



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Seaboard Electronics Company
File: B-237352
Date: January 26, 1990

DIGEST

1. Protest challenging requirement apparent from the face of an invitation for bids is untimely where filed after bid opening.
2. Protester's bid was properly rejected as nonresponsive where bid stated on its face that it did not comply with a material requirement in the specification that battery back-up to radio fire alarm monitoring system must transmit continuous low battery messages once the strength of such batteries dropped below a certain level.
3. Agency properly refused to permit modification of nonresponsive bid to render such bid responsive as such action gives firms the option of accepting or rejecting a contract after bids are exposed, thus impairing the integrity of the competitive bidding process.

DECISION

Seaboard Electronics Company protests the rejection of its bid submitted in response to invitation for bids (IFB) No. N62922-89-B-6577, issued by the Department of the Navy for the purchase of a radio fire alarm reporting system for Navy installations at Subic Bay, Philippines. Seaboard contends that the solicitation includes an unusual design requirement for such alarm systems that limits competition, and that the Navy improperly rejected Seaboard's bid as nonresponsive because Seaboard took exception to the requirement in its bid. In addition, Seaboard claims the Navy erred in refusing to permit it to remove the exception in its bid after bid opening.

We dismiss the protest in part and deny it in part.

The IFB, issued August 1, 1989, requires bidders to provide radio fire alarm reporting system equipment in accordance

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with the specifications included in the solicitation. These specifications require the system to be powered electrically, and to be backed up by batteries in the case of electrical power failures. To ensure that such batteries are always operable, paragraph C-5.2.9 of the IFB requires the system to monitor the strength of the batteries and to transmit a low battery message prior to the point at which the battery would fail to operate the transmitter. In addition, paragraph C-5.2.9 requires that "[t]his low battery or trouble message shall be included as part of every subsequent transmission until the problem is corrected."

Eight bids were received by the September 16 bid opening date. Seaboard's \$660,718 bid was the lowest, and the second low bid, \$690,612, was submitted by Repco Incorporated. Included with Seaboard's bid and placed immediately after the price schedule was a typewritten page captioned "Exceptions/Deviations." This page states in part:

"Seaboard transmitters constantly monitor and supervise its battery power supply and report trouble as per the specification; however, Seaboard transmitter does not include low battery message as part of every subsequent transmission. We strongly believe this is not required since the battery is not the primary source of power. This specification is unduly restrictive, and our Engineering Department does not find such requirements in the National Fire Protection Association codes nor in the Department of Navy's COMNAVFACENG COM Guide specifications NFGS-16723 'Fire Alarm System Radio Type.'" (Emphasis added.)

Several days after bid opening, by letters dated September 20 and 21, Seaboard urged the Navy to "cross out" the "extremely minor exception" submitted with its bid. Seaboard also informed the Navy, in both letters, that its equipment had been modified to provide continuous transmission of low battery reports. By letter dated September 29, the Navy responded that it considered Seaboard's bid to be materially inconsistent with the requirements of the solicitation, thus requiring rejection of the bid as nonresponsive. The Navy also informed Seaboard, citing prior decisions of our Office, that the company could not

change, correct, or amend its bid after bid opening to render the bid responsive. Seaboard was then informed that award had been made to the second-low bidder, Repco Incorporated, on September 28. On October 6, Seaboard filed a protest with our Office.

Seaboard protests that the solicitation's requirement for continuous transmission of the low battery message is inconsistent with other fire alarm monitoring system procurements and unduly restricts competition. Seaboard also contends, that the Navy erroneously rejected Seaboard's bid as nonresponsive because its exception was not material. Further, Seaboard argues that the Navy erred in refusing to permit Seaboard to remove the exception in its bid after bid opening.

At the outset, to the extent the protest is directed against the solicitation requirement for continuous transmission of a low battery message, the protest is untimely and will not be considered by our Office. Our Bid Protest Regulations provide that protests based upon alleged improprieties in a solicitation apparent prior to bid opening must be filed prior to that date. 4 C.F.R. § 21.2(a)(1) (1989). The purpose of this rule is to enable our Office to review the matter and take effective action where appropriate. GM Plastics, Inc., B-235083, Apr. 24, 1989, 89-1 CPD ¶ 405. Accordingly, since the protest challenging the low battery transmission requirement was not filed until well after bid opening, when Seaboard was advised that its bid had been rejected, the protest is untimely on this ground.

In any event, we are unpersuaded by Seaboard's contention that this requirement in the IFB was improper. Seaboard argues that the requirement limits competition because numerous other solicitations for similar fire alarm monitoring systems did not include a requirement for continuous transmission of low battery messages unless batteries were the primary source of power for the system. However, Seaboard offers no evidence that this requirement limits competition and refutes its own argument by notifying the Navy, after bid opening, that it can easily modify its equipment to comply with the requirement of the solicitation. Further, the record does not show, and Seaboard provides no evidence, that the Navy's determination--that it required the self-monitoring capability on the back-up battery power supply system in particular because the electrical power supply at Subic Bay is unreliable--was unreasonable.

Seaboard also argues that the language in its bid challenging the specification did not concern an integral element of

the system, and hence was not material and did not render the bid nonresponsive. To be responsive, a bid must represent an unequivocal offer to provide the exact thing called for in the IFB such that acceptance of the bid will bind the contractor in accordance with the solicitation's material terms and conditions. Westec Air, Inc., B-230724, July 18, 1988, 88-2 CPD ¶ 59. A deficiency or deviation which goes to the substance of bid by affecting price, quality, quantity, or delivery of the article offered is a material deviation that requires the bid to be rejected as nonresponsive. Community Metal Prods. Corp., B-229628, Jan. 15, 1988, 88-1 CPD ¶ 41. Therefore, when a bidder attaches a notice to its bid taking exception to a material requirement of the solicitation, the bid is rendered nonresponsive, and must be rejected. Northwest Pesticide Enters., Inc., B-235982, Sept. 28, 1989, 89-2 CPD ¶ 284.

Here, Seaboard offered the Navy a radio fire alarm system that would not provide the self-monitoring capability sought by the Navy. The language of the solicitation is clear, and Seaboard itself focused on the language, specifically taking exception to the requirement for continuous transmission of a low battery message. In the Navy's view, this feature of the solicitation is a material requirement of the IFB because of concerns about the reliability of electrical power at Subic Bay. We see no basis to disturb the Navy's determination since officials of the contracting agency are most familiar with the conditions under which the system will be used, and Seaboard has made no showing that the Navy's determination was arbitrary or unreasonable. Community Metal Prods. Corp., B-229628, supra.

Seaboard further argues that the Navy erred in refusing to "cross out" the language in its bid taking issue with the requirement for a continuous low battery message. We do not agree. It is a fundamental rule of sealed bidding procurements that the responsiveness of a bid must be determined based upon the bid itself and not on the basis of post-bid opening submissions. Aldan Rubber Co., B-212673, Dec. 5, 1983, 83-2 CPD ¶ 645. Permitting bidders to modify bids after bid opening to render such bids responsive gives firms the option of accepting or rejecting a contract after bids are exposed, thus impairing the integrity of the

competitive bidding process. Heritage Medical Prods., Inc.,
65 Comp. Gen. 783 (1986), 86-2 CPD ¶ 159. Accordingly, the
Navy properly refused to allow Seaboard to change its bid
after bid opening.

The protest is dismissed in part and denied in part.

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