

DECISION



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

FILE: B-212781.2 and .3

DATE: May 15, 1984

MATTER OF: Syntrex Inc.; Managed Information Systems

DIGEST:

1. When descriptive literature, required to be submitted with a bid for evaluation purposes, indicates that word processing system does not meet mandatory requirement in the manner specified, contracting agency's rejection of bid as nonresponsive is proper. To be responsive, bid must be an unequivocal offer to conform to specifications in all material respects. However, bid may not be rejected for failure to meet unstated or ambiguously defined requirements.

2. When descriptive literature, preprinted for use in promoting sales to the public, indicates that specifications are subject to change, bid need not be rejected as non-responsive if there are other indications in the bid itself that the bidder intends to comply with government specifications. However, successful completion of a live test demonstration 3 weeks after bid opening cannot be used as evidence of intent to comply, since responsiveness must be determined at bid opening.

This decision responds to two protests against the Department of Education's award of a more than \$2 million contract for "standalone" word processing systems and related services to CompuCorp.

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Managed Information Systems, Inc., believes that its low bid was improperly found nonresponsive, while Syntrex Incorporated argues that Compucorp's second-low bid also was nonresponsive because descriptive literature indicated that Compucorp's specifications were subject to change without notice. We deny both protests.

Background:

The Department of Education determined that it could replace and upgrade word processors installed at various locations in and near Washington, D.C. by using formal advertising procedures, since no special or unique production was required, adequate competition was anticipated, and award could be made on the basis of price. The agency therefore issued invitation for bids No. 83-002 on July 15, 1983, planning to award a fixed price contract for hardware, software, and conversion, and a fixed price requirements contract for maintenance and training. The invitation covered an initial quantity of 150 terminals and 102 printers in three configurations, with an option for an additional 150 terminals and 90 printers. Prices for the option quantities were to be considered in determining the low bidder.

The invitation contained a 12-page, detailed checklist on which bidders were to indicate whether their equipment met mandatory technical specifications and to cross-reference that portion of the descriptive literature, required to be submitted with bids, that supported their compliance with these specifications. Before award, the invitation stated, the apparently successful bidder would be required to conduct a live test demonstration on each of the configurations that it offered.

At opening on August 22, 1983, 14 bidders responded; of these, 12 were asked to verify their bids due to suspected mistakes and a number were allowed to make corrections. As corrected, the bids at issue here were as follows:

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Managed Information Systems	\$2,302,750.40
Compucorp	2,382,997.58
* * *	
Syntrex No. 2	3,736,425.33
Syntrex No. 1	3,762,856.33.

Managed Information Systems' low bid was found non-responsive, making Compucorp the apparently successful bidder. The next eight bids and Syntrex No. 2 also were found nonresponsive, making Syntrex No. 1 second in line for award.

On September 15, 1983, Compucorp successfully completed a 9-hour live test demonstration. By this date, three protests had been filed with our Office: Managed Information Systems challenged the decision that its bid was nonresponsive, while Syntrex alleged that all bids lower than its own were nonresponsive.¹

Notwithstanding these protests, on September 26, 1983, the Department of Education awarded Compucorp a \$2,101,192 contract, covering all equipment and services through September 30, 1984, and immediately exercised the option.²

¹The third protester, Wang Laboratories, Inc., had complained before bid opening of unduly restrictive specifications. The firm did not bid and subsequently failed either to comment on the agency report or to request our decision on the existing record. In accord with our Bid Protest Procedures, 4 C.F.R. § 21.3(d) (1984), we therefore closed our file on Wang's protest.

²The Department of Education did not, however, furnish a report on the protests to our Office until December 9, 1983, so that delivery--required within 90 days after award--was virtually complete before the protesters had an opportunity to comment.

Managed Information Systems' Protest:

Shortly after bid opening, the Department of Education advised Managed Information Systems that it could not determine from the firm's descriptive literature whether it met a number of mandatory requirements. In a protest to our Office, Managed Information Systems addressed each of the alleged deficiencies, providing specific references to and extractions from its descriptive literature. The Department of Education reviewed its evaluation and concluded that it had been mistaken in finding Managed Information Systems nonresponsive with regard to three mandatory requirements; it still contended, however, that the firm did not meet 11 others.

GAO Analysis of Managed Information Systems' Protest:

We find that a number of the Department of Education's mandatory requirements are either unstated or so ambiguously defined that rejection of Managed Information Systems' bid solely on the basis of failure to meet them would have been improper. However, since the record also indicates that Managed Information Systems' word processors do not meet at least one clearly stated, apparently material requirement, we do not dispute the ultimate determination of nonresponsiveness.

In the first category, the Department of Education asserts, for example, that Managed Information Systems did not meet specification No. 1.3.1.2.3, which required bidders to "Provide editing keys to implement the following functions: (1) Erase display, (2) Delete, (3) Insert, (4) Copy, and (5) Move." According to the agency report, literature submitted shows that Managed Information Systems supports these functions but does not provide "specific, dedicated editing keys."

Since the solicitation nowhere requires specific keys to be dedicated to these particular functions, rejection for failure to provide them clearly was improper. See Alanthus Data Communications Corp., B-206946, Feb. 10, 1983, 83-1 CPD ¶ 147.

The Department of Education also found that Managed Information Systems did not meet specification No. 1.4.3.2.9, which required underscoring to be "viewable on the screen." The agency argues that Managed Information Systems delineates underscoring by caret marks before and after the character, word, or phrase to be set off, and therefore is not responsive to this requirement. In our opinion, the requirement is ambiguous, and it is just as reasonable to find caret marks that appear on the screen to be "viewable" as it is to find text that is literally underscored "viewable." When a specification is not stated with sufficient particularity to insure a common understanding of the agency's needs, a bid or offer should not be rejected for failure to meet it. Id.

The same objection applies to specification No. 1.4.3.4.1, covering mathematical processing, which requires, among other things, "Percents, rounding." The solicitation does not state to what place figures must be rounded, and in our opinion is even unclear as to whether rounding and calculating percentages are two separate, required capabilities. Failure to demonstrate them therefore would not have provided a basis for rejecting Managed Information Systems' bid as nonresponsive.

Our review of Managed Information Systems' descriptive literature, however, reveals that its system did not meet at least one clearly stated, apparently material requirement. Specification No. 1.3.2.14 required two workstations to be able to share one letter-quality printer, and stated that the "printer sharing interface must be operational within a maximum distance of 100 feet from a workstation."

Managed Information Systems offered a system in which an interface device known as a "Diplomat Spooler" is placed between workstations and the printer. Its function, the firm's literature indicates, is to "buffer" data transmitted from workstations to the printer, so that printing and pagination can be performed at the same time that other documents are being created or edited.

The firm states that it provides industry standard cabling, which certifies transmission of up to 50 feet, between the "Diplomat Spooler" and workstations and

between the "Diplomat Spooler" and the printer; it suggests that in cases where operation up to 100 feet is required, the "Diplomat Spooler" should simply be placed equidistant from the workstation and the printer.

The Department of Education found, and we agree, that a system with only 50-foot cabling does not meet the requirement for a printer-sharing interface that can operate up to 100 feet from a workstation. The equidistant arrangement would achieve a maximum distance of 50 feet between a workstation and the interface device and between the printer and the interface device, but this is clearly not the arrangement specified. Assuming that the 100-foot operating distance between printer sharing interface and workstation is a material requirement (and Managed Information Systems does not dispute that it is), the Department of Education's rejection of the bid on this basis appears proper. In order for a bid to be responsive, there must be an unequivocal offer that conforms in all material respects to the government's specifications. Raymond Engineering, Inc., B-211046, July 12, 1983, 83-2 CPD ¶ 83. We therefore deny Managed Information Systems' protest.

Syntrex's Protest:

Syntrex initially protested that all bidders lower than itself were nonresponsive; however, since the Department of Education agreed as to all except Compucorp, Syntrex's further allegations are directed solely to that firm. Syntrex argues that the "subject to change" legend in Compucorp's descriptive literature renders the bid non-responsive. If it had known that specifications subject to change would be acceptable, Syntrex continues, it would have bid on a new, less expensive word processing system that would have been available before the required delivery date.

In addition, Syntrex alleges that Compucorp failed to submit required references and a list of government facilities at which its word processors were used; that Compucorp's bid was materially unbalanced because identical charges were proposed for maintenance of different configurations; and that Compucorp's training equipment would be different than that actually installed.

The Department of Education responds that it did not intend to use the descriptive literature submitted with bids as the sole basis for determining responsiveness and

that it also used the live test demonstration for this purpose. Compucorp's "subject to change" legend, according to the agency, was interpreted as meaning that Compucorp would offer any enhancements to its word processing systems that became available during contract performance to the government; it was not read as qualifying the bid or permitting Compucorp to substitute nonconforming hardware or software.

When, before award, Syntrex protested to the Department of Education concerning the legend, the agency considered as further evidence of responsiveness the fact that Compucorp stated in a cover letter that all products and services met or exceeded the agency's requirements; indicated on the bidder's checklist that it met all mandatory specifications; and accepted all solicitation terms and conditions, including an Order of Precedence clause giving specifications precedence over the bid in case of inconsistency. The agency concluded that, considering the bid as a whole, if Compucorp delivered word processors that did not meet specifications, the "subject to change" legend would not prevent termination of its contract for default.

GAO Analysis of Syntrex's Protest:

Our examination of Compucorp's bid reveals that two different legends are used in its descriptive literature. On the pages describing Compucorp's Models 700 and 775 information processors, as well as those on which its paper feeder, printer, and acoustical cabinet are described, the statement "Specifications subject to change" appears. On the descriptive literature for software packages that automatically write letters, fill in forms, spell and proofread, edit and format, and calculate is the statement that "All information contained herein is subject to change without notice." In addition, the cover of the operator's manual for Compucorp's Database Management System features a disclaimer stating that because the software is subject to continuing refinements before its release, Compucorp assumes no responsibility for the correct operation of functions and their descriptions in the manual.

The issue here is whether the above statements qualified the bid and provided Compucorp with a unilateral option to deviate from invitation requirements. We think they did not.

We previously have held that in an advertised procurement, when the government requires descriptive literature to be submitted with a bid and uses such literature to determine precisely what the bidder is proposing and will be bound to furnish if awarded a contract, any statement in that literature that specifications are subject to change is a material deficiency, rendering the bid nonresponsive. See, e.g., Professional Material Handling Co., B-211722, Oct. 11, 1983, 83-2 CPD ¶ 435; Dobbs Detroit Diesel, Inc., B-182992, May 9, 1975, 75-1 CPD ¶ 236. Compare Arista Co., 53 Comp. Gen. 499 (1974), 74-1 CPD ¶ 34 (when descriptive literature is not required for evaluation purposes, the bidder is merely required to agree to the specifications, and a "subject to change" legend does not necessarily render the bid nonresponsive). We also have held that the deficiency generally is not overcome by a blanket offer to comply with specifications, which at best renders the bid ambiguous. Big Joe Manufacturing Co., B-182063, Nov. 14, 1974, 74-2 CPD ¶ 236.

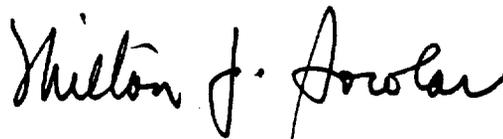
We have made exceptions only when it was reasonably clear that a "subject to change" legend was not intended to reserve the right to change the product offered or to deviate from any of the government's material requirements. See Burley Machinery, Inc., 55 Comp. Gen. 592 (1975), 75-2 CPD ¶ 411 (regular dealer's bid may be accepted when it clearly indicates that stock items will be furnished and that "subject to change" legend on manufacturer's literature refers only to items that will be produced in the future); IFR, Inc., B-203391.4, Apr. 1, 1982, 8-1 CPD ¶ 292 (bid may be accepted when "subject to change" legend appears on literature submitted solely to establish that commercial item will be furnished, and has been crossed out on literature submitted to establish technical characteristics of item); Waukesha Motor Co., B-178494, June 18, 1974, 74-1 CPD ¶ 329 (bid may be accepted when cover letter submitted with it discusses descriptive literature and specifically states that all equipment and tests will be completed and will meet specifications).

In this case, we think there was sufficient indication in Compucorp's bid that it intended to meet all contract requirements notwithstanding the "subject to change" legend and the disclaimer. The bid was not only accompanied by Compucorp's letter, specifically prepared for purposes of this procurement and stating that the government's needs will be met or exceeded, but also contained Compucorp's affirmative responses to each mandatory requirement in the bidder's checklist. Thus, while the letter alone might have been insufficient to resolve the ambiguity regarding Compucorp's intentions, we think, in light of the checklist, that it would be unreasonable to read Compucorp's bid as reserving the right for Compucorp to deviate from the specifications. Therefore, we think the bid properly was viewed as responsive.

We note, however, that Compucorp's live test demonstration could not have been used as evidence of an intent to comply with the specifications, since it is well settled that responsiveness must be determined at the moment of bid opening. Raymond Engineering, Inc., B-211046, July 12, 1983, 83-2 CPD ¶ 83. Rather, since it was conducted nearly 3 weeks after bid opening, the demonstration could only have been used to establish, before award, Compucorp's ability to produce a word processing system that met the Department of Education's requirements. As such, it would have involved Compucorp's responsibility. Id.

As for Syntrex's other allegations, the references and list of government facilities at which Compucorp's word processors are used also involve responsibility and could have been submitted at any time before award; according to the Department of Education, the required information was provided. As for the firm's allegedly unbalanced bid, Compucorp included maintenance costs for printers in its price for maintenance of the word processors, resulting in the same overall cost for different configurations. Finally, the Department of Education states that Compucorp's training equipment was the same as that which was installed. These bases of protest therefore are without merit.

Syntrex's protest is denied.



Acting Comptroller General
of the United States