



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Performance Controls, Inc.

File: B-224432

Date: October 7, 1986

DECISION

1. Protest, filed after bid opening, that solicitation's brand name or equal purchase description gave an unfair competitive advantage to brand name producer, is untimely, since it alleges solicitation improprieties apparent before bid opening.
2. Contention that contracting agency improperly awarded brand name or equal contract without consideration of protester's low bid of an allegedly equal product lacks merit, where required descriptive literature did not accompany protester's bid, and both protester's subsequent submission of brochures and its advice that the same brochures were available in the contracting agency's copy of the Thomas Register occurred after award.

DECISION

Performance Controls, Inc., protests issuance of an allegedly defective solicitation, and the rejection of its low bid without consideration of its descriptive literature, under invitation for bids (IFB) No. F08650-86-B-0095 issued by the Department of the Air Force, Patrick Air Force Base, for six Kintec Corporation Part No. 3263-SB-02, or equal, servo amplifiers. We dismiss the protest in part as untimely and we deny it in part as without merit.

Two firms submitted bids by the May 29, 1986, bid opening: Performance Controls (\$60,000) and Kintec (\$74,700). Kintec bid its brand name part number as listed in the IFB, while Performance Controls bid its own part number.

Performance Controls contends that the IFB's brand name or equal purchase description is defective because the IFB specifies a non-commercial Kintec part number, and the description lacks a servo amplifier manufacturer's part

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number, drawings and specifications. Performance Controls argues that the purchase description gives Kintec an unfair competitive advantage because Kintec need not prove that its product meets the listed salient characteristics, but only that the item offered corresponds to the Kintec part number listed in the IFB.

These contentions constitute allegations of solicitation improprieties that were apparent before bid opening, since Kintec could not properly be disqualified for bidding in compliance with the invitation. See Cummins-Wagner Co., Inc., et al., B-188486, June 29, 1977, 77-1 C.P.D. ¶ 462. Our Bid Protest Regulations require the filing of protests based upon such alleged improprieties before bid opening, 4 C.F.R. § 21.2(a)(1) (1986), to enable the contracting agency or our Office to decide an issue while it is most practicable to take effective action where the circumstances warrant. See Ratcliffe Corp.--Reconsideration, B-220060.2, Oct. 8, 1985, 85-2 C.P.D. ¶ 395. Since Performance Controls' protest raised the issue after that date, they are untimely.

The protester also contends that the Air Force's rejection of its low bid for failure to include descriptive literature was improper because the Air Force had in its possession on the day of award, June 25, brochures mailed by Performance Controls the previous day showing that its product was equal to the brand name product. Performance Controls further argues that even if the contracting officer did not receive that descriptive literature before the actual award, the same information was available to the contracting officer in the Air Force's copy of the Thomas Register. (The Thomas Register is a multi-volume compilation of products and services, company profiles, and company catalog data.) Performance Controls urges that the Air Force should not have awarded the contract without first reviewing Performance Controls' descriptive literature because it might have saved \$14,000 had Performance Controls' product proven equal.

The Air Force reports that the IFB expressly warned bidders of their duty to furnish all descriptive material necessary to determine whether their products met the listed salient characteristics, and that the purchasing activity was not responsible for securing any information not identified in the offer and reasonably available. The list of salient characteristics was two pages long. At bid opening on May 29, Performance Controls' bid lacked any descriptive material. Consequently, on June 19, the Air Force rejected the bid as nonresponsive. In a June 24 telephone conversation with the contracting officer, Performance

Controls offered to send the necessary descriptive data; the contracting office acceded to obtaining a legal opinion as to whether it could be considered. On June 25, a legal opinion was issued supporting the decision to reject the bid as nonresponsive. The Air Force reports it awarded the contract on June 25 before the contracting officer received Performance Controls' brochures, which arrived later the same day.

The Air Force admits possession of the Thomas Register and that it contains the same information Performance Controls provided on June 25; however, Performance Controls never advised the Air Force that the information was in the Thomas Register until well after award. According to the Air Force, its Small Business Office uses the Thomas Register only to identify firms for inclusion on source lists although, the agency states, it would have used the Thomas Register to evaluate Performance Controls' bid had it known that the information was there. The Air Force notes that a later technical review of the brochures showed that Performance Controls' product did not meet the listed salient characteristics of the brand name product in any event.

The contracting agency is primarily responsible for evaluating the sufficiency of data supplied by a bidder to show that its allegedly equal product meets the IFB's listed salient characteristics. While we do not object to a contracting agency's consideration after bid opening of descriptive data in existence before the date, the agency has no obligation to go to the bidder after bid opening for data, or to expend other unreasonable efforts to obtain descriptive data on the bidder's product. Pure Air Filter International, et al., 56 Comp. Gen. 608 (1977), 77-1 C.P.D. ¶ 342.

On this record, we find that the Air Force properly rejected Performance Controls' low bid since the firm neither submitted its information nor advised the Air Force, before award, that the agency already had access to essentially the same information, in the Thomas Register. Moreover, we know of no requirement that an agency stay an award until it receives post bid opening information from a nonresponsive bidder. The contracting officer did not have to wait for the brochures Performance Control mailed on June 24 before awarding the contract. We further note that Performance Controls does not dispute the Air Force's ultimate technical conclusion that the product described in the firms's brochures did not meet the IFB's salient characteristics.

The protest is dismissed in part and denied in part.

for *Seymour E. Fess*
Harry R. Van Cleve
General Counsel