

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

30570

FILE: B-216167**DATE:** March 1, 1985**MATTER OF:** Champion Road Machinery International
Corporation**DIGEST:**

1. Bidders' warranties which limit responsibility of bidders in contravention of warranty in IFB render bids nonresponsive.
2. Award by foreign government grantee, under Agency for International Development (AID) grant procurement, should not be disturbed since grantee has relied in good faith on AID approval, albeit erroneous, AID letter of commitment has been delivered to awardee and awardee has proceeded with performance.
3. Claim for damages from bidder whose bid properly was rejected as nonresponsive will not be considered.

Champion Road Machinery International Corporation (Champion) requests our review of the Agency for International Development (AID) approval of an award to Galion Manufacturing Division of Dresser Industries, Inc. (Galion), by the Arab Republic of Egypt (ARE) for 54 motorgraders and accessories under ARE invitation for bids (IFB) No. DSF-MLG/89-84/ARE financed by AID Grant No. 263-K-605 (now 263-0161). Champion, the low bidder by approximately \$300,000, objects to the rejection of its bid as nonresponsive and contends that AID's approval of an award to Galion, the second low bidder, was improper because Galion's bid was nonresponsive. Champion claims damages as a result of AID's improper approval of the award to Galion.

We deny a portion of Champion's complaint and its claim for damages. We sustain Champion's complaint that Galion's bid was nonresponsive.

GAO ROLE

We have considered this complaint pursuant to our policy of reviewing contract awards made with grant funds

031343

to determine whether there has been compliance with applicable statutory requirements, agency regulations and grant terms. ^{1/} See Niedermeyer-Martin Co., 59 Comp. Gen. 73 at 76 (1979), 79-2 C.P.D. ¶ 314 at p. 6. Although contracts under grants to foreign governments financed by AID are not subject to rules applicable to federal procurements, contract awards should comply with applicable statutory, regulatory and grant criteria. Sola Basic Industries, B-185505, April 7, 1976, 76-1 C.P.D. ¶ 232. In this regard, we have held that, if competitive bidding is required, IFB's issued by foreign governments pursuant to AID grants must follow certain basic principles of federal procurement law, but that this requires only that the grantees' decisions be rational, as opposed to grantee compliance with the technical intricacies of formal advertising. Niedermeyer-Martin Co., 59 Comp. Gen. 73 at 78 (1979), 79-2 C.P.D. ¶ 314 at p. 8.

APPLICABLE REQUIREMENTS

In this case, the requirements which a proposed award must meet prior to AID approval are the following: (1) the statutory/regulatory requirements of AID Regulation 1 (22 C.F.R. § 201.22 (1984)); (2) the terms of the grant agreement; and (3) the terms of the IFB. AID Regulation 1 provides:

"Awards. Every award shall be made to that responsible bidder whose bid, conforming to the invitation for bids, is lowest in price, unless another bid is demonstrably more advantageous to the importer [ARE] because of any factor (other than price) set forth in the invitation for bids as a factor to be considered in the evaluation of bids." 22 C.F.R. § 201.22(d).

^{1/} Effective January 29, 1985, we no longer consider such complaints. See 50 Fed. Reg. 3978 (1985); The George Sollitt Construction Co., B-218101, Feb. 6, 1985, 85-1 C.P.D. ¶ _____.

The grant agreement provides:

"No more than reasonable prices will be paid for any goods or services financed, in whole or in part, under the Grant. Such items will be procured on a fair and, to the maximum extent practicable, on a competitive basis." Article C, section C.4.

Finally, the IFB provides that the lowest priced responsible and qualified bidder responsive to the IFB will receive the award. The IFB defines "responsive," in part, as follows:

"A responsive bid is one which accepts all of the terms and conditions of the IFB without material modifications. A material modification is one which . . . limits in any way responsibilities, duties, or liabilities of the bidder or any rights of the borrower [ARE] or of AID, as any of the foregoing have been specified or defined in the IFB."

PROCUREMENT BACKGROUND

Under the Activity Protocol implementing the grant, ARE receives, opens and evaluates bids prior to recommending a proposed award to AID. Upon receipt of ARE's recommendation, AID is required to examine the proposed award to ensure that it is in accordance with the IFB's terms and conditions. AID then issues a letter to ARE advising of its determination.

Of the five bids received, Champion was low and Galion second low. The Champion warranty varied from the IFB and ARE referred the deviation to AID for review. AID found the deviation material and advised ARE that the Champion bid was nonresponsive. The record indicated that, at approximately the same time, ARE was experiencing concern regarding the responsiveness of Galion's bid. However, instead of requesting AID's review of the bid, ARE sought clarification of the bid directly from Galion. One of the items clarified was the responsiveness of Galion's warranty. Satisfied with Galion's clarification, ARE proposed to AID an award to Galion. On June 24, 1984, AID approved the proposed award. The contract was awarded to Galion by ARE on June 26, 1984. Champion requested AID's reconsideration of its determination that Champion's bid was nonresponsive. AID reconsidered on the basis of Champion's clarifications and found

Champion's bid responsive. AID advised ARE and Galion of this change of position. ARE at first agreed to cancel the award to Galion, but later requested that AID reconsider its determination that Champion's bid was responsive. Galion protested the determination. AID considered having the IFB canceled. However, AID headquarters in Washington, D. C. (AID/Washington) reviewed the matter and decided that Champion's bid was nonresponsive and that Galion's bid was responsive because Galion's standard warranty did not have to be considered part of Galion's bid. AID/Washington advised the field office in Cairo to proceed with award to Galion. Galion was given the AID letter of commitment on August 30.

BID RESPONSIVENESS

In considering the responsiveness of the Champion and Galion bids to the IFB, we bear in mind certain fundamental concepts of formal advertising. First, a responsive bid must clearly evidence on its face the bidder's intention to comply with, and be bound by, the terms and conditions of the IFB. Second, a bidder may not be afforded an opportunity after bid opening to change or alter its bid so as to make it responsive since this is tantamount to permitting the submission of a second bid. Sheffield Building Company, Incorporated, B-181242, Aug. 19, 1974, 74-2 C.P.D. ¶ 108. Third, even where a bid is reasonably subject to two interpretations, a bidder may not explain the bid's meaning if such clarification could prejudice other bidders. B&P Printing, Inc., B-188511, June 2, 1977, 77-1 C.P.D. ¶ 387. Fourth, the terms of a warranty are a material part of an IFB and a bidder's exception to, or qualification of, an IFB's warranty clause renders its bid nonresponsive. Premier Electric Supply, Inc., B-191184, July 21, 1978, 78-2 C.P.D. ¶ 59; 45 Comp. Gen. 273 (1965).

IFB WARRANTY AND SUBMISSION REQUIREMENTS

The IFB required a warranty that ran 12 months from the date of installation and startup, under which the contractor bore total risk and expense for the repair and/or replacement of any defects due to faulty design, materials and/or workmanship.

The IFB further provided:

"All copies of the bid must be signed in ink by the bidder. The bidder's name shall be printed or typed on the bid and each continuation sheet thereof on which an entry is made. Erasures or other changes must be initialed by the person signing the bid." (Emphasis in original.)

CHAMPION'S BID

Included in Champion's bid was a document entitled "Statement of Warranty" (Statement). Among other things, the Statement expressly denied responsibility for engines, tires and accessories manufactured by others.

GALION'S BID

Included in Galion's bid was a document, Galion quotation form G1381 (Galion Form), consisting of a two-sided, preprinted form with blanks on the face sheet for insertion of product description/price and the manufacturer's certification of correctness and, on the reverse, standard terms of export sale (Terms). On the face sheet, in the product description blank, under the heading "Accessories," was inserted without explanation the phrase "12 Month Warranty." On the reverse, among the Terms was a 6-month warranty and a warning that:

". . . this document, together with any additional writings signed by . . . [Galion], represents a final, complete and exclusive statement of the agreement between the parties and may not be modified, supplemented, explained or waived by parol evidence.

"Any referenced by . . . [Galion] to . . . [ARE's] specifications . . . are only to describe the products and work covered hereby and no warranties or other terms therein shall have any force or effect." (Emphasis supplied.)

Like Champion, Galion expressly denied responsibility for components, including engines, tires, and accessories manufactured by others. It also provided that the 6-month warranty ran from the date of shipment.

GAO ANALYSIS

In our view, both bids are nonresponsive.

Both the Champion Statement and the Galion Form bear the name of the respective bidders and are part of the respective bids constituting bid continuation sheets (as provided in the IFB).

Champion, by limiting its responsibility for components of Champion equipment manufactured by others, qualified its bid and thereby rendered its bid nonresponsive. B-169927(1), March 16, 1971.

AID read Galion's standard warranty out of Galion's bid on the theory that the terms on the reverse side of the Galion Form were not signed by the bidder. However, it is clear that the IFB only required that the bidder's name be printed on each continuation sheet and not that the sheet be signed. Therefore, the Terms of the Galion Form must be considered. Moreover, we cannot accept that Galion's certification of the IFB form and inclusion of the phrase "12 month warranty" under the heading "Accessories" on the face of the Galion Form rendered the Terms on the reverse of the Galion Form meaningless. Since nothing in the Galion bid states that the Terms are inapplicable, the inclusion of the Terms, which are inconsistent with the IFB warranty provisions, created an ambiguity which cannot be corrected after bid opening without allowing Galion an improper option to avow or disavow its bid. B-175660, June 1, 1972; see also 42 Comp. Gen. 96 (1962).

The Galion standard warranty was inconsistent with the IFB terms because it offered a shorter warranty period than required and because it excluded required elements from warranty coverage. As indicated above, the terms of a warranty are material. The 6-month warranty in lieu of the required 12-month warranty alone renders the Galion bid nonresponsive. Further, we have specifically found that a warranty that runs from date of shipment in lieu of the IFB required warranty running from first use is a material qualification rendering the bid nonresponsive. B-150764, May 23, 1963; see also Premier Electric Supply, Inc., B-191184, July 21, 1978, 78-2 C.P.D. ¶ 59. We have likewise found nonresponsive deviant warranties which provide that equipment manufactured by others is excluded from warranty protection. B-169927(1), supra. Finally, in a similar situation, where a manufacturer argued that its certification that the equipment offered was in strict accordance with the provisions of the IFB overrode an inconsistent warranty, we rejected the argument noting, "If you did not intend it to be applicable it is not understood why reference was made to it in your proposal and why you included a copy of it with your proposal." B-156681,

June 2, 1965. We therefore conclude that Galion's inclusion of the Galion Form rendered its bid both ambiguous and nonresponsive. Infrared Industries, Inc., B-181739, Nov. 20, 1974, 74-2 C.P.D. ¶ 272.

In the circumstances, the Galion bid should not have been accepted. However, we recognize that ARE complied with applicable requirements in submitting the proposed award to AID for approval. Moreover, ARE in good faith relied on AID's approval in awarding the contract to Galion. Since the AID letter of commitment has been delivered to Galion and Galion has proceeded with performance, we do not recommend that the award be disturbed. See New World Research Corporation, B-186084, Aug. 31, 1976, 76-2 C.P.D. ¶ 206.

Further, since Champion was nonresponsive and therefore not entitled to award, we will not consider its claim for damages.

Harry R. Van Cleave
for Comptroller General
of the United States