

Jordan



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Reflect-A-Life, Inc.

File: B-232108.2

Date: September 29, 1989

DIGEST

On a solicitation calling for the submission of bids on a brand name or equal basis, where the protester, the exclusive licensee of the brand name part, offered that part, yet the agency made award to the low bidder offering the brand name manufacturer's less expensive part based upon a different, but reasonable, interpretation of the purchase description, the solicitation was prejudicially ambiguous such that the requirement should be resolicited.

DECISION

Reflect-A-Life, Inc., protests the award of a contract to Kings Point Industries, Inc., under invitation for bids (IFB) No. DLA100-87-B-0321, issued by the Defense Personnel Support Center (DPSC), Defense Logistics Agency (DLA), for the acquisition of 122,500 high visibility white belts for use by members of the Air Force while working at night directing aircraft during takeoffs and landings.

This procurement was the subject of an earlier protest by Reflect-A-Life (B-232108.1) which that firm withdrew, after the record was fully developed, pursuant to an agreement between the protester and DLA in which the latter agreed to retest the protester's and Kings Point's products. Upon being advised by DLA that it had confirmed its original award decision based on the results of the retesting, Reflect-A-Life filed the instant protest with our Office. As in its original protest, Reflect-A-Life disputes the agency's determination that the Kings Point product is "equal" to Reflect-A-Life's brand name item and contends that the bid of Kings Point should have been rejected as nonresponsive.

We sustain the protest on the basis that the solicitation specifications were ambiguous.

046657/139683

The IFB included the standard brand name or equal clause. It also incorporated a purchase description which described the physical characteristics and functions of the belt. The purchase description stated that the item was to be an adjustable length retro-reflective high visibility belt with a hook and pile fastener and a plastic retainer and slide. The belt's primary component is a 2-inch wide reflective tape consisting of two subcomponents welded to one another: (1) a vinyl microprism reflective sheeting; and (2) a vinyl-coated fabric backing.

Through "interim changes" to the purchase description two components of the belt were identified by specific part numbers and names of manufacturers to be supplied on a brand name or equal basis. Of these two "changes," the one relevant to this protest is that made to paragraph 3.1.1 of the purchase description entitled "Reflective Sheeting," which described the characteristics of the reflective sheeting subcomponent of the reflective tape of which the belt is made. The IFB added to the end of that paragraph the requirement that the sheeting component be part No. 136-1573, manufactured by Reflexite Corporation, or equal. No similar language was added to paragraph 3.2 of the purchase description, entitled "Backing Material," which continued to state that the reflective tape's fabric backing should "conform to Type II, Class 2, form 1 of MIL-C-43006E," a standard military specification.

DPSC states that in making this change to the purchase description, it assumed that it was requiring a brand name or equal product for only the sheeting subcomponent of the reflective tape. However, according to the manufacturer, Reflexite, part No. 136-1573 does not refer to the sheeting alone but to the entire 2-inch wide reflective tape comprised of the sheeting and the backing. The manufacturer adds that it sells as an end item only the reflective tape; it does not sell the sheeting separately because during the process of manufacturing the sheeting is welded to the backing to make the tape. Finally, Reflexite and the protester state, without rebuttal, that the backing on part No. 136-1573 is special, and that it exceeds the requirements of military specification MIL-C-43006E, Type II, Class 2, form 1, which paragraph 3.2 of the purchase description required.

Four bids were submitted. The protester, Reflect-A-Life, offered the brand name Reflexite part No. 136-1573 under an exclusive licensing agreement the protester had with the manufacturer for the sale of that part. On its face, Kings Point's bid also offered the brand name part, since its bid

simply included a price without indicating that it was offering an otherwise equal item.

DPSC also requested bid samples from the bidders which were to be tested using the 10 performance requirements, applicable to the entire reflective tape, found at paragraph 3.8 of the purchase description. All four bidders' samples consisted of the entire reflective tape. The sample which Kings Point submitted was not the brand name part number tape, but rather was a less expensive tape manufactured by Reflexite.^{1/} Reflect-A-Life was the only bidder to submit a sample tape identified by the brand name part number.

Following testing in which only 5 of the 10 tests were conducted DPSC awarded the contract to Kings Point as the low bidder. Reflect-A-Life's protest of that award was subsequently withdrawn pursuant to a stipulation signed by it and DLA, which provided in pertinent part that the Reflect-A-Life and Kings Point samples would be retested, to include, at a minimum, all tests required by paragraph 3.8 of the purchase description. Nine of the 10 tests were performed.^{2/} Although neither product "passed" the "reflective intensity" test, both complied with the standards set for the remaining tests and the DPSC contracting officer again determined that the Kings Point product was acceptable. When the protester was so notified, it filed this renewed protest.

In its original protest, Reflect-A-Life contended that it reasonably read the solicitation to mean that the brand name or equal requirement for Reflexite part No. 136-1573 applied to the entire reflective tape and, as the exclusive licensee for that product, it bid on that basis. Reflect-A-Life complained that the bid sample of the less expensive tape provided by Kings Point did not conform to the requirements of the IFB and that fact should have required rejection of Kings Point's bid. The protester added that had it known that DPSC was willing to accept a less expensive tape it would have bid on that basis, as it had in the past. In its renewed protest, Reflect-A-Life reiterates its belief that the Kings Point sample does not conform to the IFB.

^{1/} The record indicates that most, if not all, of the samples actually had a common source: Reflexite.

^{2/} The one exception was a test for fungus resistance. Reflect-A-Life also protests the failure to conduct this test, but in view of our decision to sustain the protest on a different ground, we do not reach this issue.

We think there is a latent ambiguity in the solicitation's specifications.^{3/} As we stated in Wheeler Bros., Inc., et al.--Request for Reconsideration, B-214081.3, Apr. 4, 1985, 85-1 CPD ¶ 388, an ambiguity exists where two or more reasonable interpretations of a specification are possible. Moreover, a party's particular interpretation need not be the most reasonable to have a finding of ambiguity; rather, a party need only show that its reading of the solicitation provision is reasonable and susceptible of the understanding it reached.

Here, although the brand name or equal requirement was included only in the purchase description's paragraph relating to the sheeting subcomponent, the brand name was identified using a specific part number which encompasses the entire reflective tape. In addition, the only requirements in the IFB which could be interpreted as "salient characteristics" of the brand name item, that is, the paragraph 3.8 performance tests, were said to be applicable to the entire reflective tape. Since Reflexite part No. 136-1573 is only available from the manufacturer as the entire reflective tape--not just the sheeting--it was reasonable for the protester to believe that the agency wanted the Reflexite part No. 136-1573 reflective tape, rather than some less expensive tape, and it had no duty to inquire what the agency intended by its reference to that particular part number. On the other hand, in view of its failure to specify the part number with reference to the backing, DPSC apparently did not intend, despite its use of Reflexite part No. 136-1573 as the brand name for the sheeting, to require the entire reflective tape to be a brand name requirement. Thus, we conclude that the brand name requirement for Reflexite part No. 136-1573 was ambiguous as drafted. See, e.g., Flow Technology, Inc., 67 Comp. Gen. 161 (1987), 87-2 CPD ¶ 633.

It is also clear that Reflect-A-Life was prejudiced by the ambiguity in the solicitation. In this regard, we must emphasize that Kings Point's bid offered the brand name part number, but the sample Kings Point provided was a less expensive model from the same manufacturer. Had Reflect-A-Life known that the brand name manufacturer's less expensive

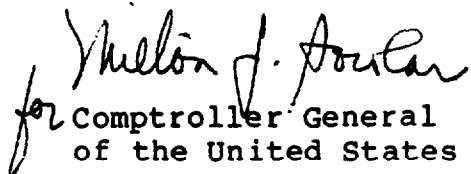
^{3/} As such, we do not agree with the agency that the ambiguity was patent, so as to have required protester to raise this issue prior to bid opening. Where, as here, a protester is reasonably unaware of any interpretation other than its own, it cannot be charged with knowledge of an ambiguity that had to be protested before the closing date. Window Sys. Eng'g, B-222599, Aug. 27, 1986, 86-2 CPD ¶ 230.

model was acceptable, the results of the bidding might well have been different since it could, as did Kings Point, have offered a less expensive product. In cases such as this, where the solicitation requirement is ambiguous, with the result that bidders responded to it based upon different reasonable assumptions as to what the requirement was, the competition has been conducted on an unequal basis such that the requirement should be resolicited. Amdahl Corp., et al., B-212018 et al., July 1, 1983, 83-2 CPD ¶ 51.

Based on the foregoing, we find the award to Kings Point was improper and the solicitation was prejudicially defective. Accordingly, we sustain the protest.

Since contract performance has been suspended, pursuant to the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(d) (Supp. IV 1986), we recommend that the contract awarded to Kings Point be terminated for the convenience of the government and that the solicitation be canceled and the requirement resolicited. We think two principal actions need to be taken with respect to the resolicitation. First, DPSC and the Air Force should reexamine and come to a clear understanding of the user's actual minimum needs. Second, if to describe those minimum needs and to determine whether bids are responsive to them it is necessary to use a brand name or equal requirement or to examine bid samples, the solicitation should unambiguously identify the component(s) to which those requirements apply and should include the appropriate implementing clauses, including the listing of characteristics and the test standards which must be met in order for a bid to be responsive.

Inasmuch as its protest is sustained, we find Reflect-A-Life is entitled to the costs of filing and pursuing its protests, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1989). Reflect-A-Life should submit its claim for such costs directly to the agency.


for Comptroller General
of the United States