

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548***Morse*
27994**FILE:** B-213591**DATE:** April 17, 1984**MATTER OF:** Surgical Instrument Company of America**DIGEST:**

A bid not accompanied by required bid samples was properly rejected as non-responsive, despite the presence of a waiver of bid sample clause, where the contracting officer could not conclude that the offeror's previously accepted product met the current IFB's requirements so that waiver would be appropriate.

Surgical Instrument Company of America (SICOA) protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. M1-156-83 issued by the Veterans Administration (VA) for the supply of surgical forceps. SICOA complains that the VA improperly determined its bid nonresponsive because it did not furnish required bid samples with the bid. We deny the protest.

The VA solicited offers to furnish a total of 3,168 tweezer-type forceps (items 1-4) and 1,728 curved forceps (items 5-7) meeting certain hardness and corrosion resistance criteria. The IFB specified that both types were to be "For Operating Room Use," and cautioned that "floor grade instruments" would not be acceptable. The IFB provided at page 1 that bid samples were required as part of the bid, for all items. Additionally, page 11 contained the following clause:

"BID SAMPLES:

. . . two (2) bid samples of each item . . . must be furnished as a part of the bid and must be received before the time set for opening bids. Samples will be evaluated to determine compliance with all characteristics listed for examination in this invitation.

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However, the requirement for furnishing samples may be waived as to a bidder if (1) the bidder states in his bid that the product he is offering to furnish is the same product he has offered to the procuring activity on a previous procurement and (2) the Contracting Officer determines that such product was previously procured or tested by the procuring activity and found to comply with cited requirements conforming in every material respect to those in the [IFB]."

The VA contracting officer determined that SICOA was not entitled to a waiver because SICOA's forceps previously accepted by the VA had been "floor grade instruments" and therefore not acceptable for the operating room requirement established by the present IFB. SICOA, however, complains that it attached to its bid a cover letter which stated that both types of forceps it was offering were qualified products already on file with the VA, and that SICOA had furnished tweezer-type forceps (items 1-4) to the VA under a previous contract. SICOA asserts that the forceps it offered for this procurement were indeed of operating room quality, and has furnished this Office with certain evidence to that effect from an independent testing laboratory which indicates that the firm's forceps have passed the copper sulfate and boil test for corrosion resistance required for all items. SICOA therefore protests that the VA should have waived the firm's failure to include bid samples.

A bid must represent an unequivocal offer to provide the requested items in total conformance with the material terms of the solicitation, and any bid which deviates from those terms is nonresponsive and must be rejected. A material deviation is one which affects the price, quality, quantity, or delivery of the goods or services offered. Fluke Trendar Corporation, B-196071, March 13, 1980, 80-1 CPD 196. In this regard, the failure to submit with a bid a required bid sample generally is a material deviation which renders a bid nonresponsive. Interface Flooring Systems, Inc., B-206399; B-207258, April 22, 1983, 83-1 CPD 432. As in this case, however, a solicitation may provide for the waiver of the bid sample requirement for a bidder who

offers a product previously procured and tested by the agency if the agency concludes that further evaluation of that bidder's product is unnecessary. See Federal Procurement Regulations § 1-2.202-4(f) (1964 ed.).

We believe SICOA's bid properly was rejected. As the IFB's waiver clause provides, to be eligible for waiver the product being offered previously must have been found to meet all material requirements of the IFB. The VA points out that forceps previously procured did not have to meet the operating room use requirement, and asserts that the requirement thus represented a significant departure from the types of forceps the agency purchased in the past. In fact, the record indicates that the waiver provision was included in the IFB by error, and that the VA desired samples from all bidders "as no one was cited as known to be acceptable due to revision of product description." We therefore find no basis to question the contracting officer's determination that SICOA did not qualify for waiver because the offered forceps were not, in the terms of the IFB provision, "previously procured or tested . . . and found to comply with cited requirements conforming in every material respect to those in" the current solicitation.

As indicated above, SICOA has furnished evidence that purports to show that although the previous invitations had solicited floor grade instruments, the forceps SICOA supplied nevertheless were suitable for operating room use under the present solicitation. However, there is no indication in the record that those forceps had ever been evaluated by the VA for operating room suitability, and under the IFB it was the bidder's responsibility to establish such suitability through the submission of samples with its bid. Since SICOA did not furnish bid samples, and did not qualify for waiver, the bid properly was rejected as nonresponsive.

The protest is denied.

for Milton J. Austin
Comptroller General
of the United States