



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

Decision

Matter of: VTEC Laboratories, Inc.
File: B-245481
Date: December 26, 1991

Neil Schultz, for the protester,
Darleen A. Druyun, National Aeronautics and Space Administration, for the agency,
Kathleen A. Gilhooly, Esq. and Henry R. Wray, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where a "brand name or equal" solicitation required submission of descriptive literature sufficient to establish that the offered product conforms to the salient characteristics, the procuring agency properly rejected as nonresponsive a bid that included descriptive literature which failed to show compliance with several salient characteristics.

DECISION

VTEC Laboratories, Inc. protests the rejection of its bid as nonresponsive and the award of a contract to Atlas Electric Devices Company, under invitation for bids (IFB) No. 9-WSFE-W02-1-15B, issued by the National Aeronautics and Space Administration (NASA), White Sands Test Facility, Las Cruces, New Mexico, for a cone calorimeter system used to evaluate the behavior of materials in a fire. NASA rejected VTEC's bid because it did not conform to five of the stated salient characteristics of the specified brand name product.

We deny the protest in part and dismiss it in part.

The IFB, as amended, required bidders to furnish a cone calorimeter of the brand name Custom Scientific CS-237-W, or

its equal, and listed 12 salient characteristics that the calorimeter must possess. The IFB included a "brand name or equal" clause which informed prospective bidders that bids offering "equal" cone calorimeters would be considered for award if the products were clearly identified and were determined to meet fully the salient characteristics requirements referenced in the solicitation. The brand name or equal clause also required that bidders offering an equal product submit with their bids all descriptive material necessary for the contracting office to determine whether the product offered met the salient characteristics. The clause cautioned that the contracting office was not responsible for locating or securing any information which was not identified in the bid and reasonably available to the contracting office.

NASA received two bids by the June 13, 1991 bid opening date. VTEC, offering an equal product, was the apparent low bidder, and Atlas was second-low. When it was not apparent from a review of VTEC's bid how VTEC's product would satisfy the IFB's salient characteristics, NASA contacted VTEC by telephone for an explanation. VTEC submitted a letter detailing its responses. After reviewing VTEC's letter, NASA rejected VTEC's bid as nonresponsive for failure to show compliance with five salient characteristics, including a remote handset. NASA then made award to Atlas, the next low bidder, based on its offer of the brand name product.

VTEC protests that NASA should have requested additional literature or information concerning the perceived deficiencies in VTEC's bid and literature, implying that sufficient data could have been furnished. VTEC argues that the fact that it described only some of the salient features didn't mean it wouldn't supply information addressing the other salient features.

To be responsive to a brand name or equal IFB, a bid offering an equal product must conform to the salient characteristics of the brand name product listed in the solicitation. T & T Products, Inc., B-243895, Aug. 7, 1991, 91-2 CPD ¶ 139. A bidder must submit with its bid sufficient descriptive literature to permit the contracting agency to assess whether the equal product meets all the salient characteristics. CNC Company, B-239328, July 30, 1990, 90-2 CPD ¶ 86. Where descriptive literature is required to establish the bid's conformance with the specifications, and bidders are so cautioned, the bid must be rejected if the literature submitted fails to show clearly that the offered product conforms to the specifications. Wright Tool Company, B-242800; B-242800.3, May 30, 1991, 91-1 CPD ¶ 522.

VTEC's bid and literature clearly did not demonstrate that its offered equal product met all of the salient characteristics specified in the IFB. For example, VTEC's literature did not provide for a remote handset, a requirement listed in the salient characteristics.

Contrary to VTEC's position, there was no basis for NASA to assume that the firm's offered product met all of the salient characteristics. As the solicitation specifically stated, it was VTEC's responsibility to identify the salient characteristics in the IFB and assure that the literature furnished with its bid, or the bid itself, clearly indicated conformance with those characteristics. Although VTEC contends that NASA should have been more expansive in its request for additional information, agencies should avoid post-bid opening inquiries of bidders for supporting data which may affect bid responsiveness, which is to be determined based on the contents of the bid as of opening. Joaquin Mfg. Corp., B-240777, Dec. 18, 1990, 90-2 CPD ¶ 498. Accordingly, since the acceptability of the equal product was to be determined on the basis of descriptive literature submitted with the bid, and since the material submitted by VTEC did not show conformance of the product offered with the specified salient features, NASA properly rejected VTEC's bid as nonresponsive.

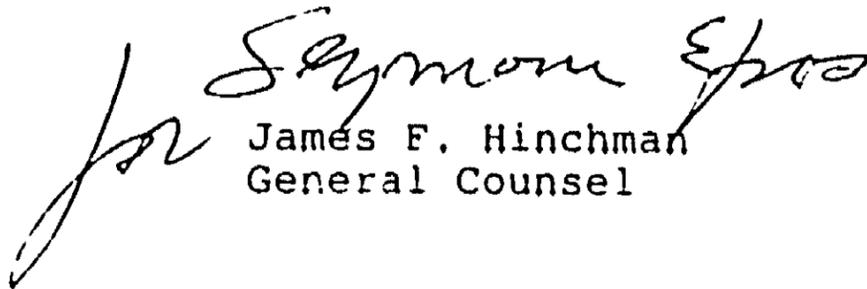
VTEC also protests that the IFB listed a competitor's brand name product rather than generic specifications provided by the National Institute of Standards and Technology; that the brand name product did not include the salient features listed; that an IFB amendment changed the brand name model from a CS-237 to a CS-237-V without including drawings; and that the amendment did not extend the bid opening date. We dismiss these protest allegations, filed after award, as untimely. Alleged solicitation improprieties, such as these, must be protested prior to bid opening in order to be considered timely filed. 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991); Allentown Caging Equipment Co., Inc., B-240494, Nov. 5, 1990, 90-2 CPD ¶ 365. The purpose of our timeliness requirements for protests of alleged solicitation improprieties is to enable the procuring agency or our Office to decide an issue while it is most practicable to take effective action where the circumstances warrant. Hersha Enterprises Ltd., t/a Quality Inn-Riverfront, B-244863, July 25, 1991, 91-2 CPD ¶ 93.

In its comments on the agency report, VTEC asserts that it is a small business located in a labor surplus area, implying that NASA should have given its bid special consideration on this basis. Such consideration would have been improper, however, since the solicitation was issued on an unrestricted basis with no preference for labor surplus area concerns. Any objection to the unrestricted nature of the

procurement and the absence of a preference for small business area concerns should have been raised prior to bid opening. 4 C.F.R. § 21.2(a)(1), SUCRA; Cascade Industrial Health, B-232902, Feb. 6, 1989, 89-1 CPD ¶ 119.

Finally, VTEC states that its bid was substantially lower than the awardee's. However, it would be improper for NASA to accept VTEC's nonresponsive bid even if it would result in a lower price because to do so would compromise the integrity of the competitive bidding process. Associated Mechanical, Inc., B-243892, Aug. 23, 1991, 91-2 CPD ¶ 192.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel