



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Schweigers, Inc.
File: B-236071
Date: October 12, 1989

DIGEST

Where it was clear from the bid that unsolicited descriptive literature submitted with the bid described equipment not meeting material solicitation requirements, and where the contracting agency reasonably determined that the bidder's intention was to qualify the bid, the bid properly was rejected as nonresponsive.

DECISION

Schweigers, Inc. (SI), protests the award of a contract to Sanitation Products, Inc., under invitation for bids (IFB) No. 237-0021, issued by the Federal Bureau of Prisons, Department of Justice, for trash compaction equipment at the Federal Prison Camp at Yankton, South Dakota. SI asserts that the IFB's specifications were unduly restrictive, and objects to the rejection of its bid as nonresponsive. We dismiss the protest in part and deny it in part.

SI first asserts that the specifications contained in the IFB were unduly restrictive. According to the protester, the agency should have used general specifications for the equipment; instead, SI asserts, the Bureau apparently wrote the specifications around a product available from only one manufacturer.

We dismiss this portion of the protest as untimely. Under our Bid Protest Regulations, allegations of improprieties in a solicitation, where such defects were or should have been apparent on the face of the solicitation, must be raised prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1989). Here, the protester had all of the information it needed, prior to bid opening, to assert that the specifications should have been more broadly written. To permit the matter to be raised after award has been made would defeat the purpose of our timeliness rules; consequently, we will not consider the

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argument on its merits. Synergetics Int'l, Inc., B-225499, Dec. 2, 1986, 86-2 CPD ¶ 632.

SI next argues that the Bureau was in error in determining that the equipment it offered failed to meet the specifications set forth in the IFB in two significant areas. With respect to the replaceable ram guides that are used to guide the trash compactor ram back and forth, the agency determined that the firm offered a product with cast iron guides, where the IFB specified nylon guides. With regard to the hydraulic capacity of the pump used to operate the compactor ram, the Bureau found that SI's equipment included a pump with a capacity of 13 gallons per minute (gpm) or, with an optional pump, 18 gpm; the IFB, on the other hand, specified a capacity of 20 gpm. In making this determination, the agency considered manufacturer's literature that described in detail the particular model (Marathon "Ram Jet," Model RJ-225) of trash compactor offered by SI; although the IFB neither requested nor required such literature, SI had included it with its bid.

SI asserts that the manufacturer's literature submitted with its bid, even though it described the particular model offered, should be disregarded, since it does not reflect the fact that the manufacturer assured the firm that all IFB specifications could and would be met. According to SI, it was this assurance on which it based its bid, which included a blanket acceptance of all IFB requirements; any ambiguity arising from durations from IFB specifications in the item described in the standard literature, SI concludes, should have been eliminated by this agreement to comply with all IFB specifications. We disagree.

Generally, consideration of unsolicited descriptive literature is governed by the Federal Acquisition Regulation (FAR) § 14.202-5(f) (FAC 84-11), which requires that the procedures in FAR § 14.202-4(g) be followed. The FAR provides that unsolicited descriptive literature will not be disregarded where it is clear that the bidder's intention was to qualify the bid. See Moore Special Tool Co., Inc., B-228498, Jan. 29, 1988, 88-1 CPD ¶ 112. Where, as here, 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 for the literature to be considered in determining whether the bid is responsive. Id.

To be responsive, a bid must be an unequivocal offer to perform without exception the exact thing called for in the solicitation, so that, upon acceptance, the contractor will be bound to perform in accordance with all of the IFB's

material terms and conditions. Caswell Int'l Corp., B-233679, Mar. 21, 1989, 89-1 CPD ¶ 291. If any substantial doubt exists as to whether a bidder, upon award, could be required to supply each item specified in the IFB, the integrity of the competitive bidding system requires rejection of the bid as nonresponsive. Id. Thus, where unsolicited descriptive literature will cause the bid to be nonresponsive if the literature reasonably raises a question as to whether the bidder intends to comply with material terms of the solicitation. Orbit Advanced Technologies Ltd., B-224603.2, Mar. 11, 1987, 87-1 CPD ¶ 273. Further, the responsiveness of a bid must be ascertained from the bid documents themselves, not from clarifications provided by the bidder after bid opening; to permit explanations after bid opening would be tantamount to granting an opportunity to submit a new bid, one that could be responsive or nonresponsive at the bidder's option based on information available to the bidder after bid opening. Id.

Here, we have reviewed the descriptive literature submitted by SI, and find that the agency reasonably determined that the descriptive literature was intended to qualify the bid. Both the bid and the literature refer to the Marathon "Ram Jet," Model RJ-225, on-site trash compactor. With regard to pump capacity, as noted above, the specifications in the literature, even with the optional motor, fall short of those required by the IFB. With respect to the ram guides, the literature states that the "ram is supported and guided by cast iron shoes which ride on replaceable wear strips." (Emphasis added.) Thus, with regard to this specification, the literature indicates that the ram is "guided" by material made of cast iron. Although, in its comments on the agency report, SI states that the replaceable wear strips are made of nylon, the literature suggests otherwise. Thus, we believe the agency reasonably determined from the literature that the requirement that the compactor ram be guided by material made of nylon would not be met. Thus, in our view, the literature SI submitted described equipment that clearly was at variance with one requirement of the IFB, and reasonably raised a question as to whether the product complied with another specification.

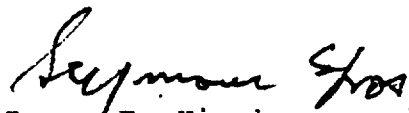
The Bureau has explained, moreover, that the requirements were not trivial ones. Nylon compactor ram guides, for example, were specified because, under the extreme weather conditions prevalent in South Dakota, they are easier to maintain, last longer, and are less expensive to replace than guides made of cast iron, which are more susceptible to rust and corrosion. (The ram guides are major friction points, since the ram slides back and forth along the guides on each stroke of the compaction ram.) Similarly, the

hydraulic capacity of the pump that operates the compactor ram has a direct impact on the speed with which the compactor can operate; the capacity of the pump, therefore, is central to the performance of the equipment.

It thus was at best unclear from the bid, including the descriptive literature, whether SI intended to be bound to furnish equipment meeting the specified requirements. Although SI attempts to explain its intent, such uncertainty can be resolved only by reference to the bid documents themselves, not to post-bid opening explanations. Orbit Advanced Technologies Ltd., B-224603.2, supra.

Finally, in its comments on the agency report, SI raises for the first time the argument that the equipment offered by the awardee is not responsive to IFB specifications; according to the protester, it is not clear from the manufacturer's standard literature for the equipment that it will have a 20 gpm pump capacity. As an initial matter, we note that the allegation is untimely. Our Regulations require that protest allegations not based on solicitation improprieties be filed within 10 days after the basis of protest is known or should have been known. 4 C.F.R. § 21(a)(2). Here, the protester knew or should have known of the identity of the successful bidder and of the equipment offered at least as of the time of the public bid opening. Its objection at this late date, therefore, is not entitled to consideration on the merits. In any event, we have examined the manufacturer's literature in question and have determined that the equipment described there explicitly conforms to the IFB specification concerning pump capacity.

The protest is denied.

for 
James F. Hinchman
General Counsel