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DECISION



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

FILE: B-191273 DATE: July 5, 1978
MATTER OF: Unitron Incorporated

DIGEST:

1. Where protester submits bid offering model of frequency converter, without including change indicated in referenced updated IFB specification sheet, and protester's proposed delivery date may be reasonably interpreted as after date specified in IFB, bid was properly rejected as nonresponsive.
2. Protester's contention of inconsistency in IFB specifications must be raised prior to bid opening to be timely.
3. Bidder may not rely on oral instructions by agency which modify IFB specifications.
4. Question of capability of successful bidder to meet delivery requirement is one of bidder's responsibility, which our Office will not normally review absent circumstances not present here.
5. Agency decision not to disclose information to protester pursuant to Freedom of Information Act request is not reviewable by GAO.

Unitron Incorporated (Unitron) protests the award of a contract for two frequency converters to Abacus Controls, Inc. (Abacus), under invitation for bids (IFB) No. F19628-77-B-0007 issued by the Department of the Air Force, Electronic Systems Division, Hanscom Air Force Base, Massachusetts (Air Force).

The IFB was issued on September 30, 1977, and the bid opening date was October 30, 1977. The Air Force had previously solicited bids for these items under IFB F19628-77-B-0005 issued July 26, 1977, with a bid opening date of August 26, 1977. However, this earlier

IFB was canceled, shortly after bid opening, because the Air Force determined that the specifications were inaccurate and overly restrictive. This determination was made as the result of questions raised by Abacus concerning the specifications in a August 16, 1977, telephone call and in a no-bid letter received by the Air Force on August 25, 1977. Unitron did not submit any written protest with respect to the cancellation of this earlier IFB.

Upon receipt of the second IFB, Unitron's representative called the Air Force contract representative to question what he perceived to be an inconsistency between the frequency converter description in block 29 of the IFB and the referenced attached specifications dated August 19, 1977. Block 29 specified part number PS-62-6GD, which corresponds to a Unitron frequency converter part number which it has supplied to the Air Force in substantial quantity for approximately 10 years. The number is also a Federal stock number. Unitron had bid this model number in response to the first IFB. The August 19 specification sheet, among other things, specified the use of terminal strips, while the Unitron part number model used MS connectors. Accordingly, Unitron felt that the August 19 specifications did not describe the block 29 part number. Unitron states that it was advised to bid the part number and submit a cover letter defining the specified differences between the part number and the August 19 specification.

The Air Force contract representative states that he advised Unitron to bid the August 19 specifications and not the part number. No written explanation or reply was requested, and none was sent to Unitron by the Air Force.

Unitron's submitted bid specified its model number, as referenced in block 29, and noted in a cover letter the differences in the August 19 specification sheet. Unitron's cover letter also contained a clause stating that:

"Although the indicated delivery date in the solicitation is defined by you as 1 March 1978, this contractor proposes delivery no later than 2 January 1978, assuming an award is received by 15 November 1977. Should the award occur after that time a day-by-day change in this delivery would occur."

The IFB required that bids remain firm for 90 days from the date of the bid opening and specified delivery by March 1, 1978.

The Air Force received three bids which were opened October 30, 1977: one by Topaz Electronics for \$10,280; Unitron's bid for \$11,580; and Abacus' bid for \$15,000. Topaz' bid was immediately determined to be nonresponsive. The Air Force initially determined Unitron's bid to be the low responsive bid and conducted a preaward survey. However, the Air Force subsequently determined that the Unitron bid was nonresponsive and, after a preaward survey of Abacus, awarded it the contract on January 27, 1978. By letter dated February 2, 1978, Unitron was advised by the Air Force that its bid had been rejected because it was nonresponsive to the 90-day firm bid rule and it varied from the IFB specifications, and that the contract had been awarded to Abacus.

Unitron filed its protest with our Office by letter dated February 9, 1978. The major arguments raised by Unitron are as follows: 1. The first solicitation procedure was irregularly conducted since after the bid opening, rather than award the contract to Unitron, which had been the only responsive bidder, the Air Force improperly canceled the IFB. 2. The second IFB contained revised inconsistent specifications. 3. Unitron's bid was responsive to the specifications in the second IFB, as stated to it by the Air Force contracting representative. 4. In any event, the revised specifications in the August 19 description sheet called for a design modification which was not superior to that proposed by Unitron in its bid. 5. The Air Force misconstrued Unitron's offer of early delivery and should have requested clarification if it had any question concerning the meaning of Unitron's delivery terms. 6. The successful bidder's ability to perform is questionable because of the extensive modifications required in a short time period. 7. The Air Force has declined to deliver certain material requested by Unitron under the Freedom of Information Act, 5 U.S.C. § 552 (1970) (FOIA).

Unitron's contention that there were improprieties with respect to the first IFB cancellation, of which it was advised orally on August 29, 1977, and in writing on September 12, 1977, is not timely since its February 9 letter of protest was not received in our Office until

February 13, 1978. As specified in our Bid Protest Procedures, 4 C.F.R. § 20.2(a),(b)(2) (1977), in order to be timely a protest must be filed with our Office within 10 days after the basis of the protest is known to the protester. See L & M Cleaning Company, B-190958, March 21, 1978, 78-1 CPD 222. Accordingly, the merits of Unitron's protest concerning the first IFB are not now for consideration.

Similarly, Unitron's contention that the second IFB contained inconsistent specifications is not for consideration. As stated in 4 C.F.R. § 20.2(b)(1) (1977), "Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening * * * shall be filed prior to bid opening * * * ." In this instance, Unitron, upon receiving the IFB, called the Air Force to question what it perceived to be an inconsistency in the specification. Thus, it is clear that this alleged impropriety was apparent to Unitron prior to the bid opening and, therefore, is not timely raised. Boiler Services, B-187080, May 31, 1977, 77-1 CPD 372; Patty Precision Products Company, B-188469, July 25, 1977, 77-2 CPD 44.

Unitron asserts that in response to its telephone inquiry the Air Force advised it to bid the part number rather than the August 19 specification, while the Air Force contends it advised Unitron to the contrary. In either case, Unitron relied on such oral advice at its peril. As specified in the IFB, any changes in the specifications which are not in writing may not be relied upon by a bidder. Sabin Metal Corporation, B-189759, December 16, 1977, 77-2 CPD 471.

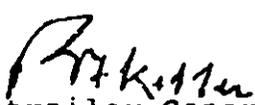
Unitron's argument that the revisions contained in the August 19 specification sheet do not make the converter any better suited for Air Force requirement than the model which it offered is not a matter that we will consider. We have consistently held that the determination of Government needs and the method of accomplishing such needs is primarily the responsibility of the procuring agency and absent convincing evidence of abuse of administrative discretion we have no basis for inquiry. Digital Equipment Corporation, B-181336, September 13, 1974, 74-2 CPD 167; Gen. 463 (1970). There is no evidence of abuse of administrative discretion, in this record, to warrant review.

Unitron contends that the Air Force misconstrued its delivery offer, which related only to an offer of early delivery and was not intended to conflict with Unitron's acceptance of the IFB delivery or firm bid terms. As quoted earlier, Unitron's delivery phrasing does at least lend itself to the interpretation that it is being offered in lieu of the IFB terms, despite the fact that Unitron does not specifically take exception either to the 90-day firm bid provision or the date of delivery stated in the IFB. When two reasonable interpretations are possible concerning a bidder's proposed delivery date, and one is non-responsive, the agency may properly reject the bid as non-responsive to a material condition of the IFB. Moreover, this determination must be based on the bid as submitted, and not on later clarification. Joseph Pollak Corporation, B-185890, June 29, 1976, 76-1 CPD 418.

Unitron has detailed the substantial design modification which will be required for Abacus to modify its converter to meet the IFB specifications and suggests that, therefore, the Air Force determination that Abacus can do so within the time available in order to meet the IFB delivery date is mistaken and should be reviewed. This is in effect a request that we review the Air Force's determination that Abacus is a responsible bidder. Our Office has consistently held that ascertainment of bidder responsibility is a function of the agency making the procurement, and we will not review this determination absent circumstances not present in the instant record. Central Metal Products, Incorporated, Solicitation No. M2-40-74, 54 Comp. Gen. 66 (1974), 74-2 CPD 64; Eastern Home Builders and Developers, Inc., B-182218, November 29, 1974, 74-2 CPD 302.

Unitron's final contention concerns the fact that the Air Force has refused to supply it with material, requested under the FOIA, concerning the basis for the technical changes in the specification. However, GAO does not review the disposition of requests made under the FOIA. DeWitt Transfer and Storage Company, 53 Comp. Gen. 533 (1974), 74-1 CPD 47.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States