

DECISION

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

29239

FILE: B-213236**DATE:** September 5, 1984**MATTER OF:** Mechanical Equipment Company, Inc.**DIGEST:**

1. Protest against alleged improprieties which are apparent on the face of a solicitation must be filed prior to bid opening.
2. The overall determination of the technical adequacy of bids is primarily a function of the procuring agency. The judgment of the procuring agency's technicians as to the technical adequacy of the bids will generally be accepted by GAO. GAO will only question such determinations where there is a clear showing by the protester of unreasonableness, arbitrariness, abuse of discretion or violation of procurement statutes or regulations.
3. Where the solicitation calls for descriptive information to show to what the government would be binding itself by making an award, a blanket statement of compliance by the bidder in its noncomplying descriptive information is not sufficient to make the bidder's nonresponsive bid responsive.
4. A bidder is not allowed to make its nonresponsive bid responsive after bid opening through telephone clarifications because to do so would be tantamount to permitting the bidder to submit a new bid, which is not permitted.
5. The protester has the burden of proving bias or favoritism on the part of the procuring agency. Where the written record fails to demonstrate bias, the protester's allegations are to be regarded as mere speculation.

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Mechanical Equipment Company, Inc. (MECO), protests the rejection of its bid under invitation for bids (IFB) No. DTMA91-83-B-30029R issued by the Department of Transportation, Maritime Administration (DOT). The IFB was for the procurement of a marine salt water, two-stage distilling unit for shipboard use. In addition, MECO requests the recovery of the cost of preparing its bid.

MECO contends that its bid was fully responsive to all the requirements of the IFB and that the rejection of its bid was due solely to favoritism on the part of the agency toward the awardee.

For the reasons set forth below, we dismiss MECO's protest in part and deny it in part.

Background

The IFB was issued as a revised solicitation following the rejection of all the bids under solicitation No. DTMA91-83-B-30029, which had been issued for the same distilling plant. The IFB specified that bidders were required to submit sufficient descriptive information to enable the agency to determine exactly what would be furnished so that the government could ascertain to what it "would be binding itself by making an award."

The following bids were received at bid opening:

MECO - \$62,300.00
Aqua-Chem, Inc. - \$65,167.00
Riley-Beaird, Inc. - \$67,789.49

A technical evaluation of the bidder's descriptive information revealed that MECO's bid failed to comply with certain of the IFB's specifications dealing with the location of a "dump valve" for the distilling unit, the number of salinity cells needed for the unit and the need for in-harbor and/or emergency processing of raw-fresh or brackish water supplied from shore facilities. Consequently, DOT found MECO's bid to be nonresponsive and awarded the contract to Aqua-Chem.

Responsiveness

MECO contends that the IFB's provision for descriptive information was seriously lacking in detail and, thus, susceptible to considerable interpretation as to what would

be sufficient to show that a bidder's proposed distilling unit would meet the IFB's technical requirements. MECO notes that its bid contained a nine-page technical description of its proposed units and two drawings showing the unit's diagrammatic arrangement and the unit's installation outline. According to MECO, the IFB's descriptive information provision was not intended to require detailed manufacturing drawings and illustrations of "every component, part, nut and bolt" of what is essentially highly technical and sophisticated equipment. Therefore, MECO takes the position that, since the IFB did not establish exactly what was to be detailed or shown in the descriptive information to be submitted by a bidder, MECO's technical description and drawings were sufficient to show that MECO met the IFB's technical requirements.

In addition, MECO points out that it made the following notation in the technical description which it submitted with its bid:

"Regardless of above, this offer includes all equipment specified in section 'C' (Description/ Specification) of Solicitation DTMA91-83-B-3029R."

MECO further points out that it stated on both of the two drawings submitted with its bid that they were for "sales purposes only" and, thus, not intended as depictions of detailed information which would be contained in manufacturing drawings. In MECO's view, its statement of compliance with the technical specification in section "C" of the IFB and its statement on the two drawings show that MECO took no exception to any of the IFB's technical requirements.

DOT states that the IFB called for a salt water distilling unit for ship use which would meet the portion of the Maritime Administration Standard Specifications For Merchant Ship Construction pertaining to distilling plant construction as set forth in attachment "A" to the IFB. DOT further states that a technical evaluation of MECO's descriptive information revealed that MECO's bid was nonresponsive because (1) MECO failed to indicate provisions for in-harbor and/or emergency processing of raw-fresh and/or brackish water, (2) MECO's diagrammatic drawing placed the system's dump valve upstream of the activating salinity and downstream of the water meter, exactly opposite of the IFB's construction specification requirement that the dump valve be incorporated downstream of the activating salinity cell and upstream of the water meter, and (3) MECO failed to show salinity cells at every location where sea water leakage

could possibly contaminate any distillate. DOT emphasizes that, since MECO's bid was found to be nonresponsive, the award to Aqua-Chem, as the low, responsive bidder, was proper.

In response, MECO argues that the IFB's requirements for descriptive information do not specifically state that the requirement for emergency processing raw-fresh and/or brackish water be shown in the bidder's descriptive literature. MECO also argues that the emergency processing called for by the IFB does not constitute any major or even minor system within the "operational context" of the salt water distilling unit. According to MECO, emergency processing would normally consist of only a flanged or threaded connection whereby raw-fresh and/or brackish water could be fed to the distilling plant if necessary.

As to the other reasons given by DOT for finding its bid nonresponsive, MECO admits that its diagrammatic drawing shows the salinity cell to be downstream of its dump valve. However, MECO takes the position that this was an "obvious clerical error" which should not have been cause for the outright rejection of its bid. In this regard, MECO alleges that anyone familiar with the design of distilling plants knows that the salinity cell will be placed upstream of its dump valve. With respect to MECO's failure to show an adequate number of salinity cells, the company argues that it was up to the bidder to determine the number of cells and their placement within the distilling unit because the standard construction specifications did not list a particular number of cells to be provided or specify their exact location.

To the extent that MECO's protest is based upon alleged ambiguities or improprieties in the IFB's descriptive information requirements, its protest is untimely. Our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1984), require that protests based upon alleged solicitation improprieties apparent prior to bid opening be filed prior to bid opening. Ferguson-Williams, Inc.; Mark Dunning Industries, Inc., B-208927, Nov. 1, 1982, 82-2 C.P.D. ¶ 394. Bids were opened on September 14, 1983, and MECO's protest was not filed with our Office until October 3, 1983.

With respect to DOT's evaluation of the descriptive data that MECO submitted, the overall determination of the technical adequacy of bids is primarily a function of the procuring agency. Therefore, the contracting officer has a reasonable amount of discretion in the evaluation of bids.

See Harding Pollution Controls Corporation, B-182899, July 3, 1975, 75-2 C.P.D. ¶ 17. The judgment of the technicians and specialists of the procuring agency as to the technical adequacy of bids or proposals submitted in response to the agency's statement of its needs will generally be accepted by our Office. Metis Corporation, 54 Comp. Gen. 612 (1975), 75-1 C.P.D. ¶ 44. Such determinations will be questioned by our Office only upon a clear showing of unreasonableness, an arbitrary abuse of discretion or a violation of the procurement statutes and regulations. Marine Electric Railway Products Co., Inc., B-189929, Mar. 9, 1978, 78-1 C.P.D. ¶ 187.

Based on our review of the record, we find that DOT's rejection of MECO's bid was reasonable. MECO admits that its descriptive information makes no reference to in-harbor and/or emergency processing of raw-fresh and/or brackish water. MECO also admits that the dump valve is in the wrong location on its diagrammatic drawing. As to the number and placement of salinity cells, the IFB's construction specifications required an electrical salinity system which would detect leakage through salinity cells located at any place sea water leakage could possibly contaminate any distillate. The record shows that DOT determined that MECO had only one salinity cell on its diagrammatic drawing, which, in DOT's view, was not sufficient to "monitor all areas of possible sea water leakage between stage condensers 1 and 2 and downstream of the distillate." Moreover, we note that MECO agrees with DOT that "identical salinity cells would be placed between stages one and two and after the distillate cooler."

The protester has the burden of affirmatively proving its case. Alchemy, Inc., B-207954, Jan. 10, 1983, 83-1 C.P.D. ¶ 18. We are not persuaded that DOT's determination was unreasonable by MECO's allegation that the IFB did not require all of the salinity cells to be shown on a bidder's descriptive literature. In our opinion, MECO has confused what the IFB requirements were regarding the nature of the descriptive information to be submitted by a bidder with the IFB requirements regarding what the descriptive information was supposed to show. The three technical inadequacies that DOT found in MECO's descriptive information related to material distilling plant construction requirements set forth in the Standard Specifications For Merchant Ship Construction, attachment "A" to the IFB. Further, we find that the language of the IFB's descriptive information provision made it clear that, whatever information the bidder submitted, it had to meet the IFB's distilling plant

construction requirements. Specifically, the descriptive information provision stated that the information would be used to determine exactly what the bidder proposed to furnish and to what the government would be binding itself by making an award.

Turning to MECO's argument that the general statement of compliance in its technical description showed that the company intended to comply with all requirements of the IFB, we have held that a blanket statement of compliance is not sufficient to make a nonresponsive bid responsive. See Illinois Chemical Corporation, B-205119, Feb. 9, 1982, 82-1 C.P.D. ¶ 119; Sutron Corporation, B-205082, Jan. 29, 1982, 82-1 C.P.D. ¶ 69.

Finally, we note that MECO argues that, if DOT had any questions concerning the responsiveness of its bid, a telephone call to MECO could have clarified any of DOT's doubts. We have held that to permit a bidder to make its nonresponsive bid responsive after bid opening, which is what DOT would have been doing if it had sought clarification from MECO after bid opening, would be tantamount to permitting the bidder to submit a new bid and may not be permitted. See Recording Consultants Inc., B-201629, May 6, 1981, 81-1 C.P.D. ¶ 355; Casecraft, Inc., B-201065, July 20, 1981, 81-2 C.P.D. ¶ 51.

Bias

MECO contends that, although DOT sought the work under the "guise" of a competitive procurement, the fact of the matter was that DOT intended from the beginning to award a contract to Aqua-Chem. MECO emphasizes that, in both the original solicitation and the IFB, DOT found the bid of the low bidder to be nonresponsive. MECO further points out that award was almost made to Aqua-Chem under the original solicitation before it was canceled. MECO argues that the selection of Aqua-Chem was made despite the fact that all the bidders offered essentially the same descriptive information under both solicitations. According to MECO, the foregoing pattern of events could not have happened unless the contracting personnel were determined from the outset to make an award to Aqua-Chem.

The critical test for determining bias in the evaluation of bids is whether all the bidders in the competition were treated fairly and equally by the agency. See Servo Corporation of America, B-193240, May 29, 1979, 79-1 C.P.D. ¶ 380. However, the protester has the burden of affirmatively proving its case and unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition. See A.R.F. Products, Inc., 56 Comp. Gen. 201, 208 (1976), 76-2 C.P.D. ¶ 541. Moreover, where the subjective motivation of an agency's procurement personnel is being challenged, it is difficult for a protester to establish--on the written record which forms the basis for our Office's decisions in protests--the existence of bias. Joseph Legat Architects, B-187160, Dec. 13, 1977, 77-2 C.P.D. ¶ 458.

We find that the record does not support MECO's allegation of DOT bias toward Aqua-Chem. While the record does show that the low bid under solicitation No. DTMA91-83-B-30029 was rejected as being nonresponsive, the record also shows that all the bids, including the bid of Aqua-Chem, were rejected for this reason. Because all the bids were nonresponsive and because the bids revealed that the bidders had made widely varying interpretations as to what type of distilling equipment was required, DOT canceled the solicitation on the ground that it contained inadequate, ambiguous, or otherwise deficient specifications. See Federal Procurement Regulations, 41 C.F.R. § 1-2.404-1(b)(1) (1984). Since we have concluded that DOT was reasonable in determining that MECO's bid on the IFB was nonresponsive, we find no support for MECO's assertion that DOT was finding bidders nonresponsive only to ensure that award would be made to Aqua-Chem. Where the written record fails to demonstrate bias, the protester's allegations are properly to be regarded as mere speculation. Sperry Rand Corporation, 56 Comp. Gen. 312, 319 (1977), 77-1 C.P.D. ¶ 77.

Because we find no merit to MECO's protest, MECO's claim for bid preparation costs is also denied. Management Services, Inc., B-206364, Aug. 23, 1982, 82-2 C.P.D. ¶ 164.

for 
Comptroller General
of the United States