before the existence of the proprietary notice contained in your bid was discovered. Thereafter, the proprietary data contained in your bid was removed from public display and kept confidential. On February 20, 1973, the descriptive literature from your bid, excluding the proprietary data, was given to the Fuel Division, Naval Supply Center, Charleston, for evaluation in conjunction with the Naval Fuel Supply Office, Washington, DC. The technical personnel stated in a memorandum dated February 21, 1973, that there was insufficient information to evaluate your bid. On February 21, 1973, a review of your bid was made on the basis of the proprietary data and the nonproprietary information previously evaluated. Upon this second review, it was determined that the cable offered in your bid was not in accordance with the required specifications as contained in NAVSUP 40 Specification No. 42003, paragraph 3.3.8. Used up

PUBLISHED DECISION
53 Comp. Gen.

730024 091414

the results of both of these reviews, the contracting officer determined your bid to be nonresponsive due to (1) a failure to submit unrestricted descriptive literature, and (2) the offering of a cable which did not meet the specifications.

You base your protest upon the following two theories: (1) that Armed Services Procurement Regulation (ASPR) 2-404.4 should not apply to this procurement; but, even if it does, Cairo's bid was responsive to each provision, and (2) the cable offered by Cairo was responsive, as indicated by specification No. 42001, paragraph 3.3.8 requested bids for the cable as stated or an "equal" cable.

Examining your first theory, it is our opinion that ASPR 2-404.4 would be applicable to this instant procurement. Federal law, as codified in 10 U.S.C. 2305, includes the following with respect to all advertised procurements:

- (c) Bids shall be opened publicly at the time and place stated in the advertisement. * * *

A public opening has been interdicted to mean that the bid must publicly disclose to all competing bidders the essential nature and type of the products offered and those elements of the bid which relate to quantity, price and delivery terms. ASPR 2-404.4 has incorporated this concept and specifically states as follows:

2-404.4 Restrictions on Disclosure of Descriptive Literature.

- (a) When a bid is accompanied by descriptive literature (as defined in 2-402.5(c)), and the bidder imposes a restriction that such literature may not be publicly disclosed, such restriction renders the bid nonresponsive if it prohibits the disclosure of sufficient information to permit competing bidders to know the essential nature and type of the products offered on those elements of the bid which relate to quantity, price and delivery terms. * * *

Since the regulation was promulgated in implementation of a statute and was published in the Federal Register, it has the force and effect of law and bidders are charged with constructive notice of its provisions. Therefore, the contracting officer was correct in requiring the standards of ASPR 2-404.4 to be applied to your bid.

In interpreting and applying the commercial provision applicable to civilian agencies of the Government, we looked in 41 Comp. Gen. 510 (1952), at page 513 that:

By the terms of section 1-2.401.4 of the Federal Procurement Regulations not all restrictions imposed by a bidder on the public disclosure of descriptive data submitted with a bid renders such bid non-responsive. Only those restrictions which relate to quantity, price and delivery terms or which prohibit the disclosure of sufficient information to permit competing bidders to know the essential nature and type of the products offered will have this effect. * * *

Also, see B-159259, November 3, 1965, where we discussed the comparable regulation applicable to the National Aeronautics and Space Administration (NASA). In both of these cases, the items being procured were either of a "commercially available" nature or "off-the-shelf" equipment actually included to meet the requirements of the purchase description. It was in these circumstances that we stated in Id. Comp. Gen., 1965, at page 514 that:

We are in agreement with the contracting officer's determination that * * * / * * / restriction on public disclosure of the nature and type of product offered. All bid items had copies of the purchase description and drawings which were included therein. The contracting officer knew that * * * / * * / bidding material for item # * * * / * * * / which was * * * / * * * / Purchasers, the * * * / * * * conform to the purchase description requirements were not hidden but obvious and easily ascertainable. (Underlining supplied.)

See, to the same effect, our holding in B-159259, supra.

In the instant procurement, while it appears that public disclosure was made as to the bid price, quantity and delivery terms, of your bid, the system you bid on was neither a "commercially available" nor "standard off-the-shelf" item and the descriptive literature was necessary to disclose the essential nature and type of the system you offered. Therefore, restriction of the descriptive literature submitted with your bid was a proper basis for a finding of nonresponsiveness under 15CFR 2-401.4(a).

Although you have contended that the portion of the unrestricted descriptive literature submitted with your bid was sufficient for the purpose of determining the essential nature and type of your system, we note that the agency technical personnel concluded otherwise. It

D. 107140

these circumstances, we do not believe our Office would be justified in substituting our judgment for that of the Navy technical personnel.

In any event, your bid was also determined nonresponsive with respect to meeting the Navy's need for a cable in accordance with paragraph 3.3.6 of the applicable specification, which states:

* * * A cable consisting of solid annealed copper conductors, cabled in pairs, with pairs cabled, with high molecular weight polyethylene inner jacket, longitudinally applied corrugated shield of copper and covered with a jacket of high molecular weight polyethylene or equal, shall be acceptable as a minimum requirement. * * *

You interpreted the "or equal" phrase in the specification as modifying the entire cable, and you offered a cable with other than the specified copper sheath.

It is the Navy's position that the "or equal" applies only to the outer jacket and that such intended meaning is clear from the structure and punctuation of the sentence. We presume of course for disagreeing with this interpretation. Since the Navy considers a copper sheath essential to meet its needs, your bid is not acceptable for this reason.

Accordingly, your protest is denied.

Sincerely yours,

JAMES G. DUNN.

Yours truly,

Comptroller General
of the United States