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DECISION

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

FILE: B-216220 **DATE:** March 1, 1985

MATTER OF: Baker Company, Inc.

DIGEST:

1. Where a bidder submits a bid and bases its acceptability on descriptive literature submitted with the bid, the bid is properly determined to be nonresponsive where the descriptive literature evidences that the product offered does not satisfy a material requirement of the specifications.

2. Even if an IFB fails to clearly spell out the descriptive literature requirement, where a bidder's descriptive literature evidences nonconformance with the specifications, rejection of the bid is required. This is so, even if the offered product could be modified to possess or, in fact, possesses the required characteristics.

3. Although the deviation from the specifications reflected by the protester's descriptive literature allegedly represents only approximately 1 percent of the cost of the product offered, the deviation is considered material, not minor, under FAR § 14.405 where the specifications clearly required biological safety cabinets to have two duplex receptacles and the protester offered to provide only one receptacle per cabinet.

4. A nonresponsive bid may not be accepted even though it would result in monetary savings to the government since acceptance would be contrary to the maintenance of the competitive bidding system.

5. An improper award in one or more procurements does not justify repetition of the same error.

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6. Where a protester initially files a timely protest and later supplements it with new and independent grounds of protest, the later-raised allegations must independently satisfy the timeliness rules of GAO's Bid Protest Procedures. Such grounds are untimely when they are based on information available from the face of the awardees' bids and are filed considerably more than 10 working days after bid opening.

7. Protester, who is ineligible for award, is not considered an "interested party" to protest the responsiveness of awardees' bids under GAO's Bid Protest Procedures because resolicitation would not be necessary even if the protest contentions were valid since there are a number of bidders other than the awardees who are eligible.

Baker Company, Inc. (Baker), protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. 263-84-B(63)-0081, issued by the Department of Health and Human Services, National Institutes of Health (NIH), for an indefinite quantity of various models of biological safety cabinets. In addition, Baker contends that the two awardees, Contamination Control, Inc. (CCI), and NuAire, Inc. (NuAire), were nonresponsive to the IFB.

We deny the protest in part and dismiss the remainder.

The IFB required bidders to submit with their bids descriptive literature, in order to establish, for the purpose of evaluation and award, details of the product offered. The IFB warned that "the failure of descriptive literature to show that the product offered conforms to the requirements of this solicitation will require rejection of the bid." The solicitation stated that the requirement for descriptive literature may be waived at the discretion of the contracting officer for any bidder that affirmatively represents, in its bid, that the product offered by the bidder is the same as that previously supplied under a prior contract with the same requirements. However, the IFB also stated that a bidder submitting a bid under the descriptive literature requirement may not have its bid considered on the basis of a previously supplied product after the time specified for receipt of bids.

Baker indicated in its bid that it had not supplied the offered products under a prior contract and, therefore, its bid was evaluated on the basis of its descriptive literature supplied. Because Baker's descriptive literature indicated that its offered model VBM 400 cabinet had only one duplex receptacle on the rear wall of the work area rather than two duplex receptacles (one on each sidewall) as required by the specifications ("ordering data"), Baker's bid was determined to be nonresponsive. Awards were made to CCI and NuAire, the lowest responsive and responsible bidders, for various sized cabinets at the different delivery locations.

Baker argues that its bid should have been accepted because "the contracting officer knew or should have known that the Baker Company had previously provided this same cabinet to the agency and had constructed its cabinet to include the two electrical receptacles as requested by the agency." We disagree. Although the agency disputes Baker's allegation that it has supplied the cabinets in question on prior procurements, we need not resolve this factual dispute. An agency's determination whether the product offered by the bidder meets the specifications must be based on the data submitted with the bid. Introl Corp.; Forster Enterprises, B-209096, B-209096.2, June 9, 1983, 83-1 C.P.D. ¶ 633. Where, as here, a bidder submits descriptive literature and represents that its product has not been provided under other contracts, the agency could reasonably base its responsiveness determination on the descriptive literature provided with the bid. See Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.214-21(e) (1984). Where, as here, a bidder's descriptive literature clearly evidences nonconformance with the specifications, rejection of the bid is required, even if the offered product could be modified to possess or, in fact, possesses the required characteristics. See Continental Telephone of California, B-213255, Apr. 17, 1984, 84-1 C.P.D. ¶ 428.

Baker contends that the descriptive literature clause was imprecise in that it did not specify what features of the "ordering data" must be shown to be met by the descriptive literature. We disagree. The "ordering data" clearly stated that one "three prong convenience duplex receptacle for grounded plugs shall be provided in each sidewall." The descriptive literature clause stated that "the failure of descriptive literature to show that the product offered conforms to the requirements of this solicitation will require rejection of the bid." We believe that it should have been clear to all bidders that if they submit

descriptive literature which does not evidence compliance with any of the requirements of the "ordering data," their bids will be rejected as nonresponsive. Moreover, assuming, for the purpose of discussion, that the IFB was defective for failing to clearly spell out the descriptive literature requirement, Baker's bid was properly rejected since the literature which accompanied it showed that the items bid would not conform to a stated requirement of the purchase description. Modutech Marine, Inc., B-207601, Feb. 9, 1983, 83-1 C.P.D. ¶ 144; Blazer Industries, Inc., B-194188, June 19, 1979, 79-1 C.P.D. ¶ 440.

Baker contends that NIH should have waived the failure of its descriptive literature to include a reference to an additional electrical receptacle as a minor informality, in accordance with FAR, 48 C.F.R. § 14.405, because the cost of the additional receptacle is only $28 while the cabinets cost over $3,000 each. Baker argues that the government could save "many thousands of dollars" by accepting its bid. We disagree.

FAR, 48 C.F.R. § 14.405, defines minor informalities as follows:

> "A minor informality or irregularity is one that is merely a matter of form and not of substance. It also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired."

Although the cost of the additional duplex receptacle may be a small percentage of the cost of the cabinet, that fact alone does not make it a minor informality. See E.H. Morrill Company, 63 Comp. Gen. 348 (1984), 84-1 C.P.D. ¶ 508. The agency states that the deviation would have a "significant effect on the quality of the product offered." We believe that the fact that the "ordering data" clearly specified that cabinets "shall" have two duplex receptacles and that the deviation in Baker's descriptive literature would affect the price and quality of the cabinets offered made this requirement material and one which cannot be

waived pursuant to FAR § 14.405. See Niagara Machine & Tool Works, B-214288, July 16, 1984, 84-2 C.P.D. ¶ 48. Moreover, a nonresponsive bid may not be accepted even though it would result in monetary savings to the government since acceptance would be contrary to the maintenance of the competitive bidding system. Railway Specialties Corporation, B-212535, Oct. 31, 1983, 83-2 C.P.D. ¶ 519.

Baker argues that NIH used the same descriptive literature clause in a prior procurement and Baker's bid was found responsive then, notwithstanding the fact that Baker submitted the same descriptive literature as it did this time. We have consistently held, however, that an improper award in one or more procurements does not justify repetition of the same error. Wright Tool Company, B-212343, Oct. 12, 1983, 83-2 C.P.D. ¶ 457.

In its comments on the agency report, Baker raised for the first time the argument that even if its low bid is not responsive, its alternate bid becomes the lowest priced, responsive bid. Our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(2) (1984), require protests of other than solicitation improprieties to be filed within 10 working days after the basis of protest is known or should have been known, whichever is earlier. Further, where a protester initially files a timely protest and later supplements it with new and independent grounds of protest, the later-raised allegations must independently satisfy these timeliness requirements. Star-Line Enterprises, Inc., B-210732, Oct. 12, 1983, 83-2 C.P.D. ¶ 450. Our Procedures do not comtemplate the unwarranted piecemeal development of protest issues. See AIL West, B-190239, Jan. 17, 1978, 78-1 C.P.D. ¶ 38. The record shows that NIH sent Baker a notice of award to CCI (and NuAire) on August 21, 1984, concurrently, with the reason for rejection of Baker's bid. Baker's protest of the agency's failure to make award under Baker's alternate bid should have been filed with GAO no later than 10 working days after Baker received this letter. Star-Line Enterprises, Inc., B-210732, supra. Baker received this letter on or before August 27, 1984, the date on which it filed its protest with GAO. Since this argument was first raised on December 11, 1984, it is clearly untimely and will not be considered. Star-Line Enterprises, Inc., B-210732, supra.

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Baker's final allegation is that the bids of CCI and NuAire are nonresponsive. We find that Baker is not an interested party under our Bid Protest Procedures to protest the awards to CCI and NuAire since, even if its protest were sustained, it is ineligible for award. Further, if Baker's allegations were sustained, it would not result in a resolicitation and an opportunity for Baker to rebid, since there are a number of other bidders for each geographic location other than CCI and NuAire. Therefore, Baker does not have the direct and substantial interest that is necessary to make it an interested party in this case. Public Entity Underwriters, Ltd., B-213745, Sept. 20, 1984, 84-2 C.P.D. ¶ 326; RAH, Inc., B-201664, Apr. 17, 1981, 81-1 C.P.D. ¶ 297.

for Seymour Efros
Harry R. Van Cleve
General Counsel