



Comptroller General
of the United States
Washington, D.C. 20548

J. Mitchell

Decision

Matter of: Cole Compressor, Inc.--Reconsideration
File: B-241439.2
Date: November 28, 1990

Donald J. Langlois for the protester.
John F. Mitchell, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

1. Bidder's inclusion in its bid of an "exception" sheet in which it objected to a certain specification requirement does not constitute a timely agency-level protest since the contracting officer is not authorized to open a bid until the time set for bid opening.
2. Bid properly was rejected as nonresponsive where bidder enclosed with it an "exception" sheet in which the bidder expressly stated that it would not comply with one of the specification requirements.
3. A bidder who is ineligible for award because its bid is nonresponsive is not an "interested party" under the General Accounting Office's Bid Protest Regulations to maintain a protest of an award to another bidder.
4. Request for reconsideration is denied where protester's reiteration of its original basis for protest does not show that prior dismissal was based on either errors of fact or law and where protester does not present information not previously considered that warrants reversal or modification of the prior decision.

DECISION

Cole Compressor, Inc. requests that we reconsider our October 25, 1990, dismissal of its protest concerning the procurement of a vacuum system by the Department of the Treasury under invitation for bids (IFB) FMS-90-0045. For the reasons stated below, the request for reconsideration is denied.

Documents included with Cole's protest show that the IFB specifications included a requirement that the electric motors

which drive the system's vacuum pumps have "a maximum [speed] of 1,250 revolutions per minute [RPM]." Cole included with its bid an "Exceptions" sheet in which it stated that "the specifications seem to be directed to one particular manufacturer," took exception to the RPM requirement, and offered to supply a system with a motor RPM of 3,505, almost three times the maximum allowed by the IFB. When Treasury notified Cole that its bid had been rejected as nonresponsive and that the agency had made award to the next low bidder, Busch, Inc., Cole protested first to the agency and then to our Office. In its protests, Cole maintained that the solicitation's maximum RPM limitation restricted competition to Busch for no good reason and also questioned whether the system offered by Busch met the volume requirements of the IFB's specifications.

If Cole thought the IFB was improper because it contained a specification requirement which was unduly restrictive of competition, Cole was obligated to protest prior to bid opening.

Our Bid Protest Regulations contain strict rules requiring timely submission of protests. These rules specifically require that protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1990); Manatts, Inc., B-237532, Feb. 16, 1990, 90-1 CPD ¶ 287. A protest filed with a bid cannot properly be considered as filed before bid opening since the contracting officer is not generally authorized to open the bid until the time set for bid opening. Americover Co., B-234352, Mar. 28, 1989, 89-1 CPD ¶ 320.

These timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Air Inc.--Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129. In order to prevent these rules from becoming meaningless, exceptions are strictly construed and rarely used. Id.

By expressing its objection to the maximum RPM requirement by means of an "Exception" sheet to its bid, Cole not only failed to timely protest the requirement but made its own bid nonresponsive. As we pointed out in our dismissal notice, bids that do not comply with solicitation specifications are nonresponsive on their face. A bid is responsive as submitted when it offers to perform without exception the exact thing called for in the IFB, and acceptance of the bid will bind the contractor to perform in accordance with all the IFB's material terms and conditions. Stay, Inc., B-237073, Dec. 22, 1989, 89-2 CPD ¶ 586. When a bid does not offer to comply with the specifications included in the solicitation, or where

a bidder provides information that materially reduces, limits, or modifies a solicitation requirement, the bid must be rejected as nonresponsive. Hagglunds Prinoth, B-238244, Apr. 12, 1990, 90-1 CPD ¶ 385. Such a nonresponsive bid may not be accepted, even if the bid would provide savings to the government, because the public interest in maintaining the integrity of the competitive bidding process outweighs any monetary benefit to be obtained from waiving material bidding deficiencies. Sac & Fox Indus., Ltd., B-231873, Sept. 15, 1988, 88-2 CPD ¶ 250.

Since Cole's bid was nonresponsive, it was ineligible for award. Cole is therefore not an interested party to protest the award to Busch.

Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. § 3551-3556 (1988), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a). Determining whether a party is interested involves consideration of a variety of factors, including the nature of issues raised, the benefit or relief sought by the protester, and the party's status in relation to the procurement. Black Hills Refuse Serv., 67 Comp. Gen. 261 (1988), 88-1 CPD ¶ 151.

A protester is not an interested party where it would not be in line for contract award were its protest to be sustained. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must show that our prior decision may contain either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a). Cole does not challenge the bases for the prior dismissal--it simply reiterates its objection to the IFB's RPM specification as unduly restrictive of competition. This does not meet the standard for reconsideration. R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274.

The request for reconsideration is denied.


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