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DECISION



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

FILE: B-218379.2 **DATE:** August 2, 1985
MATTER OF: MRL, Inc.

DIGEST:

1. Where protester alleges that an oral protest of solicitation requirements was timely made with agency but agency denies that oral protest was ever made, the protester did not meet the burden of proving that the oral protest was in fact made. Accordingly, where protest alleging solicitation improprieties was filed initially with GAO after bid opening, it is untimely.

2. Where a bid sample is requested, the solicitation should list those characteristics for which the sample will be examined and evaluation of the sample is limited to those listed characteristics. Protest is sustained where sample characteristics were not listed and the sample was improperly rejected for subjective reasons not related to the specifications.

MRL, Inc. (MRL), protests the award of a contract to Spectrum Industries, Inc. (Spectrum), under invitation for bids (IFB) No. DAHA41-85-B-0004, issued by the National Guard Bureau for a quantity of electronic locks to be installed at various Army National Guard facilities throughout Texas.

We sustain the protest.

The IFB was issued on December 28, 1984, with bid opening January 28, 1985. MRL submitted the low bid of \$36,180. MRL's bid sample was examined by a team of electricians who found certain deficiencies. The contracting officer, relying on this analysis, rejected MRL's bid as being nonresponsive. On March 22, 1985, award was made to Spectrum, the second lowest bidder.

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MRL first alleges that the solicitation unnecessarily and therefore improperly required a bid sample, that solicitation requirements regarding electromagnetic susceptibility were unnecessarily onerous, and that the contracting officer might be trying to effect a sole source procurement without the necessary justification. MRL states that prior to bid opening it orally protested to the contracting officer on the above grounds but the contracting officer refused to resolve the protest or to request that the protest be placed in writing.

The contracting officer states that although he and his staff had several conversations with MRL's president from the time MRL received the IFB, neither he nor any of his staff were aware that MRL was protesting the solicitation until they received a copy of MRL's March 25 protest to the General Accounting Office.

Although we generally resolve disputes over timeliness in the protester's favor, the record must reflect at least some reasonable degree of evidence to support the protester's version of the facts. Lucco Art Studio, Inc., B-217422, Feb. 27, 1985, 85-1 C.P.D. ¶ 249. The record here only shows conflicting statements by the protester and the contracting agency and, consequently, the protester has not met the burden of proving that an oral protest was made. Lucco Art Studio, Inc., B-217422, supra. Accordingly, we are unable to conclude that MRL filed a protest with the contracting agency based on improprieties in the solicitation prior to bid opening. Since MRL's protest here was not filed until after bid opening, these allegations are untimely under 4 C.F.R. § 21.2(a)(1) (1985). We point out, moreover, that even if we were to find that MRL did timely protest to the National Guard, bid opening would have constituted adverse agency action on that protest and the protest, subsequently filed here more than 10 days after bid opening, would still have been untimely. King-Fisher Company, B-209097, July 29, 1983, 83-2 C.P.D. ¶ 150. Therefore, we will not consider MRL's first three allegations.

MRL also contends that its bid should not have been rejected as nonresponsive. It argues that the National Guard Bureau has not shown where its sample failed to meet any of the specifications.

The contracting officer, in rejecting MRL's bid, relied on a technical report that identified eleven defects in MRL's sample.

The responsiveness of a bid concerns whether a bidder has unequivocally offered to provide supplies or services in conformity with the material terms and conditions of the solicitation. Jimmie Muscatello's Military and Civilian Tailors, B-211578, Sept. 29, 1983, 83-2 C.P.D. ¶ 390. To insure a common basis for intelligent competition, it is important that the terms and conditions that a bid must meet be clearly set out in the invitation. Thus, where a bid sample is needed to assure the procurement of an acceptable product, the invitation should list those characteristics for which the sample will be examined, set bid opening as the latest time for submission of the sample, and caution firms that a bid will be rejected if the sample does not conform. D.N. Owens Co., 57 Comp. Gen. 231 (1978), 78-1 C.P.D. ¶ 66. The sample, however, is to be evaluated only for the characteristics set forth in the solicitation; a sample need not meet every specification requirement that the items to be furnished under the contract must meet. 49 Comp. Gen. 311 (1969).

Here, the solicitation merely incorporated by reference the standard bid sample clause (Federal Acquisition Regulation, 48 C.F.R. § 52.214-20 (1984)); there was no listing of the characteristics the sample had to meet. Accordingly, the solicitation did not provide any basis upon which a sample could be evaluated. ATD-American Co., B-214859, Aug. 27, 1984, 84-2 C.P.D. ¶ 229.

We have held that even where a solicitation's bid sample provision does not state the characteristics the sample must meet, nevertheless, if it were clear from the sample that the bidder intended to qualify the bid by taking exception to the specifications, the bid would have to be rejected, notwithstanding the deficiency in the bid sample provision. ATD-American Co., *supra*. In this case, however, the technical report relied on by the contracting officer does not provide objective evidence of the failure to meet any specification.

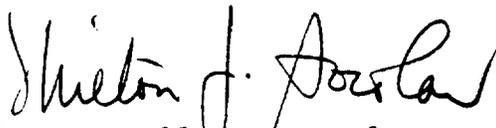
Some of the reasons MRL's sample was found unacceptable are:

1. Accessibility to mounting screws on push button panel is difficult due to anchors attached to outside walls of case;
2. Mounting screws and washers on push button panel are non-locking and easy to lose;

3. There are no test point locations on circuit board; and
4. Tamper switch is of poor quality and tends to corrode at contacts after years of service.

The agency in its report does not relate these deficiencies to any specification provision in the IFB, and our review of the specifications and the military standards referenced in the IFB does not establish any relationship. It appears, therefore, that MRL's sample was improperly rejected for subjective reasons not related to any specification requirement.

We sustain the protest, and recommend that the contract to Spectrum be terminated if feasible. If the termination is feasible, we further recommend either that award be made to MRL if the firm is responsible and such award would satisfy the agency's needs, or, if the bid sample requirement is essential to the agency's needs, that the requirement be resolicited under an IFB that properly sets forth the basis for sample evaluation. If termination is not feasible, we find MRL to be entitled to its costs of filing and pursuing the protest and its bid preparation costs. 4 C.F.R. § 21.6(d)(1)&(2) (1985).

for 
Comptroller General
of the United States