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PROWITZ

DECISION



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

FILE: B-218834.2 **DATE:** September 11, 1985
MATTER OF: Colt Industries

DIGEST:

1. Under GAO Bid Protest Regulations, a protest may be dismissed where the protester fails to furnish a copy of the protest to the contracting officer within 1 day after the protest is filed with GAO. Dismissal is not warranted, however, when the agency is otherwise aware of the basis of the protest and files its report in a timely manner.
2. Cancellation of a contract awarded under a solicitation containing an ambiguous experience requirement is not appropriate where the record indicates that the protester is not prejudiced by this ambiguity as it cannot comply with the intended meaning of the requirement.
3. When a solicitation provision requiring bidders to submit make and model numbers of all equipment offered is not intended to demonstrate bidders' conformance with specifications, the information does not relate to bid responsiveness. Rather, this information concerns how bidders will perform and as such, is a matter of responsibility. Thus, bidders may properly submit the information after bid opening.

Colt Industries protests the award of a contract to Equipment Associates Company, Inc., under invitation for bids (IFB) No. 685-4, issued on March 8, 1985, by the Department of the Interior's Bureau of Mines, Helium Field Operations. The agency sought bids for two gas-fired engine generator sets to be used at the Exell Helium Plant in Masterson, Texas.

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Colt contends that Interior improperly determined that its bid was not responsive to an experience requirement set forth in the solicitation. Additionally, Colt contends that Equipment Associates failed to provide with its bid information required to identify the generator it proposed and, accordingly, that the firm's bid should have been rejected as nonresponsive.^{1/}

We deny the protest.

BACKGROUND

The IFB described the skid-mounted, natural gas-fired engine generator sets by using both design and performance specifications. The protested experience requirement, paragraph 9.03, stated that the engine manufacturer must have provided a minimum of two engines of the size and type described in the specifications, and that these units must have had a minimum satisfactory operating record in the field of 2 years. Engine size and type, however, were not defined by number of cylinders, bore, stroke, or horsepower anywhere in the specifications.

The agency received 11 bids by the April 22, 1985, bid opening date. Colt, offering an MEP 4-cylinder engine manufactured by its Fairbanks Morse Engine Division, submitted the low bid in the amount of \$672,702. Two other firms, which were third and fourth low bidders, respectively, offered the same Fairbanks Morse engine.

The solicitation indicated that certain additional information might be requested of a bidder being considered for award. By letter dated April 24, the contracting officer requested that Colt submit information as to the location of two engines of the size and type in the solicitation, along with fuel consumption and exhaust emission test results. Colt responded by submitting the names of individuals to contact at four sites where engines manufactured by Fairbanks Morse were installed. (As part

^{1/}Colt also alleged that the agency improperly did not permit bidders to examine all bids at opening. We note that under the Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.402(c) (1984), bids need not be made available for inspection where, as the agency states was the case here, government personnel are not immediately available to supervise this procedure.

of its bid package, Colt had previously provided Interior with a list of more than 300 locations at which spark gas engines manufactured by Fairbanks Morse had been installed since 1955.)

After reviewing this information, the contracting officer determined that Fairbanks Morse had not previously manufactured and installed at least two of the 4-cylinder engines that Colt had offered. Rather, the agency states, only one of the engines on the list submitted with Colt's bid was a 4-cylinder engine; all others were 6 or more cylinders. In addition, according to the agency, the bulletins, fuel consumption, and exhaust emission data subsequently provided by Colt were for 6-cylinder or larger engines. The contracting officer accordingly rejected Colt's bid as nonresponsive, along with those of the other two bidders offering Fairbanks Morse engines. On May 3, Interior awarded the protested contract to Equipment Associates, which had offered an engine manufactured by Superior.

COLT'S PROTEST

A. Procedural Requirements

Preliminarily, Interior contends that Colt's protest concerning rejection of its own bid should be dismissed for failure to comply with our Bid Protest Regulations, 4 C.F.R. § 21.1(d) (1985), which require that a copy of the protest be furnished to the contracting officer or designee within 1 day after a protest is filed with our Office. This regulation stems from the requirement imposed on the procuring activity by the Competition in Contracting Act of 1984, 31 U.S.C.A. § 3553(b)(2)(A) (West Supp. 1985), for furnishing our Office with a report on a protest within 25 days.

While we may dismiss protests for failure to comply with this procedural requirement, 4 C.F.R. § 21.2(f), we do not do so automatically, but only where the procuring agency has been prejudiced by the protester's noncompliance. We consider such factors as whether the agency otherwise had actual knowledge of the basis of the protest at the time it was filed and whether the agency is nevertheless able to file its report in a timely manner. See Motorola Inc.--Reconsideration, B-218888.2, June 24, 1985, 85-1 CPD ¶ 719; Sabreliner Corp., B-218033, Mar. 6, 1985, 85-1 CPD ¶ 280.

In this case, we do not find that dismissal of the protest is required. Although there is some dispute as to whether the contracting officer timely received a copy of the submission that Colt filed with our Office on May 13, we note that on May 6, Colt notified Interior of its intent to protest. Furthermore, Interior had been informed of the basis of protest by means of an identical, earlier protest by Colt that we had dismissed because of procedural deficiencies. Additionally, upon being notified that Interior had no record of receiving a copy of this protest, Colt promptly sent another to the contracting officer via Federal Express. Finally, Interior filed its protest report with our Office within the statutory 25 days. We therefore will consider the merits of the protest.

B. Evaluation of Colt's Bid

Colt contends that Interior improperly determined that its bid was nonresponsive for failing to meet the requirement that the engine manufacturer have provided a minimum of two engines of the size and type described in the specifications and these engines have a minimum satisfactory operating record of 2 years. Colt interprets this provision as requiring experience in the manufacture of engines with the same bore, stroke, and configuration--but not necessarily the same number of cylinders--as the one on which it bid. Consequently, Colt maintains that the information it provided Interior, primarily consisting of a list of previously installed Fairbanks Morse engines with the same bore, stroke, and configuration as the 4-cylinder engine described in its bid, shows that it meets this requirement.

Interior, however, maintains that this provision requires experience in the manufacture of engines identical to those offered by the bidder. According to the agency, this requirement reflects the needs of its Helium Field Operations to obtain engines with proven records of performance and the ability to meet state (Texas) environmental standards. Experience in the manufacture of similar engines, having the same bore, stroke, and configuration, but not the same number of cylinders, Interior contends, is not sufficient to ensure that these two needs will be satisfied. Interior therefore concludes that Colt's bid was properly rejected as nonresponsive.

Initially, we note that the contracting officer erred in treating the experience requirement as a matter of bid responsiveness. We have previously found that requirements

such as this one constitute definitive responsibility criteria. See, e.g., Vulcan Engineering Co., B-214595, Oct. 12, 1984, 84-2 CPD ¶ 403. These are objective standards, included in a solicitation, that establish a measure by which a prospective contractor's ability to perform may be judged. The standards put firms on notice that the class of prospective contractor is limited to those who meet specified qualitative or quantitative criteria deemed necessary for adequate performance. Provost's Small Engine Service, Inc., B-215704, Feb. 4, 1985, 85-1 CPD ¶ 130. Therefore, any rejection of Colt's bid ordinarily would have to be based on a finding that Fairbanks Morse did not have experience equivalent to that specified rather than a finding that Colt's bid was nonresponsive.

In this case, however, we believe there was a latent ambiguity in the experience requirement, which is subject to more than one reasonable interpretation. See Amdahl Corp., et al., B-212018, et al., July 1, 1983, 83-2 CPD ¶ 51. Although Interior required that the proposed engines meet design and performance specifications, it did not state in the solicitation that those engines must have a certain number of cylinders. We therefore consider that Colt reasonably viewed the solicitation as requiring experience in the manufacture of any engine with the specified design and performance characteristics. We also consider Interior's interpretation of this requirement, namely, that experience was required in the manufacture of the identical engine offered by the bidder, reasonable. Alternatively, we regard the solicitation as defective because it did not clearly express what Interior required in terms of experience so as to ensure both reliability and compliance with state environmental standards. (Colt has not challenged the requirement as unduly restrictive, but only argues that it meets it.)

It is a basic principle of federal procurement law that specifications must be sufficiently definite and free from ambiguity so as to permit competition on a common basis. We note, however, that the mere existence of an ambiguity or other deficiency in specifications does not, absent a showing of prejudice, provide an agency with sufficient reason to cancel and resolicit. Here, we do not believe that Colt has shown the prejudice necessary to justify cancellation. Although the experience requirement, as a prerequisite to an affirmative determination of responsibility, need not have been met at the time of bid opening, Colt has not demonstrated that, for its 4-cylinder engine, it could have satisfied this requirement at any

time. Colt does not contend that Fairbanks Morse has previously manufactured more than one of the 4-cylinder engines, while the solicitation required the manufacture and successful installation of at least two engines for at least 2 years. Compare Halifax Engineering, Inc., B-190405, Mar. 7, 1978, 78-1 CPD ¶ 178 (prejudice was found, where, as a result of ambiguity in a solicitation, bidders failed to submit required documentation and the record indicates that they would have done so but for the ambiguity). Colt also has not alleged or shown that it could have supplied a 6-cylinder or larger Fairbanks Morse engine, which apparently would meet the experience requirement, at a competitive price.

We deny Colt's protest on this basis.

C. Evaluation of Equipment Associates' Bid

Colt also contends that Interior should have rejected Equipment Associates' bid as nonresponsive for failure to comply with a solicitation requirement that the make and model number for all equipment offered be included in all bids. Colt alleges that Equipment Associates did not specify the model number of its generator and that the contracting officer improperly elicited this information after bid opening.

Where a contracting agency requests descriptive literature or the make and model number of equipment so that it can determine exactly what the bidder proposes to furnish, it may, in appropriate circumstances, reject as nonresponsive a bid that does not include this information. In such a case, the solicitation must clearly indicate that this information will be considered part of a bid, that it must be submitted with the bid, and that the failure to submit the information or literature demonstrating product conformance at bid opening will result in the rejection of the bid. Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.202-5 (1984); See Brady Mechanical, Inc., B-206803, June 7, 1983, 83-1 CPD ¶ 613.

Here, it does not appear that Interior requested this information to ascertain whether the engines offered conformed to specifications. Further, the agency did not comply with the cited FAR section that would have enabled it to treat this information as a matter of bid responsiveness. Instead, Interior, as is evidenced by its placement of the applicable provision in the section of the solicitation listing contract conditions, sought this

information to determine the responsibility of bidders, that is, their capability to perform the contract. Consequently, Equipment Associates' bid should not, as the protester argues, have been rejected as nonresponsive because it did not include the model number of the generator, and Interior properly requested and considered this information after bid opening. See Raymond Engineering, Inc., B-211046, July 12, 1983, 83-2 CPD ¶ 83.

We also deny Colt's protest on this basis.

for *Raymond Egan*
Harry R. Van Cleve
General Counsel