



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: BSC Industries, Inc.
File: B-237299
Date: February 5, 1990

Roland R. Wommack, BSC Industries, Inc., for the protester
Bob Hicks, Liebert Corporation, for the interested party.
James K. White, Office of the General Counsel, Department of
Commerce, for the agency.

Amy Shimamura, Esq., and Christine S. Melody, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

1. Bid was properly rejected as nonresponsive where descriptive literature was required to establish conformance to the solicitation's specifications, and protester not only failed to submit all of the required descriptive literature but also submitted literature which indicated that its offered product did not conform to the specifications.

2. Where protester alleges that a firm that evaluated bids for the contracting agency, under contract, engaged in discussions with other bidders in order to disqualify the protester's bid, but fails to provide any evidence in support of its allegation, there is no basis for concluding that the protester's bid was improperly evaluated.

DECISION

BSC Industries, Inc., protests the rejection of its low bid and the award of a contract to Liebert Corporation under invitation for bids (IFB) No. 51WCNA906108RA, issued by the Department of Commerce for packaged self-contained air conditioners (PACs) for National Weather Service Weather Forecast Offices throughout the United States. The PACs will be supplied for office development related to the Next Generation Radar (NEXRAD) program. BSC contends that it submitted all of the descriptive literature required by the

IFB; that its bid was responsive to the IFB; and that the agency improperly evaluated its bid.

We deny the protest.

The IFB was issued to 36 prospective bidders for an indefinite delivery requirements-type contract for PACs. The IFB incorporated the standard Federal Acquisition Regulation (FAR) descriptive literature clause, FAR § 52.214-21. Additionally, section M.4 of the IFB required, for the PAC's indoor air conditioning unit, indoor floorstand, and outdoor air-cooled condenser, descriptive literature which detailed compliance with all technical requirements of the specifications. Section M.4 further required dimensional drawings of the indoor air conditioning unit showing components, piping, wiring and field connections, and dimensional drawings of the indoor floorstand showing the adjustment operation and the turning vane.

Five bids were submitted by the July 25, 1989, bid opening date; BSC was the apparent low bidder. The bids were evaluated by Fluor Daniel, Inc. (FDI), a firm that is under contract with Commerce to provide technical reviews of items falling within the NEXRAD program. FDI found that BSC failed to provide the following descriptive literature: the indoor air conditioning unit dimensional drawings; evaporator fan performance curves; acoustic performance data; dimensional drawings for the indoor floorstand; and drawings for the outdoor air-cooled condenser. FDI also found, based on descriptive literature that was submitted by BSC, that the protester's indoor air conditioning unit did not meet the specification requirement for refrigeration piping connections at the bottom of the unit. Based on FDI's findings, the contracting officer rejected BSC's bid as nonresponsive and awarded a contract to Liebert, the next low responsive and responsible bidder. Thereafter, BSC filed this protest with our Office.

BSC contends that since it submitted all of the required descriptive literature and took no exceptions to the specifications, its low bid was responsive and should not have been rejected. Specifically, BSC maintains that it provided 29 pages of drawings of the indoor air conditioning unit showing components, piping, wiring and field connections; four copies of evaporator fan performance curves, including acoustical data; dimensional data on the floorstand; and 21 pages of drawings of the outdoor air-cooled condenser showing components, piping, wiring and field connections. Additionally, BSC maintains that its indoor unit meets the specification requirement for connections at the bottom of the unit.

The agency specifically denies that it received all of the descriptive literature that BSC claims it submitted with its bid. In support of its position, the agency has provided affidavits by all employees who handled BSC's bid attesting that only 13 pages of descriptive literature, copies of which were provided to our Office for our review, were submitted by BSC.

Where descriptive literature is required by the solicitation to establish the bidder's conformance to the specifications, and bidders are so cautioned, a bid must be rejected as nonresponsive if the bidder fails to submit the required descriptive literature, Adrian Supply Co., B-225630.2, May 7, 1987, 87-1 CPD ¶ 489, or if the literature submitted shows that the offered product does not conform to the specifications. JoaQuin Mfg. Corp., B-228515, Jan. 11, 1988, 88-1 CPD ¶ 15. The fact that a bidder takes no exception to the solicitation's requirements, like a blanket offer to comply, is not sufficient to make the bid responsive. Id.

Based on our review of the record, we conclude that the agency properly rejected BSC's bid as nonresponsive because not only does the record indicate that BSC failed to submit all of the required descriptive literature, but also because the literature BSC did submit indicates that BSC's offered product does not comply with the specifications. On either basis, the agency's rejection of BSC's bid as nonresponsive was proper.

The agency's affidavits establish that BSC's bid was delivered in a Federal Express envelope and was kept in a locked bid box, except for three instances: (1) when the agency's designated bid receiving and handling official opened the envelope upon receipt to ascertain that it contained a bid; (2) when the bid opening officer opened and read BSC's bid at bid opening; and (3) when the bid opening officer photocopied the bid so that a copy could be sent to FDI for evaluation. The bid opening officer who examined each page of BSC's bid at bid opening to determine whether any exceptions were taken to the IFB's specifications, clauses and articles, attests that BSC's descriptive literature consisted only of the 13 pages that were provided to our Office.

Although BSC contends that it submitted 54 pages of descriptive literature, including four pages of performance curves, with its bid, it has provided no evidence in support of its contention; nor has it specifically refuted any of the statements in the agency's sworn affidavits. In fact,

in its comments on the agency report, the protester concedes that it was only in "general compliance" with the specifications; and earlier, in an August 30 letter to the agency, BSC also admitted that it has no dimensional drawing for the indoor floorstand which was required by the IFB. In light of this statement, we fail to see how BSC could have submitted all of the required descriptive literature as it now claims; in this regard, the record indicates that BSC only provided dimensional data on the floorstand, not a drawing of the item as required.

In these circumstances, and because nothing in the record suggests otherwise, we have no reason to question the agency's position that incomplete descriptive literature was submitted with BSC's bid.

Moreover, even if BSC had submitted all of the required descriptive literature, the agency nevertheless properly rejected BSC's bid because BSC's offered indoor air conditioning unit does not meet the specification requirement for "field pipe connections . . . at the bottom of the unit." The notation on BSC's one-dimensional drawing of its "Floormaster" indoor unit states that "electrical and refrigeration connections will be through the rear, lower left side door." Nothing in the drawing suggests that the connection at the "rear, lower left side door" is at the bottom of the unit as required by the IFB. Nor does BSC indicate where the literature demonstrates its compliance with the requirement. The agency therefore had no basis upon which to make a determination that BSC's unit met the specification requirement for connections at the bottom of the unit; its determination that the unit was nonconforming thus was justified.

Further, even though BSC took no exception to any of the specification's requirements, that fact, in and of itself, is not enough to establish BSC's compliance with the IFB's specifications. A bidder must demonstrate that its product complies with the specifications with sufficiently detailed descriptive literature as required by the IFB. Adrian Supply Co., B-225630.2, supra.

Since the record indicates that BSC failed to submit all of the required descriptive literature, and also because the literature submitted indicates that the offered unit does not conform to specifications, Commerce properly rejected BSC's bid as nonresponsive.

BSC also contends that its bid was improperly evaluated. Specifically, BSC alleges that the agency's representative, FDI, discussed its bid with BSC's competitors during bid

evaluation, and that the purpose of the discussions was to find that BSC's bid did not conform to the specifications so that Liebert could be awarded the contract.

The agency states that it investigated BSC's allegation that FDI held improper discussions, and determined that FDI's conversations with BSC's competitors during bid evaluation were in response to telephone inquiries from those firms, and that FDI properly provided only publicly available information in response to the inquiries.

Based on our review, we conclude that there is nothing in the record substantiating BSC's allegation that FDI engaged in discussions with BSC's competitors in order to disqualify its bid. The record indicates that the FDI employee, who was on the bid evaluation panel, asked the Liebert manufacturer's representative who signed Liebert's bid to call him at home with the bid results because he would not be able to attend bid opening. The FDI employee attests in a sworn statement that he did not initiate the contact with Liebert's representative or show any favoritism toward Liebert during this procurement, but merely asked the Liebert representative to call him at home with the bid results because the representative happened to call him to inform him that Liebert would be submitting a bid. There is no indication in the record that BSC was prejudiced by this contact, and since it took place prior to bid opening, the FDI employee would not have been able to discuss BSC's bid in any event.

After bid opening, the same FDI employee was called by two PAC manufacturers' representatives. During the first call, the representative of a non-bidding firm requested the bid results and was asked by the FDI employee whether BSC (a Baltimore, Maryland, firm) had a local (Kansas City, Missouri) representative. The record indicates that as a result of this call, BSC was informed by the non-bidding firm's representative that FDI needed more information in order to evaluate BSC's bid. BSC, therefore, called FDI to inquire whether more information was required, and was informed by the FDI employee that FDI could not discuss the bid or request additional information since the procurement had been conducted using sealed bidding.

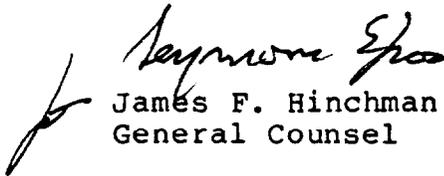
During the second call, the fourth low bidder called the same FDI employee to inquire about the status of bid evaluation and was told that BSC's bid was under consideration. The fourth low bidder then informed the FDI employee that BSC's bid should be "thrown out" because the firm was inexperienced; and that Liebert, which submitted the second and third low bids, would be unable to meet the

specification requirements. The FDI employee attests that he did not comment on the fourth low bidder's statements.

We see no basis to conclude that these telephone calls demonstrate that FDI's evaluation of BSC's bid was conducted in bad faith or otherwise prejudiced BSC. Nevertheless, we think that in the future the agency should instruct the FDI employee responsible for evaluation of bids to confine any requests for information regarding the bidding results or the bidders to authorized government representatives.

Since the record supports the agency's determination that BSC's bid was nonresponsive, and the protester has provided no evidence in support of its allegation that discussions were held with its competitors for the purpose of disqualifying its bid, we have no basis upon which to conclude that FDI improperly evaluated BSC's bid.

The protest is denied.


James F. Hinchman
General Counsel