

K. Riback



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Mechanical Resources, Incorporated

File: B-241403

Date: January 30, 1991

William Bryant for the protester.

Richard C. Vassallo for Adrick Marine Corporation, an interested party.

Linda A. Leonard, Esq., United States Coast Guard, for the agency.

Katherine I. Riback, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protests that the specifications for refrigeration machinery are unduly restrictive and not internally consistent are alleged improprieties apparent from the solicitation and are untimely when not filed prior to bid opening.
2. Protester's bid was properly rejected as nonresponsive where on its face it took exception to a material specification requirement.
3. Allegations that the awardee does not have the competent or financial resources needed to perform the contract concerns the agency's affirmative determination of the awardee's responsibility which the General Accounting Office will not review absent a showing of possible fraud, bad faith, or misapplication of a definitive responsibility criterion.
4. The contracting officer properly waived a bidder's failure to acknowledge receipt of two solicitation amendments which merely clarified the solicitation and did not impose additional obligations on the bidders.

DECISION

Mechanical Resources, Incorporated (MRI) protests the award of a contract to Adrick Marine Corporation (AMC) under invitation for bids (IFB) No. DTCG-23-90-B-ENM025-2, issued by the United States Coast Guard for refrigeration machinery for a walk-in vegetable/dairy room and a walk-in freezer room on board 13

United States Coast Guard vessels. MRI contends that its apparent low bid was improperly rejected as nonresponsive; that the awardee is nonresponsive; and that the agency improperly waived the low bidder's failure to timely acknowledge receipt of the final solicitation amendments. The protest is dismissed in part and denied in part.

The IFB was issued on August 13, 1990, with a September 13 opening date. Four amendments to the solicitation were issued with responses to questions raised by two potential bidders other than the protester and AMC. Amendment Nos. 3 and 4 were mailed on September 7, 1990; none of the bidders acknowledged receipt of these two amendments before bid opening.

Of particular relevance to this protest are the IFB specifications for the condenser units, which required that "water tubes shall be constructed of 90-10 copper-nickel [Cu-Ni] alloy [and] condenser water heads shall be 90-10 copper-nickel." The agency advises that these requirements were based on a commercial refrigeration standard and were intended to minimize the number of dissimilar metals in the condenser which in turn increases the condenser's resistance to corrosion and reduces maintenance needs.

On the bid opening date four bids were received, and it was determined that MRI had submitted the apparent low bid. However, MRI included with its bid a page with the title "Specifications," beneath which appears "Condensing Units." The document specifically states that it is to become a part of the "proposal" submitted in response to this solicitation. As for the freezer units, the sheet stated "SHELL & TUBE 90, CU-NI TUBES AND TUBE SHEETS. BRONZE HEADS W/ZINC ANODES." The following section entitled "VEG DAIRY" contains the same statement. The contracting officer, noting that the solicitation specifications required that "[c]ondenser water heads shall be 90-10 copper-nickel," ordered a technical review of all of the bids, primarily to determine if MRI's proposed substitution of bronze condenser heads for copper-nickel condenser heads constituted a material exception to the solicitation. Upon concurrence from the legal and technical division that MRI's bid took exception to a material requirement of the solicitation, the contracting officer determined that MRI's bid was nonresponsive. The agency then considered the next low bidder, AMC, for award. Although AMC's acknowledgment of receipt of Amendment Nos. 3 and 4 was not received until several days after the bid opening date, the agency decided to waive AMC's failure to acknowledge the amendments under Federal Acquisition Regulation § 14.405(d) because the amendments had no effect on price, quantity, quality or delivery of the items bid upon. The contracting

officer determined that the firm was responsible, and award was made to AMC on September 25, 1990.

The protester has raised several issues with respect to the rejection of its bid and the award to AMC. First, the protester contends that its bid was improperly determined to be nonresponsive because of a one word "typographical error" the use of "bronze" instead of "and"--which could have been corrected had the agency asked for a clarification after bid opening. In any event, the protester argues, the specifications should have permitted the use of bronze condenser water heads, which have been acceptable in other applications in the past. In fact, the protester questions whether the stated reason for requiring the tube and condenser heads to be constructed of 90-10 copper-nickel--to minimize the number of dissimilar metals in the condenser--will be achieved since the solicitation fails to specify the material required for the tube sheet. Second, MRI alleges that AMC does not have the capability and the financial resources necessary to perform this contract. Third, the protester contends that it was improper of the agency to waive AMC's failure to acknowledge receipt of the two amendments issued the week before bid opening.

At the outset, to the extent the protester contends that the solicitation should have permitted the use of bronze condenser heads, and should have specified the material for the tube sheets, the protest is untimely, and will not be considered by our Office. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1990), protests against apparent solicitation improprieties must be filed prior to bid opening. The protester's objections to the solicitation's material requirements concern alleged solicitation improprieties apparent from the face of the solicitation and should have been raised prior to bid opening. Because the protester did not protest these issues to either the agency or our Office until after the bid opening date and the award, these grounds of protest are dismissed as untimely. Pennsylvania Printed Prods. Co., Inc., B-239579, Aug. 29, 1990, 90-2 CPD ¶ 179.

MRI's principal argument is that the agency incorrectly determined that the "Specifications" page included in the protester's bid contained an exception to the solicitation, rather than a "typographical error," which it could have corrected had inquiry been made of it after bid opening.

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. Seaboard Elec. Co., B-237352, Jan. 26, 1990, 90-1 CPD ¶ 115 A deficiency or deviation which goes to the substance of the

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. Id.

We are inclined to agree with the agency that MRI's proposed substitution of bronze for copper-nickel condenser water head appears to be the result of a deliberate exception to the solicitation and not a typographical error. The protester's argument that the word "bronze" on the "Specifications" page is a typographical error is not plausible because the word "bronze" appears twice, and a substitution of the word "and" for the word "bronze" would render both statements in which it appears incomplete and senseless. Even if the wording on the protester's "Specifications" page was a typographical error, however, it could not be "corrected" or "clarified" after bid opening. 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. Benthos, Inc.; Cygnus Eng., B-237454; B-237454.2, Feb. 20, 1990, 90-1 CPD 295. MRI's bid was therefore properly rejected as nonresponsive.

Next, MRI alleges that AMC does not have the financial resources and the capability to perform the contract. MRI essentially attacks the Coast Guard's affirmative determination of AMC's responsibility to successfully perform the contract. We will not review that determination unless there is a showing of possible fraud or bad faith on the agency's part or that definitive responsibility criteria in the RFP were misapplied. Marine Transport Lines, Inc.; Lant Shipping Inc., B-238223.2; B-238223.3, July 30, 1990, 90-2 CPD ¶ 80. Because MRI's unsupported allegations fail to establish possible fraud or bad faith on the agency's part or a misapplication of definitive responsibility criteria, we will not review the agency's determination of affirmative responsibility.

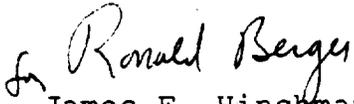
Finally, the protester contends that the agency improperly waived AMC's failure to acknowledge receipt of Amendment Nos. 3 and 4.

Generally, a bid which does not include an acknowledgment of material amendment must be rejected because absent such an acknowledgment, the bidder is not obligated to comply with the terms of the amendment and its bid is thus nonresponsive. K Serv., B-238744, June 13, 1990, 90-1 CPD ¶ 556. The failure of a bidder to acknowledge receipt of an amendment may be waived, however, where the amendment is not material, meaning that it has either no effect or merely a negligible

effect on price, quantity, or delivery of the item bid upon Id. An amendment is not material where it does not impose legal obligations on the bidder different from those imposed by the original solicitation or previous and acknowledged amendments. Angus Fire Armour Corp., B-237211.2, Jan. 18, 1990, 90-1 CPD ¶ 68. An amendment which merely clarifies an existing requirement, therefore, is not material, and the failure to acknowledge it may be waived and the bid accepted Id.

We agree with the agency's determination that Amendment Nos. 3 and 4 only clarified the solicitation in response to bidders' inquiries and did not impose additional obligations on the bidders. Neither amendment changed the existing specifications. For example, the sole subject of Amendment No. 4 was a response ("No.") to a bidder's inquiry as to whether the operating charts which were to be supplied for mounting on the ships' bulkheads near each condensing unit could be printed rather than engraved as the IFB's specifications required. Because the amendments were not material the agency properly waived AMC's failure to acknowledge Amendment Nos. 3 and 4.

The protest is dismissed in part and denied in part.


James F. Hinchman
General Counsel