



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Moore Special Tool Co., Inc.

File: B-228498

Date: January 29, 1988

DIGEST

1. Brand name manufacturer's bid was properly rejected as nonresponsive where unsolicited "specifications" furnished with bid created an ambiguity as to what bidder intended to furnish by omitting reference to required salient characteristic.
2. Cancellation of invitation for bids and conversion of solicitation to request for proposals is appropriate under applicable regulations where all bids received from responsible bidders are nonresponsive.

DECISION

Moore Special Tool Co., Inc., protests the rejection of its bid under invitation for bids (IFB) F33659-87-B-0144, issued by Newark Air Force Base, Ohio, and the subsequent cancellation of the IFB and conversion of the procurement to a negotiated request for proposals (RFP). Moore challenges the Air Force's finding that its bid was nonresponsive and the Air Force decision to commence negotiations upon the rejection of all bids submitted.

We deny the protest.

The IFB solicited bids on a brand name or equal basis, for two each coordinate measuring machines, Moore Special Tool Co., Inc., P/N M-18CNC and accessories, or equal, in accordance with the purchase description. The purchase description detailed the salient characteristics of the brand name items. For computer software, one of the accessories, the Air Force listed the following among the applicable salient characteristics:

"A source code listing of all software shall be included. The necessary compiler, assembler, loader and any other software or hardware to make program modifications shall also be included."

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According to the Air Force, a "source code" is needed to satisfy a requirement for "measurement traceability." The record indicates that before the IFB was issued, Air Force employees obtained Moore's agreement by telephone to provide the source code listing although it is not Moore's standard practice to do so in commercial, as opposed to governmental, sales.

The Air Force received three bids for the items, all of which were rejected as nonresponsive.^{1/} Among other things, all were found nonresponsive for failure to comply with the source code and related software modification requirements. Leitz and another bidder, Anorad Corporation, submitted bids for "equal" items at prices less than Moore's bid on the brand name items. Moore, the brand name bidder, submitted a detailed, paragraph by paragraph technical response to the IFB's purchase description, which included the salient characteristics of the Moore brand name item. On the face of this response, and in its cover letter accompanying its bid, Moore stated it complied with "specification F33659-87-B0144 in its entirety, without exceptions." An interim brochure and comments directed to each section of the purchase description were provided "for clarification."

Moore's comments consisted primarily of the statement "we comply." In addition, in some instances a particular tolerance or other specification was stated with the compliance statement. As to the computer software requirement, Moore stated, "We comply. (see enclosed specification)." Within the enclosed specifications, the software is denominated "Moore Metrology System Software with automatic data collection (see software description enclosed)." The software description is essentially a retyped version of information appearing in the interim brochure attached to the bid. Not mentioned in Moore's own specification are the source code listing and related items necessary for program modifications. The description does note that executive programs would be licensed from the appropriate computer and control manufacturers; that its own software would be licensed from Moore; and that "performance features (including software) are flexible and can be altered within limits to suit the customer's needs." The Air Force concluded that since Moore's own specification enclosed with its bid did

^{1/} Those who reviewed the technical aspects of the bids for responsiveness originally found Moore's bid to be acceptable based upon that bidder's oral representation, made prior to issuance of the IFB, that it would provide the source code. The contracting office did not concur in this conclusion, based on that office's examination of Moore's written bid submissions which we discuss in detail below.

not offer to provide this requirement listed in the IFB's salient characteristics, the bid was nonresponsive.

After determining that all bidders were nonresponsive, the Air Force canceled the IFB and commenced negotiations with the offerors in accordance with Federal Acquisition Regulation (FAR) §§ 4.404-1(e) and 15.103 (FAC 84-5).^{2/} Each offeror was notified by telephone and later, written confirmation, of the Air Force plan, the deficiencies in their original bids, and the need to offer prices below the lowest bid received in the original solicitation. To this end, they were advised of the prices of the three bids received.

Leitz and Anorad corrected the deficiencies noted and reduced their prices. The Anorad offer was lower than that of Leitz, but Anorad sought additional time for delivery, as a result of which its offer was rejected.

Moore responded by stating that its original bid was in full compliance with the IFB and that it took exception to nothing in the specifications. Moore advised that the provision of a software source code listing was its standard policy in government purchases and "in that regard" did not itemize it separately in its software description. Because it felt its initial bid was responsive, Moore objected to conversion of the IFB into a negotiated procurement. Since Moore did not lower its price, Leitz was awarded the contract.

Moore maintains that its bid was responsive because the firm stated therein that it complied with all requirements and took no exceptions. It argues that if the statement, "we comply," was sufficient in the 48 other instances in which it was entered adjacent to a purchase description requirement, it also should have been acceptable as to the software requirement. Moore also argues that conversion of the IFB to a negotiated procurement was incorrect, since the Air Force had received at least one responsive bid from a responsible bidder--i.e., Moore.

^{2/} These regulations provide that where no responsive bids are received from responsible bidders, an IFB may be canceled and negotiations conducted without issuing a new solicitation. Responsible bidders under the original IFB must be given prior notice and a reasonable opportunity to negotiate, and the negotiated price must be the lowest offered and lower than the lowest bid rejected under the original IFB.

The Air Force responds that it properly found all three bids received, including Moore's, nonresponsive and thus properly converted the solicitation to a negotiated one.

The contracting officer and his legal advisor appear to take the position that because Moore did not customarily supply the source code listing to its commercial customers, the listing's provision here represented a "modification" to Moore's brand name item such that Moore, even as the brand name manufacturer, was obligated to include with its bid sufficient descriptive literature to establish its compliance with this IFB requirement. We find that the Air Force correctly rejected Moore's bid as nonresponsive because of the ambiguity created by its descriptive literature.

The IFB contained the standard "Brand Name or Equal" clause found in the Department of Defense Supplement to the FAR (DFARS) § 252.210-7000 (1986 ed.). The clause does not require a bidder to furnish descriptive material unless an "equal" product is being offered. However, an agency may specify characteristics that go beyond those of the designated brand name item when those characteristics represent the essential needs of the agency. Tel-Med Information Systems, 66 Comp. Gen. _____ (1987), 87-1 CPD ¶ 561 at 5; Potomac Industrial Trucks, Inc., B-203119, Feb. 3, 1982, 82-1 CPD ¶ 78. Where the supply of such a modified brand name item is solicited, it is proper to reject a bid offering the brand name item which does not show conformance with or takes exception to the modified salient characteristics.

While the source code listing and related requirements may represent something in Moore's possession which it does not normally supply to its commercial customers, its provision here does not appear to require a "modification" to Moore's equipment. Certainly, there is nothing in the IFB's terms which would have put Moore on notice that the Air Force considered itself to be purchasing a "modified" brand name item. We therefore disagree with the position that Moore was required to submit descriptive literature; its return of an executed bid form would have been sufficient to bind it to satisfy all the purchase description requirements. However, Moore did not simply return the bid form or state that it would "comply" with the purchase description's software requirements. Its bid went beyond that and referred the government to attached specifications in which Moore undertook to describe what it would supply with reference to the software requirements.

Consideration of unsolicited descriptive literature is detailed in FAR § 14.202-5(f) (FAC 84-11) which requires

that the procedures in FAR § 14.202-4(g) be followed. Unsolicited descriptive literature will not be disregarded where it is clear that the bidder's intention was to qualify the bid. Where the unsolicited literature describes the same name or model number as the equipment offered in the bid, there is a sufficient relationship between the bid and the literature so that the literature will be considered. Caprock Vermeer Equipment, Inc., B-217088, Sept. 3, 1985, 85-2 CPD ¶ 259.

Since Moore's descriptive literature specifically referred to this IFB and described the brand name item solicited, it was appropriate for the Air Force to consider that literature. Upon examination, an ambiguity over whether the source code and related requirements would be provided was revealed, because Moore had undertaken to describe in detail its compliance with the requirements. It did not merely attach its standard commercial brochure; instead it restated its software's characteristics as "specifications." In doing so, it failed to mention any agreement to comply with the source code and related requirements. In fact, the literature made reference to licensing of its and other software, and the only reference to modification implied that it would be done by Moore, not by its customer--the opposite of what was intended in the IFB. While nothing in the bid otherwise indicated that the source code and related items were not being offered, the Air Force was reasonable in considering the descriptive literature to have created an ambiguity. Because the information supplied was subject to two reasonable interpretations, one of which the bid was responsive and the other not, Moore's bid was properly rejected. See Caprock Vermeer Equipment, Inc., B-217088, supra; Franklin Instrument Co., Inc., B-204311, Feb. 8, 1982, 82-1 CPD ¶ 105.

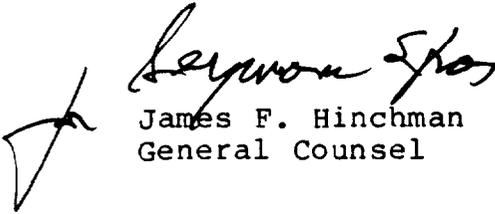
The Air Force's acceptance of Moore's "we comply" statement as sufficient in 48 of 49 instances does not change this result. As explained by the Air Force, the descriptive literature was sufficient to independently support the individual compliance statements. However, Moore argues that in at least one instance, its descriptive literature did not address all salient characteristics and, by accepting that compliance statement, the Air Force should accept that pertaining to software. We disagree with Moore's assessment.

First, determinations of technical evaluators concerning the adequacy of technical data will not be disturbed by our Office absent a clear showing of unreasonableness, an arbitrary abuse of discretion, or a violation of procurement statutes or regulations. Interad, Ltd., B-210013, May 10, 1983, 83-1 CPD ¶ 497. Moore has presented no evidence which

would lead us to disregard the Air Force determination of technical compliance. Second, even if this compliance statement is as ambiguous as that for the source code, the Air Force, by accepting the one, is not estopped from asserting that the other rendered the bid nonresponsive.

Since Moore's and both other bids were nonresponsive, the Air Force was allowed to convert the solicitation to a negotiated procurement in accordance with FAR §§ 14.404-1(e) and 15.103. Thus, Moore's protest as to the propriety of that conversion is without merit.

Accordingly, the protest is denied.



James F. Hinchman
General Counsel