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DECISION



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

FILE: B-221827.2 **DATE:** June 4, 1986
MATTER OF: Emerson Electric Company

DIGEST:

1. Agency properly may terminate a contract where it learns after award that the only two bidders submitted nonresponsive bids, and that procuring officials conducted discussions with the awardee in order to establish that the offered product would meet the requirements of the solicitation.
2. Agency's failure to receive any responsive bids constitutes a compelling reason to cancel a solicitation. Moreover, when the cancellation is proper, the agency does not create an impermissible auction when it resolicits.

Emerson Electric Company protests the termination of its contract for uninterruptible power systems for an aerospace data facility at Buckley Air National Guard Base, Colorado. The Air Force awarded the contract under invitation for bids (IFB) No. FO4701-85-B-0024, issued October 15, 1985, but subsequently terminated it and canceled the solicitation when it discovered that Emerson's bid had been nonresponsive and that procuring officials had conducted discussions with the firm in order to establish that the system offered by Emerson would meet the requirements of the IFB. Emerson also protests the cancellation and resolicitation.

We deny the protest.

Background

The Air Force sought bids for six uninterruptible power systems, which consist of electrical and electronic

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components that convert unregulated incoming electrical power into regulated power suitable for a specified use, in this case the operation of computers. If the normal power source deteriorates or fails, the systems use batteries to provide electrical power.

The IFB required bidders to furnish, with their bids, descriptive literature on proposed power modules, including the rectifier/charger, inverter, power module controls, diagnostic and monitoring systems and batteries. In addition, the solicitation contained the standard descriptive literature clause set forth in the Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.214-21 (1984), stating that the agency would reject bids failing to contain literature showing that the offered product conformed to the specification and drawings. The clause provides that the term "descriptive literature" includes only information required to determine the technical acceptability of the offered product, and does not include information used to determine the responsibility of a prospective contractor.

At bid opening on November 15, the Air Force received bids from Emerson and from Exide Electronics Corporation. Emerson was the low bidder at \$3,767,143. On November 29, the Air Force informed Emerson that a review of its technical literature revealed several areas that were not addressed or adequately supported by documentation. The Air Force specified areas to be resolved and requested Emerson's written comments or justifications, with supporting documentation as required, on 46 different specification sections. Emerson provided a detailed 7-page response with 5 attachments, including a catalog and 12 drawings, to the Air Force on December 5, supplementing it with a further 2-page response on December 6.

The Air Force awarded a contract to Emerson on January 16. On January 22, Exide protested to our Office, asserting that Emerson's descriptive literature did not conform to the requirements of the solicitation. The Air Force concluded that Exide's protest was meritorious and Exide withdrew its protest. The agency advised Emerson that the contracting officer had improperly conducted discussions with the firm and should instead have rejected its bid as nonresponsive. The Air Force concluded that Exide's bid was nonresponsive as well because the firm had not acknowledged a material amendment and had taken exception to some provisions of the specification.

The Air Force terminated Emerson's contract for the convenience of the government on January 31. The agency plans to amend the specification to include installation of the new systems and to resolicit competitive proposals rather than sealed bids.

Emerson's Protest

Emerson contends that its bid was responsive and that the additional information requested by the Air Force pertained solely to the determination of Emerson's responsibility, or capability to perform. Emerson argues that its bid did not deviate in any material way from the IFB requirements and that post-bid opening communications with a responsive bidder are not improper. Apparently assuming that if the IFB were not canceled, it would receive an award at the bid price; Emerson also asserts that the Air Force did not have a compelling reason to cancel the solicitation, as required by the FAR, 48 C.F.R. § 14.404-1(a)(1). The firm contends that any reprocurement will constitute an auction, since prices have been exposed.

Analysis

A bid is responsive when it represents an unequivocal offer to provide the requested items in conformance with the material terms of an IFB. Zero Manufacturing Co., B-210123.2, Apr. 15, 1983, 83-1 CPD ¶ 416. Responsiveness must be determined at the time of bid opening and, in general, solely from the face of the bid and material submitted with the bid. Agencies may require the submission of descriptive literature with the bid so that they can determine what the bidder proposes to furnish and whether the product is acceptable. Brady Mechanical, Inc., B-206803, June 7, 1983, 83-1 CPD ¶ 613; FAR, 48 C.F.R. § 14.202-5. Where, as here, descriptive literature is required to establish conformance with the specification, and bidders are cautioned that nonconformance will cause the bid's rejection, the bid must be rejected as nonresponsive if the literature submitted fails to show clearly that the offered product complies with the specification. Zero Manufacturing Co., supra.

Emerson correctly argues that some of the omitted information, for example a failure to state that it would meet maintenance and service requirements, relate to responsibility. Other omissions, such as a failure to state that the system would comply with the military standard addressing electromagnetic emissions, are not

material, since Emerson took no exception to the standards that were incorporated in the IFB. Emerson Electric Co., B-212659, Nov. 4, 1983, 83-2 CPD ¶ 525.

We find, however, that Emerson's bid contained a number of statements inconsistent with material requirements of the solicitation, as well as numerous failures to address compliance with such requirements. For example, paragraph 6.2.11 of the specification requires that "inverters," a portion of the system that converts the direct current from batteries to the precise alternating current required, be capable of sustaining a current overload of at least 110 percent continuously and an overload of 125 percent for 15 minutes. Emerson's proposal did not address the continuous overload capability and stated that a 125 percent overload could be maintained for 10 minutes. After the Air Force brought these discrepancies to its attention, Emerson stated that its system would sustain a 100 percent overload continuously; the firm only represented that its system could sustain a 110 percent overload after an additional telephone discussion. Other examples of material inconsistencies or omissions concern the maximum working voltage level of solid state power components and electronic devices (paragraph 5.9.5 of the specification requires no more than 50 percent of the rating established by the manufacturers; Emerson proposed 75 percent), and no reference to required "over-temperature" detection devices in the power transformers. Since Emerson's descriptive literature evidenced nonconformity with some provisions of the IFB and failed to establish conformity with others, we believe that the agency reasonably concluded in its post-award analysis that the bid was nonresponsive.

Emerson argues that its discussions with the Air Force constituted permissible clarifications. We disagree. To allow a bidder to make its nonresponsive bid responsive after bid opening--which occurred in this case--is tantamount to allowing the bidder to submit a new bid. Mechanical Equipment Co., Inc., B-212914, Sept. 5, 1984, 84-2 CPD ¶ 255.

The protester also contends that the Air Force does not have a compelling reason to cancel the IFB and resolicit, and that to do so will constitute an auction. The FAR expressly provides that the failure to receive any responsive bids constitutes a compelling reason to cancel an IFB. FAR, § 14.404-1(c)(6) (FAC 84-5, Apr. 1, 1985).

Where, as here, cancellation is in accord with governing legal requirements, the agency has not created an impermissible auction. See Arcwel Corp., B-221380, Mar. 18, 1986, 86-1 CPD ¶ 269.

We deny the protest.


Harry R. Van Cleve
General Counsel