



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Benthos, Inc.; Cygnus Engineering

File: B-237454; B-237454.2

Date: February 20, 1990

Lawrence W. Gray, for the protester.
Vincent P. Dowd, for the protester.
Sylvia A. Earle, Deep Ocean Engineering, an interested party.
James K. White, Esq., Department of Commerce, for the agency.
Sylvia L. Shanks, Esq., Paul Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGESTS

Agency properly rejected bids as nonresponsive where the bidders submitted with their bids unsolicited descriptive literature concerning the specific products offered, which raised questions as to whether the products complied with some of the material solicitation requirements and showed that the products did not comply with certain other material solicitation requirements.

DECISION

Benthos, Inc., and Cygnus Engineering protest the award of a contract to Deep Ocean Engineering (DOE) under invitation for bids (IFB) No. 51-WCNF-9-067127PAW, issued by the National Oceanic and Atmospheric Administration, Department of Commerce, for an underwater, tethered remote operated vehicle (ROV) for use in studying fish movements around trawling nets in the Gulf of Mexico. The protesters contend that their bids, both of which were lower than DOE's, were improperly rejected as nonresponsive.

We deny the protests.

The IFB called for a tethered ROV in accordance with design and performance specifications stated in section C of the solicitation. Although the IFB did not require the submission of descriptive data, each of the three bidders submitted such data concerning the product they offered. Benthos included with its bid a "technical proposal" containing descriptive literature, consisting of pictures,

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technical descriptions, specifications, and diagrams of the SeaROVER, which it offered. Cygnus's bid included a "proposal" containing a general description, diagrams and technical specifications of the Cygnet Submersible which it offered.

The Benthos Protest

Commerce determined, on the basis of the technical data which Benthos submitted with its bid, that the bid was nonresponsive in several material categories. For example, Benthos offered an ROV equipped with a housed Benthos camera and the capability to support or accommodate an externally mounted, secondary camera, "such as an OSPREY [model number] OE1323 or OE1337A." The agency states that this ROV configuration rendered the bid nonresponsive because the IFB called for the government to provide OSPREY OE1321 and OE1337A model cameras for use as the primary camera with the ROV, and the primary (housed) camera on Benthos's ROV is not comparable in quality to the OSPREY cameras. In addition, the IFB requires the ROV to be equipped with two variable intensity lights with a minimum of 300 watts each, positioned to provide optimum lighting for the OSPREY cameras. Commerce determined that Benthos's ROV is designed to provide the necessary lighting for its housed primary camera, but not for what, under Benthos's design, would be the secondary OSPREY cameras.

The agency also determined that Benthos's bid was not responsive to the requirement that the ROV provide for a minimum camera focus tilt of plus or minus 45 degrees (a total tilt capability of 90 degrees) because the size and design of the camera housing would not permit the OSPREY cameras to be interchanged with the Benthos cameras yet still obtain the necessary tilt. Benthos's ROV provides as a viewing port for the camera with which its ROV is equipped a cylindrical dome which is 9 inches in diameter. The agency explains that the size and design of the camera housing on the Benthos ROV restricts the maximum area which the OSPREY cameras could be tilted, if placed inside that camera housing, to 46 degrees (plus or minus 23 degrees). The viewing dome would have to exceed 12 inches in diameter to allow for the specified tilt for the OSPREY cameras.

The agency further states that the Benthos ROV does not provide any tilt mechanism outside the primary camera housing to accommodate the OSPREY cameras which, because of the Benthos ROV design, must be mounted externally. In sum, the agency determined that Benthos's bid was nonresponsive because it did not meet the IFB requirements to provide an ROV equipped to support the optimal viewing capability of a

government-provided, high performance video system. Benthos offered instead an ROV equipped with a less efficient primary video system.

Benthos argues that the agency assessed its ROV on the basis of "subjective judgments and erroneous information," without consulting or inquiring of the firm about its product. Benthos asserts that external mounting of video cameras is the general ROV industry practice because it provides for greater user flexibility. Benthos also challenges the agency's determinations, prior to conducting actual tests, concerning the compliance of its lighting with the solicitation requirements.

The protester further disputes the agency's finding that its proposal is nonresponsive because its ROV carries its own video system as the primary camera. Benthos maintains that "[w]e have . . . proposed the provision of . . . interfaces to support the requirements of the IFB." Concerning the agency's objection that the Benthos ROV does not provide a plus or minus 45-degree tilt mechanism for the externally mounted cameras, the protester argues that the agency drew an incorrect conclusion without first consulting the firm. Benthos asserts that its "intention [was] to tilt those cameras, as required, by the use of the servo/handbox control system."

The Cygnus Protest

Commerce also determined that the descriptive data submitted with Cygnus's bid showed that its ROV did not comply with the IFB specifications in several material respects. The agency states that the static pressure method by which Cygnus's ROV measures depth is inadequate to measure depth within the accuracy range of plus or minus 1 meter as required by the IFB, because of the extreme variations in water temperature and salinity in the waters in which the ROV is to be used. The agency also determined that Cygnus's descriptive data showed that, given its configuration and its stated maximum power, the vehicle is not capable of achieving the 4.0 knots speed with no water current, which is required by the IFB, particularly when the weight of the government-provided cameras is added to the vehicle.

Cygnus maintains that its bid was responsive because it stated in the cover letter that it was "fully compliant with the specification," that the agency's technical review was inappropriate for a sealed bid procurement, and that its ROV will achieve and exceed the speed required by the IFB, since the IFB specified the level of performance without reference to the "mission equipment."

DISCUSSION

Generally, consideration of unsolicited literature is governed by Federal Acquisition Regulation (FAR) § 14.202-5(f), which requires that the procedures in FAR § 14.202-4(g) be followed. These procedures require that the unsolicited descriptive literature 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 identical model of equipment being offered, and is explicitly represented by the bidders to be descriptive of the equipment being offered, there is a sufficient relationship between the bid and the literature to warrant considering the literature in determining whether the bid is responsive. Schweigers, Inc., B-236071, Oct. 12, 1989, 89-2 CPD ¶ 345.

To be responsive, a bid must be an unequivocal offer to provide 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. If any substantial doubt exists as to whether a bidder, upon award, could be required to provide the items as specified in the IFB, the integrity of the competitive bidding system requires rejection of the bid as nonresponsive. Id. Thus, where unsolicited descriptive literature submitted with a bid reasonably raises questions as to whether the product offered complies with a material requirement of the IFB, the bid should be rejected as nonresponsive. Anadigicom Corp., B-235349, Aug. 18, 1989, 89-2 CPD ¶ 151. A blanket offer in a cover letter to comply with all IFB specifications does not establish responsiveness where the descriptive literature evidences noncompliance. See Schweigers, Inc., B-236071, supra. 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 that could be responsive or nonresponsive at the bidder's option based on information available to the bidder after bid opening. Orbit Advanced Technologies, Ltd., B-224603.2, Mar. 11, 1987, 87-1 CPD ¶ 273.

On the basis of information set forth in their descriptive literature, the agency identified at least six aspects of Benthos's ROV, and three aspects of Cygnus's ROV which did not comply with material requirements of the IFB. We need not address all of the reasons for which the two bids were found nonresponsive since this determination properly could

be based on failure to meet any one material requirement of the solicitation.

The solicitation called for a vehicle equipped for the transportation and operation of two specific models of OSPREY cameras to be provided by the government, and the vehicle is required to include a mechanism for tilting the government-provided OSPREY cameras, and two lights positioned to provide a minimum of 600 watts of effective lighting of the objects to be photographed by those cameras.

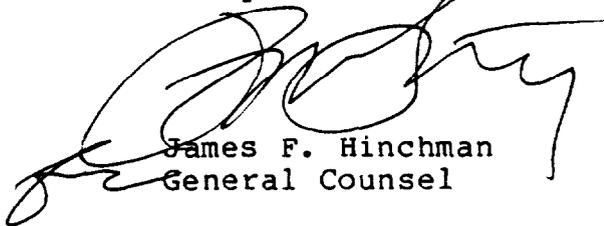
Benthos's ROV does not meet these requirements. The government provided cameras would have to be externally attached to the vehicle, and Benthos does not deny that the lights on its ROV would not serve the "secondary" OSPREY cameras as effectively as they are designed to serve the "primary" camera with which its ROV comes equipped. Rather, Benthos complains that the agency did not test its ROV to determine whether the light system is or can be structured to provide the required lighting for externally mounted cameras. Further, it is not clear from the literature that the SeaROVER provides the required tilt range (or any tilt) for cameras mounted externally.

Benthos stated in its comments on the agency report that it intended to mount the cameras externally and tilt them plus or minus 45 degrees. However, the bid, as submitted, does not make this intention clear. Therefore, the agency reasonably concluded from Benthos's literature that Benthos's bid was not responsive to the IFB requirements for lighting or camera tilt capability. The government was not required to seek further clarification or conduct testing, in the face of the bid's apparent noncompliance. See Anadigicom Corp., B-235349, Aug. 18, 1989, 89-2 CPD ¶ 151.

Cygnus's comments in response to the agency report essentially concede that the descriptive data it submitted raised questions as to whether its ROV complied with the IFB specifications. Cygnus states that the solicitation did not require--and, therefore, it did not provide--technical data or "a full technical proposal," on the basis of which the agency could have conducted a "detailed review" of the vehicle it offered. The protester reasons that since it did not provide the agency adequate information to assess the technical capabilities of its ROV, the agency's determination that its bid was nonresponsive was based on assumptions. However, since Cygnus provided descriptive data which suggested noncompliance, we believe that the agency reasonably considered the performance capabilities evidenced by that data to assess whether the vehicle, as described, could satisfy the IFB requirements.

Concerning the method by which its ROV measures depth, Cygnus responds that it was aware of the effects of the instability of the water temperature and salinity in the area where the ROV will be used. Cygnus asserts that through the use of an initialization subroutine and through operator input of correction factors, the required accuracy can be maintained. However, this information was not apparent from its bid and the agency reasonably concluded that the ROV depth sensor as specified did not satisfy the IFB requirements for accuracy. Since Cygnus's literature indicated that the vehicle as offered would not satisfy the depth sensor requirement, the agency properly found the bid nonresponsive without seeking post-bid opening clarification from Cygnus. In addition, the agency reasonably concluded that the Cygnus vehicle failed to meet the 4 knot speed requirement since Cygnus's calculations are based on a vehicle without equipment, while the solicitation makes clear that the performance specifications, including vehicle speed, are intended to apply to the equipped vehicle. Accordingly, the agency properly determined that Cygnus's bid was nonresponsive, based on the descriptive literature submitted.

The protests are denied.



James F. Hinchman
General Counsel