



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Interand Corp.--Reconsideration
File: B-224512.3; B-224512.4
Date: April 17, 1987

DIGEST

1. When a solicitation contains a brand name or equal purchase description and a requirement for descriptive literature, a bid offering an "equal" product and containing an unequivocal promise to comply with solicitation requirements is not necessarily responsive; there must also be available to the agency sufficient descriptive literature to enable the agency to determine that the offered product possesses the salient characteristics of the brand name item listed in the solicitation.
2. Where a bidder simply provides the agency with a verbatim list of the salient characteristics contained in the solicitation, a solicitation requirement for descriptive literature has not been met.
3. There is no merit to the contention that a bid is nonresponsive when it is accompanied by a statement offering to supply additional equipment as options where the solicitation did not require the additional equipment to be supplied.

DECISION

Interand Corporation requests reconsideration of our decision in Interand Corp., B-224512.2, Dec. 31, 1986, 66 Comp. Gen. ____ (1987), 87-1 CPD ¶ ____, in which we denied Interand's protest of the rejection of its low bid as nonresponsive under invitation for bids (IFB) No. F05604-86-B-0061, issued by Peterson Air Force Base, Colorado. Interand also protests the proposed award of a contract under the solicitation to Video Teknix, Inc. (VTI), the third lowest bidder.^{1/} We affirm our prior decision and deny the protest.

^{1/} The agency determined that the second lowest bid was nonresponsive; we denied in part and dismissed in part a protest of that determination in LVW Electronics, B-224512, Dec. 3, 1986, 86-2 CPD ¶ 635.

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The solicitation was for various items of audio, video, and freeze-frame teleconferencing equipment to be delivered under a 1-year requirements contract, with two 1-year options. The equipment is needed by the North American Air Defense Command (NORAD) to verify data gathered at remote radar sites. The solicitation required unit prices on various items of brand name equipment or on "equal" items, and contained the Brand Name or Equal clause prescribed by the Department of Defense Federal Acquisition Regulation Supplement, 48 C.F.R. § 252.210-7000 (1985). The IFB incorporated by reference the Descriptive Literature clause prescribed by the Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.214-21 (1985).

RECONSIDERATION

The Air Force rejected Interand's bid as nonresponsive because for two items that Interand bid as "equal" products the descriptive literature the firm submitted with its bid consisted of merely a verbatim listing of the salient characteristics contained in the solicitation, accompanied by a statement that the offered "equal" products would meet or exceed the specifications of the brand name items. Further, after reviewing additional material Interand submitted after bid opening, the agency determined that both of Interand's "equal" products would require modifications in order to meet solicitation requirements. Interand's descriptive literature did not describe the necessary modifications or otherwise indicate that modifications were needed.

We denied Interand's protest of the agency's rejection of the bid on the basis that Interand had not complied with the IFB's Brand Name or Equal clause which required a bidder to describe in its bid any proposed product modification and to mark clearly its descriptive literature to show proposed modifications. In addition, we said that the mere listing of the salient characteristics contained in the solicitation did not satisfy the descriptive literature requirement since it did not permit the agency to determine whether the offered products possessed those characteristics.

In requesting reconsideration, Interand contends that our decision ignored the fundamental rule governing procurements through sealed bidding that a bid is responsive if it represents an unequivocal promise to perform what is required by the solicitation. See, e.g., Spectrum Communications, B-220805, Jan. 15, 1986, 86-1 CPD ¶ 49. Instead, Interand complains, we said that in a brand name or equal procurement a bid offering an allegedly equal product must contain

sufficient descriptive material to permit the contracting agency to assess whether the offered product possesses the specified salient characteristics. Interand complains further that we did not indicate what constitutes sufficient descriptive material or explain why a verbatim listing of the salient characteristics would not suffice. In this regard Interand contends that our statement that it is not enough for a bidder merely to parrot back listed salient characteristics is in direct conflict with what Interand says are the controlling decisions on this point, Essex Electro Engineers, Inc. v. U.S., 3 Cl. Ct. 277 (1983), and Hub Testing Laboratories, B-199368, Sept. 18, 1980, 80-2 CPD ¶ 204. According to Interand, these decisions stand for the proposition that a bid that restates solicitation requirements without taking exception to them is responsive. Interand also argues, as it did in its initial protest, that if modifications to its equipment are needed in order to comply with solicitation requirements, how Interand plans to modify its equipment is an issue involving the responsibility of the firm, rather than the responsiveness of its bid. Thus, argues the protester, the failure of its descriptive literature to describe modifications to its equipment did not require rejection of the bid as nonresponsive.

Interand is correct in pointing out that a bid that contains an unequivocal promise to do what the solicitation requires generally is considered responsive. Where a solicitation contains a brand name or equal purchase description and a requirement to provide descriptive literature, however, it is not enough that a bid offering an "equal" product contain such an unequivocal promise. Rather, as we said in our prior decision and in numerous others, there also must be available to the agency sufficient descriptive literature to enable the agency to determine that the offered product possesses those characteristics of the brand name item that the solicitation listed as being salient. Amedco Health Care, Inc., B-215122, Dec. 3, 1984, 84-2 CPD ¶ 599; The Library Store, Ltd., B-213258, Feb. 9, 1984, 84-1 CPD ¶ 162. Moreover, the solicitation in this case specifically provided in the Brand Name or Equal clause that the government would evaluate bids based on available descriptive literature to determine product equivalence. If the protester believed this procedure to be objectionable, it should have raised this issue prior to bid opening as required under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1986).

We recognize that our prior decision did not describe the type of descriptive literature that would have sufficed here.

The reason for this is that the determination regarding whether specific descriptive literature is adequate is for the procuring agency to make in the first instance, not this Office. See Calma Co., B-209260.2, June 28, 1983, 83-2 CPD ¶ 31. Here, we agreed with the agency that Interand's repeating the salient characteristics specified in the IFB did not constitute adequate descriptive literature. We concluded that a restating of the salient characteristics, though more detailed, is no better than a blanket offer of compliance for purposes of permitting an agency to determine for itself whether a particular offered product possesses all required salient characteristics. We continue to believe that with respect to the task of determining product equivalence, a bidder provides no measureable degree of assistance to an agency by supplying it with the same list of salient characteristics that the agency included in the solicitation.

We find nothing in the decisions the protester refers to as "controlling" that is inconsistent with our holding in this case. First, Essex Electro Engineers, *supra*, did not involve a brand name or equal purchase description. The solicitation in that case requested descriptive literature "for information purposes only," not for purposes of determining product equivalence. Thus, while the Claims Court in Essex cited our decision in Hub Testing, B-199368, *supra*, for the proposition that this Office considers as responsive bids that "substantially restate the IFB requirements," Essex does not support Interand's position that a bid under a brand name or equal solicitation containing a requirement for descriptive literature is necessarily responsive where the bid merely repeats the listed salient characteristics verbatim.

Hub Testing also did not involve a brand name or equal solicitation, and the decision is not otherwise supportive of Interand's position. In that case, the IFB, which was for geotechnical analyses of sediment, soil, and rock samples, specified the methods to be used for sample preparation and analysis and also required that bids contain a description of the methods that would be used. Hub Testing's bid restated the sample preparation and analysis methods specified in the IFB, but the agency rejected the bid as nonresponsive because, in its view, such a description was not adequate to enable the agency to determine that Hub Testing's performance of the contract would meet the agency's needs. We sustained Hub Testing's protest of the rejection of its bid on the basis that if the agency desired bids to contain more exact information concerning contract performance, this desire was not conveyed by the terms of the IFB

and, in any event, how a firm intended to perform the contract involved the responsibility of the firm, not the responsiveness of its bid.

The result in Hub Testing was based on our decision in Lapteff Associates, et al., B-196914 et al., Aug. 20, 1980, 80-2 CPD ¶ 135, in which we explained more fully the difference between a solicitation request for literature showing how a bidder would perform a contract for services and literature requested to demonstrate whether an offered product possesses specified characteristics. We said that in the case of a procurement using sealed bidding, literature on how a bidder would perform (such as that requested in Hub Testing and Lapteff) may be used to determine bidder responsibility, but not bid responsiveness. This is in contrast to a procurement, such as that involved here, in which the solicitation requires data concerning a bidder's product so that the agency may determine whether the offered product possesses required characteristics. While Interand seeks to characterize as responsibility the issue of whether its "equal" products, as modified, comply with solicitation requirements, in our view whether a bidder has offered items meeting solicitation requirements involves solely the responsiveness of the bid.

PROTEST OF PROPOSED AWARD

The Air Force proposes to award a contract to VTI, the third lowest bidder, because the agency has determined that the two lower bids were nonresponsive. Interand protests the proposed award. We find no merit to the protest.

For one of the contract line items the solicitation listed a Hitachi FP-Z31 color camera as the brand name equipment and invited offers on "equal" products. The IFB listed the salient characteristics of the brand name item that an offered "equal" product would have to possess. VTI bid on a Hitachi model FP-Z31E camera and included with its bid a statement that although the IFB did not request that a lens be supplied with the camera, a "lens is required for operation." VTI offered to provide a lens as an option.

For another contract line item, the 4 X 1 red-green-blue video switch, the solicitation did not specify a brand name product but merely listed functional and performance requirements. VTI bid on a Dynair model No. SVA 520A. The statement submitted with the bid noted that the specifications did not require a video switch with a sync channel but,

since the firm believed that a sync channel would be needed, it offered to supply one as an option.

The basis for Interand's protest of the proposed award to VTI is that the statements described above rendered VTI's bid nonresponsive. According to Interand, the statements indicate that the items offered by VTI do not meet solicitation requirements.

Contrary to the protester's assertions, the list of salient characteristics contained in the IFB for the brand name color camera did not specify a lens as a required accessory.^{2/} The Air Force reports that although a lens will be necessary for the camera to operate, the agency does not seek to acquire a camera with a lens at this time because the type of lens needed will vary according to how the camera ultimately will be used. Similarly, with respect to the 4 X 1 video switch, the solicitation did not require the device to have a sync channel. Thus, since the solicitation did not require these features, there is no merit to the protester's assertion that the solicitation contained requirements that VTI's bid indicated would not be met.

Although Interand believes that the Air Force accorded different treatment here to similarly situated bidders, this is simply not the case. The agency rejected Interand's bid because Interand failed to comply with the solicitation's descriptive literature requirement. Interand does not allege that VTI also did not comply with this requirement. Rather, while Interand alleges that VTI's bid failed to offer

^{2/} The protester contends that the manufacturer's literature on the model FP-Z31 brand name color camera (which Interand bid on) lists a Canon J15 x9.5 lens as "standard" equipment. We reviewed the literature the protester provided us, however, and found that the Canon lens merely is listed on page 5 along with other accessories in a "standard configuration." On page 6 of that literature the Canon J15 x9.5 lens is listed as an "accessory" for system upgrading. In any event, whether the brand name camera comes with a lens is irrelevant since bid responsiveness in a brand name or equal procurement concerns only those features of the brand name item that the solicitation identifies as salient. The solicitation here did not list a lens as a salient feature.

required features, the record shows that these features in fact were not required at all.

Our prior decision is affirmed. The protest is denied.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel