

**DECISION**

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

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FILE: B-184515

DATE: January 12, 1976

MATTER OF: Hewlett-Packard Company

## DIGEST:

1. Where protester offered to "re-format" existing commercial technical manual and IFB required preparation of new commercial technical manual as one contingency, protester's bid contained no clear obligation to perform in accordance with IFB and was therefore properly rejected as nonresponsive.
2. ASPR § 3-210 makes negotiation discretionary as opposed to mandatory in "sole source" procurement situation. Additionally, record shows more than one source of supply was available here and negotiated procurement was therefore inappropriate.

Hewlett-Packard Company (H-P) is protesting the award of a contract for 200 Distance Measuring Infrared Survey Instruments, technical manuals and other associated technical equipment to Cubic Industrial Corporation (Cubic) pursuant to invitation for bids (IFB) DAAK01-75-B-2215, issued by the United States Army Troop Support Command (TROSCOM) on May 23, 1975. Of the eight firms solicited, only H-P and Cubic submitted bids, with H-P the low bidder.

By teletype dated July 15, 1975, to TROSCOM, and by mailgram of the same date to our Office, Cubic protested award of a contract to H-P based on the contention that H-P had qualified its bid. After determining that H-P had qualified its bid, TROSCOM notified H-P that its bid had been found to be nonresponsive and on August 25, 1975, awarded the contract to Cubic. Subsequently, by letter to our Office dated September 2, 1975, Cubic withdrew its protest. Thereafter, by teletype of September 5, 1975, to our Office, H-P protested the award to Cubic on the ground that H-P is the lowest responsive, responsible bidder.

As noted above, the IFB included a requirement for a technical manual associated with the primary object of the solicitation, the surveying devices. Additionally, the IFB incorporated by reference

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military specification MIL-M-7298C (November 1, 1970) titled "Manuals, Technical: Commercial Equipment" which provided minimum requirements for technical manuals in general. It is the technical manual associated with the measuring devices, called for by contract line item number (CLIN) A004 which provides the basis of this controversy.

Pursuant to the provisions of MIL-M-7298C and the IFB, TROSCOM had three options regarding the technical manual to satisfy the contract requirements: (1) accept the contractor's existing commercial technical manual on an "as is" basis; (2) order necessary changes in the existing commercial technical manual; or (3) require that a new technical manual be prepared.

TROSCOM alleges that use of the word "re-format" by H-P in a cover letter which accompanied its bid limited H-P's legal obligation in supplying CLIN A004 to making mere stylistic changes in H-P's existing technical manual as opposed to those substantive changes which the IFB provides for when necessary. This, TROSCOM argues, is a qualification of H-P's bid which renders it nonresponsive. In the alternative, TROSCOM argues that use of the word "re-format" created a fatal ambiguity in H-P's bid which renders it nonresponsive.

In pertinent part, H-P's cover letter states:

"This letter, letter attachment, and the completed copies of reference IFB constitutes Hewlett-Packard's response to IFB DAAK01-75-B-2215.

"Hewlett-Packard's proposal is based upon supplying equipment qualified under Ft. Belvoir's Qualified Product testing program, and listed in the solicitation as Hewlett-Packard Part No. 3805 DMI. Our proposed equipment meets or exceeds all requirements of the QPL and solicitation.

"Hewlett-Packard's proposal includes preparation of all materials and services listed on the solicitation's

DD Form 1423's, in accordance with DD Form 1423 and Data Item Description requirements.

"The proposal includes pricing for CLIN A004, which is based upon re-formatting the standard HP commercial manuals for the proposed equipment in strict accordance with DD Form 1423, [which incorporates by reference the above military specification] sequence Item A004 requirements. However, Hewlett-Packard believes that the existing commercial manuals meet the basic intent of A004 requirements, and are most likely acceptable to the Army without change. Should Army Troop Support Command concur in this belief, Hewlett-Packard's bid price for CLIN 0001AA can be reduced \$17.81 per unit for a total reduction of \$3,544.00. This statement is not intended to be interpreted as an alternate proposal to IFB requirements, but is offered for information purposes only." (Emphasis supplied.)

H-P, on the other hand, argues that the word "re-format" encompasses changes of both form and substance, and therefore its bid fully satisfied the IFB requirements. In the alternative, H-P argues that even if the word "re-format" is ambiguous, this ambiguity is cured when consideration is given to the context in which the word was used. Counsel for H-P argues that an absolute dichotomy does not exist between "form" and "substance," that the two overlap, and that H-P's offer to "re-format" its existing commercial manual a fortiori was an offer to make changes of both "form" and "substance." Counsel alleges that the military specification incorporated by reference in the IFB, as noted, supra, includes matters of a substantive nature under the heading of "format." H-P cannot be penalized, counsel urges, when it merely uses a term in the same manner as the Government did in its own solicitation.

Arguably, possible changes to a technical manual cannot be definitively categorized as changes of form or substance. Arguably too, the military specification included substantive matters under

the heading "format" further obfuscating the distinction between the two terms. However, even accepting arguendo the general truth of the above premises in a light most favorable to H-P, an offer to "re-format" an existing commercial technical manual cannot reasonably be construed as an offer to prepare a new commercial technical manual. Yet, as one contingency, the instant IFB clearly provided for the possibility that, as the contractor, H-P would be required to prepare a new commercial technical manual. In this regard, the military specification provides:

"When there is no existing commercial manual or the manufacturer's commercial manual is unacceptable because the volume of supplemental data required to make it meet the necessary requirements would be so extensive that clarity could not be preserved, the contract will specify that the contractor shall prepare a new manual, either to include the requirements of this specification, or in accordance with a designated military specification."

Since H-P offered to merely "re-format" its existing commercial manual, H-P's bid contained a material qualification to the manual requirements of the IFB. Therefore, we attach no significance to the lengthy arguments of the parties concerning the difference between "form" and "substance."

However, we recognize that H-P included the phrase "\* \* \* in strict accordance with DD Form 1423, sequence Item A004 requirements" in the offer to "re-format" its existing commercial manual--a statement allegedly obligating the firm to strict compliance with the specifications. Counsel for H-P argues that H-P's cover letter must be read in context, and that when this is done "[n]o reasonable argument can be made that \* \* \* [it] constituted anything other than an explicit and unambiguous reaffirmation of Hewlett-Packard's intent to meet all specification requirements." (Emphasis in original.) To be determined nonresponsive, counsel argues, an allegedly qualified bid must be so unequivocal as to be a clear qualification of the bid.

With regard to the coexistence of general promises to conform to a specification and specific deviations in a bid, we have held that: "The general rule of construction followed in circumstances

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where there is a reasonable doubt as to the intent of a document is that a specific statement directed to individual items will take precedence over a broad general statement when the two are in conflict." B-167339(1), October 9, 1969. In the instant case, H-P has made a general statement evidencing its intent to meet the specification requirements of the IFB. However, along with the general statement there is a specific statement of its intention to "re-format" its technical manual. At best, therefore, the H-P cover letter has created an ambiguity as to exactly what the firm's obligation will be.

H-P next argues that the determination of nonresponsiveness was made pursuant to TROSCOM's evaluation of H-P's current commercial technical manual which was not a part of H-P's bid. This, H-P contends is contrary to the established rule that responsiveness must be determined from the face of the bid without resort to extraneous documents. Since the Government allegedly did not adhere to the above-stated rule, H-P argues that it should likewise not be bound thereby. H-P offers extraneous documents in the form of affidavits which tend to support its claims.

While we agree with H-P that the above-stated rule is generally correct (Western Waterproofing Company, Inc., B-183155, May 20, 1975, 75-1 CPD 306), we do not agree with H-P's conclusion that TROSCOM's determination of nonresponsiveness was based on a consideration of an extraneous document (H-P's commercial technical manual).

By referring to its existing commercial manual (see quotation, supra) in its cover letter, we believe H-P incorporated this manual by reference in its bid. As such, TROSCOM's action in considering the H-P manual was proper; if, in fact, the H-P manual was acceptable without change, H-P's bid would have been acceptable regardless of what "re-formatting" means. Therefore, TROSCOM would have been remiss had it not considered H-P's existing commercial manual.

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From the above discussion, we conclude that the H-P bid was properly rejected as nonresponsive. Whether the use of the term "re-format" in the H-P bid can be construed as creating an unresolvable ambiguity or a patent qualification, the fact remains that the bid contains no clear obligation to perform in accordance with the technical manual requirements of the IFB. As such the bid is nonresponsive. See Armed Services Procurement Regulation (ASPR) § 2-404.2 (1975 ed.); Kipp Construction Co., B-181588, January 16, 1975, 75-1 CPD 20.

Finally, H-P urges that TROSCOM had a duty to negotiate a contract price with Cubic after H-P's bid was determined to be nonresponsive. In support of this argument, H-P cites ASPR §§ 3-210, 3-210.2(i) (1975 ed.) which provide:

"3-210 Supplies or Services for Which It Is Impracticable to Secure Competition by Formal Advertising.

• "3-210.1 Authority. Pursuant to 10 U.S.C. 2304(a)(10), purchases and contracts may be negotiated if--

'for property or services for which it is impracticable to obtain competition.'

"3-210.2 Application. The following are illustrative of circumstances with respect to which the authority of this paragraph 3-210 may be used:

(i) when supplies or service can be obtained from only one person or firm ('sole source of supply'); \* \* \*" (Emphasis supplied.)

We note that the above-cited regulation employs the term "may" as opposed to "shall." Use of this provision is therefore discretionary as opposed to mandatory, with the implementing agency. Further, in the instant procurement, eight firms were solicited

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prior to bid opening, three firms were on the Qualified Products List, and two of the eight firms solicited submitted bids. This does not suggest to us a situation wherein "supplies can be obtained from one person or firm." Moreover, as a safeguard, pursuant to ASPR § 2-404 (1975 ed.), Cubic's bid could have been rejected and the procurement resolicited if the contracting officer determined Cubic's price to be unreasonable. Since this was not done and an award was made we assume that Cubic's bid was reasonable.

For the aforesated reasons, H-P's protest is denied.



Deputy Comptroller General  
of the United States