

Halperin



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Koch Corporation

File: B-223874

Date: November 10, 1986

DIGEST

Descriptive literature clause in an invitation for bids which merely states in general terms what categories of descriptive literature might be required is defective due to lack of specificity and because the contract file does not contain a technical justification as to why product acceptability cannot be determined without the submission of descriptive literature, as required by Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.202-5(c) (1985). Therefore, it is improper for the procuring agency to reject a bid as nonresponsive for failure to include descriptive literature.

DECISION

Koch Corporation protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. 556-66-86 issued by the Veterans Administration Medical Center, North Chicago, Illinois (VA) for the replacement of existing windows in two buildings.

We sustain the protest.

The VA issued the IFB on May 5, 1986. Nine bids were received and opened on June 16. Koch's low bid of \$1,046,747 was rejected on that same day because Koch failed to submit descriptive literature with its bid. Only four bidders out of nine submitted descriptive literature.

On June 25, Koch filed a timely protest with the contracting officer against the rejection of Koch's bid arguing that although the IFB contained the standard descriptive literature clause set forth in Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.214-21 (1985), the IFB failed to specify which portions of the plans or specifications that the descriptive literature should address. Koch contended, therefore, that the IFB did not in fact require descriptive literature.

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The VA denied Koch's protest by letter dated July 29, 1986, in which the VA justified the inclusion of the descriptive literature clause in the IFB on the basis that the VA's General Counsel "recommended that the descriptive literature clause be included in all VA solicitations for replacement windows" because he considered descriptive literature to be essential in assisting the VA to determine whether the replacement windows offered by bidders will conform to the specifications. The letter stated that Koch's bid was rejected because in the absence of descriptive literature, the bid did not "conform to the essential requirements of the solicitation." Award was made to Miami Wall Systems, Inc. (Miami), the second low bidder, on July 31.

On August 13, Koch filed a protest with our Office against the contracting officer's denial of its agency level protest. In its protest to us, Koch reiterates the contentions made in its agency-level protest, namely, that the IFB did not put bidders on notice that descriptive literature must be submitted with the bids, or indicate just what descriptive literature was required. We agree.

The IFB contained the following descriptive literature clause:

"52.214-21 Descriptive Literature (APR 1984)

(a) 'Descriptive Literature' means information (e.g., cuts, illustrations, drawings, and brochures) that is submitted as part of a bid. Descriptive literature is required to establish, for the purpose of evaluation and award, details of the product offered that are specified elsewhere in the solicitation and pertain to significant elements such as (1) design; (2) materials; (3) components; (4) performance characteristics; and (5) methods of manufacture, assembly, construction, or operation. The term includes only information required to determine the technical acceptability of the offered product. It does not include other information such as that used in determining the responsibility of a prospective Contractor or for operating or maintaining equipment.

(b) Descriptive literature, required elsewhere in this solicitation, must be (1) identified to show the item(s) of the offer to which it applies and (2) received by the time specified in this solicitation for receipt of bids.

Failure to submit descriptive literature on time will require rejection of the bid; except that late descriptive literature sent by mail may be considered under the Late Submissions, Modifications, and Withdrawals of Bids provision of this solicitation.

(c) The failure of descriptive literature to show that the product offered conforms to the requirements of this solicitation will require rejection of the bid."

(Emphasis added.)

Although paragraph (b) of the clause refers to descriptive literature "required elsewhere in this solicitation," the VA admits that the solicitation contains no additional references to a requirement for descriptive literature.

When descriptive literature is required by an IFB to be submitted with bids, the adequacy of the literature in showing compliance with the delineated specifications is a matter of responsiveness, and where the literature does not show compliance the bid must be rejected. Harnischfeger Corp., B-220036, Dec. 19, 1985, 85-2 C.P.D. ¶ 689. However, where the need for descriptive literature can be justified, the IFB must clearly establish the nature and extent of the descriptive material asked for, the purpose to be served by such data, and whether all details of such data will be considered an integral part of the awarded contract. FAR, 48 C.F.R. § 14.202-5(d)(1); Wholesale Office Furniture, Inc., B-216081, Dec. 4, 1984, 84-2 C.P.D. ¶ 618; Air Plastics, Inc., 53 Comp. Gen. 622 (1974), 74-1 C.P.D. ¶ 100. Therefore, the IFB must definitely set forth the components or specifications for which descriptive literature is required, and literature is not required to show compliance with specifications beyond those set forth. Viereck Co., B-218237, June 3, 1985, 85-1 C.P.D. ¶ 630; Computer Sciences Corp., B-213134, May 14, 1984, 84-1 C.P.D. ¶ 518. Moreover, our Office has consistently held that a descriptive literature clause is defective where it merely recites categories of general subjects which might require description since it does not establish a common basis for

the evaluation of bids. See Air Plastics, Inc., 53 Comp. Gen. 622, supra; 46 Comp. Gen. 1 (1966); 42 Comp. Gen. 598 (1963).

Here, the descriptive literature clause merely states in general terms that descriptive literature--"required elsewhere in the solicitation"--would be required. The VA admits, however, that the IFB fails to specify elsewhere the nature and extent of that descriptive literature required. Because the IFB incorporates more than 15 other publications and specifications, each with many requirements, and the IFB itself contains hundreds of requirements, from reading the IFB's descriptive literature clause, a bidder would not reasonably be aware of what literature, if any, was required, and for what purpose. Air Plastics Inc., 53 Comp. Gen. 622, supra; 46 Comp. Gen. 1, supra. Therefore, the rejection of Koch's low bid for failure to include descriptive literature and the award to the second low bidder was improper.

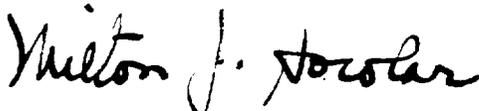
The protest is sustained.

As stated above, the VA's report to our Office does not contain the contract file's justification for the VA's inclusion of the descriptive literature clause in the IFB, as required by FAR, 48 C.F.R. § 14.202-5(c). The only justification presented is contained in the July 29 letter from the contracting officer to Koch stating that descriptive literature is required because VA's General Counsel considered it essential to a determination that the replacement windows offered will meet the specifications. In these circumstances, it is unclear whether there exists an adequate justification for descriptive literature under this IFB.

We therefore recommend that the VA determine whether descriptive literature is necessary to evaluate the responsiveness of the bids. If the VA determines that descriptive literature is not required for bid evaluation purposes (but is instead merely informational) and it is otherwise appropriate, we recommend that the VA make award to the low responsive, responsible bidder without regard to the bidder's failure to submit descriptive literature, i.e., to Koch if Koch is otherwise bound to perform in accordance with the IFB and Koch is determined to be a responsible bidder. See Patterson Pump Co., B-216133, B-216778, Mar. 22, 1985, 85-1 C.P.D. ¶ 333. If award to Koch is appropriate, the

contract awarded to Miami must be terminated for the convenience of the government.

However, if the VA determines that descriptive literature is necessary to evaluate the responsiveness of the bids, we recommend that the VA justify for the contract file its requirement for descriptive literature in accordance with FAR, 48 C.F.R. § 14.202-5(c). The VA should then resolicit, incorporating a detailed descriptive literature clause into the new IFB, clearly establishing the nature and extent of the descriptive material asked for, the purpose to be served by the data, and whether the details of such data will be considered an integral part of the awarded contract. FAR, 48 C.F.R. § 14.202-5(d)(1); Wholesale Office Furniture, Inc., B-216081, supra; Air Plastics, Inc., 53 Comp. Gen. 622, supra. If the low, responsive and responsible bidder on resolicitation is other than Miami, then that firm's contract should be terminated for the convenience of the government.

for 
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