



Comptroller General
of the United States

Washington, D.C. 20548

M. Pietrovito

Decision

Matter of: Marco Equipment, Inc.; Scientific Supply Co.
File: B-241329; B-241329.2
Date: January 31, 1991

R. Timothy Hanlon, Esq., and John E. Jensen, Esq., Shaw, Pittman, Potts & Trowbridge, for Marco Equipment, Inc., and Jon W. van Horne, Esq., McDermott, Will & Emery, for Scientific Supply Co., the protesters.
Bill Dwyer for Midwest Ophthalmic Instruments, Inc., an interested party.
Herbert F. Kelley, Jr., Esq., and James S. Delsordo, Esq., Department of the Army, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The procuring agency in a sealed bid procurement reasonably rejected as nonresponsive a bid that first stated that the protester offered a particular model that met all specifications and then included language that could reasonably be interpreted as meaning the particular model would not meet certain material solicitation requirements. A bid that takes exception to material solicitation requirements or is ambiguous with respect to whether the bid represents an offer to comply with all material requirements, must be rejected as nonresponsive.
2. The procuring agency cannot properly disregard unsolicited descriptive literature, where a bid specifically states that the bidder is offering equipment meeting or exceeding specifications contained in the descriptive literature; where the specifications contained in the unsolicited descriptive literature are noncompliant with a material solicitation requirement, the bid must be rejected as nonresponsive.

DECISION

Marco Equipment, Inc. and Scientific Supply Co. protest the award of a contract to Midwest Ophthalmic Instruments, Inc., under invitation for bids (IFB) No. DAKF15-90-B-0043, issued by the Department of the Army for automatic eye refractors.

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Scientific Supply protests that the Army improperly rejected its lower priced bid as nonresponsive. Marco protests that Midwest Ophthalmic's bid is nonresponsive and that Marco is entitled to award as the lowest responsive bidder.

We deny Scientific Supply's protest and sustain Marco's protest.

The IFB, issued as a total small business set-aside, sought the delivery and installation of 67 automatic eye refractors in various Army military entrance processing stations. The refractors, which measure a patient's near and distance vision, will be used by the Army to screen the visual acuity of Army recruits.

The IFB in Section C, stated performance and function specifications and provided, in pertinent part, that the refractors, at a minimum, have a sphere (measuring) range of "+20D through -12D (at least 0.25 step),"^{1/} automatic date and time print-out capability, and be able to measure both distant and near vision acuity.

The Army received the following bids:

Nikon, Inc.	\$412,763
Humphrey Instruments	\$532,650
Scientific Supply	\$566,150
Eye Care Distributors	\$580,555
Midwest Ophthalmic	\$589,600
Marco	\$732,846
Universal Ophthalmic	\$736,330

The bids of Nikon and Humphrey were rejected because they were not small businesses as required by the IFB, and the bids of Scientific Supply and Eye Care Distributors were rejected as nonresponsive to the IFB. Award was made to Midwest Ophthalmic as the lowest responsible, responsive bidder, and these protests followed.^{2/} Performance of the contract has been suspended pending our decision in this matter.

^{1/} "D" represents "diopter," which is a measure of the refractive power of an optical instrument.

^{2/} Scientific Supply initially filed an agency-level protest objecting to the rejection of its bid, and timely protested to our Office after the Army's rejection of its agency-level protest.

THE SCIENTIFIC SUPPLY PROTEST

Scientific Supply objects to the Army's rejection of its bid as nonresponsive and states that it offered its model 570, which meets all of the IFB requirements. The record shows that Scientific Supply bid its model 570 as its base bid and, in a cover letter attached to its bid, offered two other models as lower-priced alternates. Scientific Supply also provided unsolicited descriptive literature with its bid^{3/} and stated in the bid that:

"We offer Model 570 which meets all specifications @ \$8450.00/ea see enclosed literature Note: Neither model does not include time/date on printout also does not do near testing, distance only see attached letter offering alternate models"^{4/}

The Army interpreted this statement to mean that neither the bidder's model 570 nor its alternate models met the IFB requirements for time/date printouts and near vision testing. The Army rejected Scientific Supply's bid as nonresponsive on the basis that Scientific Supply had taken exception to material IFB requirements for time/date printout capability and near vision testing.

Scientific Supply argues that the Army's interpretation of its bid is unreasonable and that the only reasonable interpretation is that Scientific Supply bid its model 570, which met all the IFB requirements. Scientific Supply contends that its bid notation--that neither model meets the IFB requirements--refers only to its alternate models and not to the model 570 offered in its base bid.

To be responsive, a bid, as submitted, must represent an unequivocal offer to perform without exception, the exact specifications called for in the IFB so that the bidder will be bound to perform in accordance with all the material terms and conditions. Contech Constr. Co., B-241185, Oct. 1, 1990, 90-2 CPD ¶ 264. A bid, which takes exception to a material IFB requirement or is ambiguous with respect to whether the bid represents an offer to comply with a material requirement, may not be changed or clarified after bid opening and must be rejected as nonresponsive. Eclipse Sys., Inc., B-216002, Mar. 4, 1985, 85-1 CPD ¶ 267. This is to ensure

^{3/} The IFB did not require the submission of descriptive data.

^{4/} This statement, with its underlining and lack of punctuation symbols, has been reproduced exactly as it appears in Scientific Supply's bid.

that all bidders compete on an equal basis, with no advantage being given to any bidder over another, and thus to ensure the integrity of the competitive bidding system. Id.

We find that the Army reasonably concluded that Scientific Supply had qualified its bid. The bid first states that Scientific Supply offers its model 570, which meets all IFB requirements, then proceeds to state that "neither model" meets the requirements for a time/date printout and for near vision testing. In our view, this statement that some models do not meet the IFB requirements could refer to Scientific Supply's model 570, as well as its alternate models.^{5/} Thus, this statement alone creates a question as to whether Scientific Supply had made an unequivocal offer to perform in accordance with the material IFB terms and conditions.

The Army's interpretation is supported by Scientific Supply's unsolicited descriptive literature.^{6/} This literature contains a sample printout for the model 570 that does not show time/date or contain near vision testing results. This reasonably indicates that the model 570 does not comply with these requirements. Indeed, Scientific Supply admits that none of its models, including its model 570, has an integrated time/date printout capability; rather, Scientific Supply, in its post-conference comments, states that it intended to supply an external device to provide for the time/date printout requirement.^{7/}

Based on this record, we find that the Army reasonably concluded that Scientific Supply's equipment would not meet the IFB requirements for time/date printouts and near vision

^{5/} According to Webster's Ninth Collegiate Dictionary (1989), neither is defined as "not the one or the other of two or more."

^{6/} While material that is not needed for bid evaluation generally is considered to be informational only, any literature submitted will cause a bid to be nonresponsive if it establishes that the bidder intended to qualify its bid or if the literature reasonably creates a question as to what the bidder is offering and on what terms. Vista Scientific Corp., B-233114, Jan. 24, 1989, 89-1 CPD ¶ 69.

^{7/} Since Scientific Supply's initial protest did not mention this solution but rather argues there was no need for the time/date printout, it is reasonable to infer that it did not intend, in its bid, to comply with this requirement. Since the "Note" in the bid refers to both the time/date printout and near testing, it is reasonable to believe that Scientific Supply's bid product offers neither capability.

testing. At best, there are two reasonable interpretations of the bid, one of which makes the bid nonresponsive. Under these circumstances, the agency properly rejected Scientific Supply's bid as nonresponsive. Pierce Mfg., Inc., B-224007, Oct. 28, 1986, 86-2 CPD ¶ 483.

Scientific Supply also argues that the Army does not need the time/date printout capability and therefore its failure to comply with this requirement should have been waived as immaterial. We need not consider this argument because Scientific Supply does not likewise contend that the requirement for near vision testing is immaterial and should also be waived.

Scientific Supply's protest is denied.

THE MARCO PROTEST

Marco protests that Midwest Ophthalmic's bid is nonresponsive because it contains unsolicited descriptive literature, which indicates that Midwest Ophthalmic's offered equipment, a Topcon RM-A2300 Auto-Refractor, does not comply with the IFB minimum required sphere range. The Army contends that Midwest Ophthalmic's bid is responsive because it unequivocally offered to provide equipment, either the RM-A2300 or a substitute, meeting or exceeding the IFB specifications. The agency states that it disregarded Midwest Ophthalmic's unsolicited descriptive literature because it did not clearly show an intent to qualify the bid.^{8/}

Midwest Ophthalmic submitted unsolicited descriptive literature and made the following notation in its bid:

"We are bidding on Topcon RMA-2300 'or equal' substitution which meets or exceeds specifications (list attached)"

^{8/} The agency also contends that Marco's protest concerns Midwest Ophthalmic's responsibility and whether Midwest Ophthalmic will perform in accordance with the IFB specifications is a matter of contract administration that we should not consider in this case. We disagree. Marco protests that Midwest Ophthalmic did not unequivocally promise to provide equipment in accordance with all of the material IFB terms and conditions, and thus this protest concerns the responsiveness of Midwest Ophthalmic's bid.

The descriptive literature attached to the awardee's bid consists of a commercial brochure for the Topcon RM-A2300 and a document, which is entitled "Specifications." Both of these documents indicate a measuring (sphere) range of +18D to -20D. However, the IFB required a sphere range of +20D through -12D. Thus, Midwest Ophthalmic's equipment did not comply with the plus side of the sphere range requirement.^{9/}

We do not think that the Army could reasonably disregard Midwest Ophthalmic's unsolicited descriptive literature under the circumstances present in this case. The Federal Acquisition Regulation (FAR) provides that unsolicited descriptive literature will not be disregarded where it is clear that the bidder's intention was to qualify the bid. FAR §§ 14.402-4(g), 14.202-5(f). Here, Midwest Ophthalmic specifically incorporated its descriptive literature into its offered product by stating that it would provide equipment meeting or exceeding the specifications attached to its bid. These specifications, as noted above, are not compliant with the plus side of the IFB required sphere range. Therefore, we think that the descriptive literature was intended to qualify the awardee's bid. See Orbit Advanced Technologies, Ltd., B-224603.2, Mar. 11, 1987, 87-1 CPD 273.

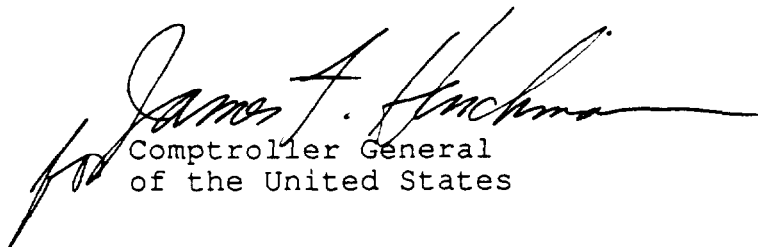
Where, as here, unsolicited descriptive literature submitted with a bid raises questions as to whether the product offered complies with a material requirement of the IFB, the bid must be rejected as nonresponsive. See Benthos, Inc.; Cygnus Eng'g, B-237454; B-237454.2, Feb. 20, 1990, 90-1 CPD ¶ 295. In this case, neither the Army nor Midwest Ophthalmic contends that the sphere range requirements are not material or that the Midwest Ophthalmic product's variance from the "plus" side of the required sphere range was de minimis or immaterial. Accordingly, we find that Midwest Ophthalmic's bid as submitted was nonresponsive.

The Army and Midwest Ophthalmic argue that during discussions concerning the awardee's responsibility the awardee confirmed that it would provide a Topcon RM-A2300 with "an extended measuring range," which would comply with the IFB

^{9/} Midwest Ophthalmic submitted to our Office a document entitled "specifications," which it alleges was attached to its bid, and this document indicates compliance with the IFB sphere range requirements (a sphere range of +22D to -25D). From our review of Midwest Ophthalmic's bid, as contained in the Army's report, the specifications now proffered to us by the awardee are not the specifications that were attached to its bid. As noted above, the specifications attached to Midwest Ophthalmic's bid show a sphere range that is noncompliant with the IFB requirements.

requirements. These discussions, which occurred after bid opening, cannot be used to establish the responsiveness of the awardee's bid. 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, supra.

We sustain Marco's protest and recommend that the Army terminate Midwest Ophthalmic's contract for the convenience of the government. If the agency finds that Marco is responsive and responsible and that its bid price is reasonable, award may then be made to Marco. In addition, Marco is entitled to recover its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d) (1990). Marco should submit its claim for its costs directly to the agency. 4 C.F.R. § 21.6(e).


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