

DECISION

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

31065

FILE: B-216800 **DATE:** April 23, 1985
MATTER OF: Coulter Electronics, Inc.
DIGEST:

1. The manufacturer of the products offered by a low bidder, its exclusive distributor to the federal government, is an "interested party" under GAO's Bid Protest Procedures to protest rejection or acceptance of bids under an IFB, since it has as direct and substantial an economic interest in the protest as the bidder.
2. Where an "equal" item has not been shown to meet the salient characteristics of a brand name product in a brand name or equal procurement, the bid must be rejected as nonresponsive.
3. Award may be made in the aggregate, even though the solicitation language contemplates multiple awards, where separate awards would not meet the government's requirements for a functional system and the bidders are not prejudiced.
4. Bid that fails to designate the manufacturer and model number on line items for certain accessories to brand name system is responsive where it is clear from the IFB and the bid that the bidder is offering the brand name accessories.

Coulter Electronics, Inc., manufacturer of the products offered by Curtin Matheson Scientific, Inc., the low bidder under invitation for bids (IFB) No. 618-95-84, issued by the Veterans Administration (VA), Fort Snelling, Saint Paul, Minnesota, protests the rejection of Curtin Matheson's bid and the award of a contract to Becton Dickinson FACS Systems, the only other bidder.

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We deny the protest.

The IFB called for prices for a cell sorter system, Becton Dickinson model 440, or equal, and 10 associated options and/or accessories. The system is to be used for biomedical investigations at the VA Hospital. The VA determined that Curtin Matheson's bid was nonresponsive because neither it nor the accompanying descriptive literature clearly demonstrated that certain of the accessories offered met all salient characteristics of the brand name equipment. Coulter protests that this determination was erroneous; it also alleges that Becton Dickinson's bid was nonresponsive because it failed to designate the manufacturer and model number for four of the accessories.

INTERESTED PARTY

The VA contends that Coulter is not an interested party under our Bid Protest Procedures, 4 C.F.R. § 21.1(a) (1984), ^{1/} because it was not a bidder, but a supplier. Coulter responds that it is interested because Curtin Matheson is the exclusive distributor of Coulter instruments to the federal government and because the VA determined that the Coulter products offered by Curtin Matheson were non-responsive. Consequently, Coulter contends that it has a direct financial interest in the procurement.

Under our Bid Protest Procedures, a party must be "interested" before we will consider its protest. Whether a party is sufficiently interested to maintain a protest depends upon the degree to which its interest in the outcome is both established and direct. In general, we will not consider interest to be sufficient where the protesting

^{1/}These procedures were in effect at the time Coulter's protest was filed on August 27, 1984. Effective January 15, 1985, they were superseded by regulations implementing the Competition in Contracting Act of 1984, Pub. L. No. 98-389, Title VII, 98 Stat. 1199 (1984). For purposes of bid protests, section 2741(a) of the Act defines "interested party" as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." See also GAO Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1985).

party would not be eligible for award, even if we resolved the issues raised in its favor. Radix II Inc., B-208557.2, Sept. 30, 1982, 82-2 CPD ¶ 302, aff'd on reconsideration, Nov. 29, 1982, 82-2 CPD ¶ 484. For example, subcontractors, manufacturers, or suppliers to bidders generally are not considered interested parties to protest the responsiveness of individual bids. Id. However, where a bidder is an authorized agent or exclusive distributor, submitting a quote on behalf of the manufacturer, we consider the manufacturer's economic interest to be as direct and substantial as that of the bidder. See Porta-Fab Corp., B-213356, May 7, 1984, 84-1 CPD ¶ 511 (manufacturer whose West Coast distributor and authorized agent submitted a quote on its behalf is an interested party to protest the award to another bidder). Compare Service and Sales Inc., B-211868, Oct. 20, 1983, 83-2 CPD ¶ 469, aff'd on reconsideration, Dec. 28, 1983, 84-1 CPD ¶ 32 (nonexclusive licensee is not an interested party to protest disclosure of allegedly proprietary data). Therefore, we will consider Coulter's protest.

RESPONSIVENESS OF CURTIN MATHESON'S BID

The VA rejected Curtin Matheson's bid because the firm's descriptive literature failed to show compliance with certain listed salient characteristics for three of 10 required accessories.

Where a solicitation identifies specific salient characteristics of a brand name product and requires descriptive literature to establish the fact that the "equal" product also has these characteristics, the responsiveness of an "equal" bid depends upon the completeness of the information submitted or reasonably available. Le Prix Electrical Distributors, Ltd., B-212518, Dec. 27, 1983, 84-1 CPD ¶ 26. The data furnished must permit the contracting agency to establish that each specified salient characteristic is available. Sutron Corp., B-205082, Jan. 29, 1982, 82-1 CPD ¶ 69. In this case, the IFB warned each bidder to:

"furnish as a part of his bid all descriptive material (such as cuts, illustrations, drawings, or other information) necessary for the purchasing activity to (i) determine whether the product offered meets the salient characteristics

requirement of the invitation for bid, and (ii) establish exactly what the bidder proposes to furnish and what the Government would be binding itself to purchase by making an award."

The three areas where the VA found that Curtin Matheson's bid failed to demonstrate compliance with the solicitation are:

1. The capability of the unit to perform three-color fluorescence analysis with a third fluorescence channel installed (the third channel, "EMI Model 9798B or equal," was one of the designated accessories to the cell sorter system);
2. The substitution of a dual laser optical bench and the addition of a 4-watt Argon-Ion laser to permit simultaneous use of two laser beams for dual fluorescence and sorting (another accessory, no brand name identified); and
3. An external analysis and sort control system that provides external control of the flow cell sorter and advanced analysis of non-rectangular regions through interfacing terminals. Also, the system is to have graphics plotting capability via a printer terminal (another accessory, "Becton Dickinson Consort 40C or equal").

Coulter argues that its cell sorter and accessories are equal to the brand name equipment and that the VA's rationale in determining that three of the accessory items did not meet salient characteristics was erroneous.

The overall determination of the technical adequacy of bids or proposals is primarily a function of the procuring agency, and the contracting officer has a reasonable amount of discretion in the evaluation of bids. Bell & Howell Co., B-204791, Mar. 9, 1982, 82-1 CPD ¶ 219. Our Office therefore generally accepts the judgment of the technicians and specialists of the procuring agency as to technical adequacy unless there is a clear showing of unreasonableness, an abuse of discretion, or a violation of the

procurement statutes and regulations. Interad, Ltd.,
B-210013, May 10, 1983, 83-1 CPD ¶ 497.

With regard to the first area of alleged nonresponsiveness, Coulter contends that its cell sorter system does have three-color capability. The descriptive literature in Curtin Matheson's bid showed a third photomultiplier tube, added by hand to the printed drawing of the basic Coulter system. Coulter contends that the three offered photomultiplier tubes may be fitted with filters to allow for three-color fluorescence or light scatter by simply adding or removing filters.

However, the VA asserts, and our review confirms, that the descriptive literature submitted by Coulter refers only to two-color analysis. There is no mention of a third filter or color fluorescence signal or three-color capability. There is no explanation or documentation of the technology of the proposed system for processing and analyzing in three colors. Finally, we agree with the VA that the hand-drawing of a third photomultiplier tube and mention of an optional third tube "to allow simultaneous measurement of 2-color fluorescence and 90 degree light scatter" in the descriptive literature does not provide sufficient information to establish that the Coulter unit has the capability to perform three-color fluorescence analysis.

With respect to the second accessory, Coulter states in its bid that it was offering an upgraded unit which "includes 5-watt coherent laser," and that an "optional 2-watt laser [is] available but not necessary" for an additional \$24,000. Coulter maintains that although its unit utilizes only a single laser, that laser is 5 watts rather than the standard 2 watts, thereby allowing the Coulter laser to be split into two beams with the capability for dual fluorescence and sorting.

The VA asserts that a single 5-watt laser does not comply with the specification for two laser beams. VA also contends, and our review substantiates, that the descriptive literature does not explain how Coulter's single 5-watt system would use two laser beams simultaneously to perform the required dual fluorescence and sorting function and meet other optical requirements. The proposed modification of the system with the addition of a 2-watt laser is not

discussed in the descriptive literature, so as to indicate clearly how the Coulter dual laser system would meet specifications.

Therefore, we find that Curtin Matheson's bid was properly rejected as nonresponsive, since the "equal" bid did not show conformance to the salient characteristics of the brand name products or compliance with solicitation requirements. Interad, Ltd., B-210013, supra.

Coulter also disputes the VA's position with regard to its external analysis and sort control system accessory. However, in view of the foregoing conclusions, we need not consider this issue since clearly two of Coulter's accessories did not meet the salient characteristics.

Additionally, Coulter protests that even if Curtin Matheson's bid on the three accessories is nonresponsive, it should have received the award as the low bidder for the basic cell sorter system and the other seven accessories. In this regard, the IFB provides:

"The VA reserves the right to make an award to the responsible bidder quoting the lowest aggregate price for all items, for any group of items, or on an item basis, whichever is more advantageous to the Government. Bids will be evaluated on the basis of additional cost to the Government that might result from making multiple awards. For this purpose, the cost of awarding and administering each additional contract is estimated to be \$500.00."

However, the VA contends that due to the highly technical, integrated nature of the cell sorter system and its accessories, a split award would be unacceptable. That is, the system would not function if one supplier furnished the system and another supplier furnished the accessories and options.

From our review, it is clear that each of the accessories for which Curtin Matheson's bid was found deficient was completely integrated with the basic cell sorter and that separate awards of these items would not meet the government's requirement for a functional system. Indeed, Curtin Matheson's bid and descriptive literature

integrate these three accessories into the basic cell sorter system; two of the accessories are not separately priced, but are included in the price for the basic system. Consequently, even though the above-quoted clause indicated that multiple awards were contemplated, we agree with the VA that an aggregate award is appropriate. See Blinderman Construction Co., B-216298, Dec. 24, 1984, 84-2 CPD ¶ 688, aff'd on reconsideration, B-218028, Feb. 20, 1985, 85-1 CPD ¶ 214 (an aggregate award is appropriate, even though the solicitation indicates that multiple awards are contemplated, where such an award is necessary to satisfy the government's requirements and bidders are not prejudiced by the erroneous solicitation statement).

RESPONSIVENESS OF BECTON DICKINSON'S BID

Coulter's second allegation is that Becton Dickinson's bid was nonresponsive because of its failure to designate the manufacturer's name/brand and model number for four of the options and accessories of the basic unit.

The IFB states that "unless the bidder clearly indicates in his bid that he is offering an 'equal' product, his bid shall be considered as offering the brand name product referenced in the invitation for bids." The specifications required that item 1, the basic unit, be a "Becton Dickinson FACS Model 440 or Equal." After item 1, the following note appears: "Bid items 2-10 are options and/or accessories of the basic unit (bid item 1)." Although brand names are stated for six of the accessories, no specific brand names are given in the IFB for the four accessories here in question. Becton Dickinson inserted prices on all bid items.

The VA states that the brand name information on the four items was unnecessary, since it is clear from the bid that Becton Dickinson intended to bid the brand name model 440 and the brand name accessories. The VA contends that by inserting prices for all bid items, Becton Dickinson bound itself to provide the Becton Dickinson FACS model 440 and its accessories.

We agree. The four items in question are based upon Becton Dickinson model 440 accessories, and the VA indicates that these accessories do not have formal model numbers. The solicitation clearly indicates that the listed

accessories are to be used with or in the Becton Dickinson model 440. There is nothing in the Becton Dickinson bid which shows that it will not comply with the specifications or that it took exception to the solicitation. Therefore, the only reasonable explanation of Becton Dickinson's bid is that it is furnishing its own brand name accessories. Consequently, since it quoted prices for these items, Becton Dickinson's failure to list a manufacturer or model number does not make its bid nonresponsive.

We deny the protest.

Harry R. Van Cleve
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General Counsel