



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: General Projection Systems, Inc.

File: B-246068

Date: January 28, 1992

Douglas R. Duberstein, Esq., Hogan & Hartson, for the protester.
 Dean L. Grayson, Esq., Arent, Fox, Kintner, Plotkin & Kahn, for Design & Production, Inc., an interested party.
 George N. Brezna, Esq., and Sandra M. Desbrow, Esq., Western Area Counsel Office, United States Marine Corps, for the agency.
 Peter A. Iannicelli, Esq., and Jerold D. Cohen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Invitation for bids (IFB) clearly conveyed to bidders that only bids offering the brand name items of equipment listed in the IFB would be considered responsive, where IFB: (1) specifically stated that the contractor must furnish the major items of equipment listed by brand name and model; (2) did not include brand name or equal clause or any other reference to bids based upon alternative items of equipment; (3) did not list the salient characteristics of the brand name equipment listed in IFB; and (4) did not include any space to state the brand name/model or request descriptive literature for offers of alternative equipment.

2. Where the protester submitted a bid offering major items of equipment other than the brand names/models that were listed in the invitation for bids (IFB), but the IFB specified that the contractor must furnish the major items of equipment listed by brand name and model, the bid was properly rejected as nonresponsive because it did not represent an offer to supply the exact thing required by the IFB.

3. Where bid represented an unqualified offer to do work and supply equipment in accord with the invitation's material requirements, the bid properly was found responsive, and its acceptance obligated the bidder to meet those requirements. Whether the bidder is capable of doing so involves the firm's responsibility, a matter that GAO generally does not review where, as here, the contracting agency finds the bidder responsible.

DECISION

General Projection Systems, Inc. (GPS), protests the United States Marine Corps' rejection of its bid as nonresponsive and award of a contract to Design and Production, Inc. (D&P), under invitation for bids (IFB) No. M00681-91-B-0052 for an audiovisual system. GPS contends that its bid, offering certain audiovisual equipment that it says is equal to the brand name equipment listed in the IFB, is responsive because the IFB is a brand name or equal procurement. Alternatively, GPS argues that, if the Marine Corps' interpretation that the IFB is a brand name only solicitation is correct, then the IFB is ambiguous as it is susceptible to two reasonable interpretations--brand name only and brand name or equal--and the requirement should be resolicited. GPS also asserts that D&P's bid should be rejected as nonresponsive, because D&P cannot provide some of the brand name equipment as it no longer is being manufactured.

We deny the protest.

Issued by the Contracting Division, Marine Corps Base, Camp Pendleton, California, on August 1, 1991, the IFB solicited bids for engineering, design, fabrication, assembly, and installation necessary to develop a complete audiovisual system for use in various buildings of the School of Infantry. The IFB contained several attachments that included diagrams of the facilities in which the system would be located, specifications, and audiovisual equipment lists.

The training facility was constructed under an earlier contract using plans and specifications that had been developed in consultation with architectural firms and audiovisual specialists based upon using certain major items

of audiovisual equipment.¹ The contracting officer submitted a justification and obtained approval to use brand name specifications under the authority of 10 U.S.C. § 2304(c)(1). See Federal Acquisition Regulation (FAR) § 6.302-1(c). The justification and approval stated that it was extremely important that only the brand names be procured because the facility was constructed based upon the weights, power requirements, projection throw distances, control panels, ceiling and wall mounted support brackets, sound levels based upon student loads, lighting intensities, etc., of the brand name equipment.

A site visit was conducted on August 20, 1991, and representatives of the three firms that ultimately submitted bids were present. When bids were opened on September 6, GPS' bid of \$305,201 was the apparent low bid. However, GPS's bid included a cover letter and enclosures which indicated that GPS intended to provide major items of audiovisual equipment that were "equal to or better than" the items specified in the attachments to the IFB. Accordingly, the contracting officer rejected GPS' bid as nonresponsive and made award to D&P at a price of \$352,000 on September 26. GPS filed its protest with our Office on October 4.

GPS first contends that the IFB was a brand name or equal solicitation and, therefore, its bid listing some items of equipment that were different from but equal to the equipment listed in the IFB attachments was responsive. GPS points out that the IFB referred to "recommended equipment specifications" in paragraph C.12.2. GPS also points out that the IFB stated on page 2:

"Contractor shall provide all system engineering, design, fabrication, assembly, installation necessary to develop and complete audiovisual systems described herein, Engineering and design shall include, but not be limited to, the Equipment Lists"

GPS asserts that these two statements clearly demonstrate that bids of listed brand name items or their equals would be considered responsive.

We find no legal merit in the protest. The equipment lists stated the brand name and model number for each major item of audiovisual equipment to be provided, and did not state that alternative items of equipment would be considered.

¹Due to budgetary constraints, the audiovisual systems had been deleted from the initial construction project. However, after construction of the school was completed, funds were obtained to procure the audiovisual systems.

Moreover, the IFB warned bidders that only the listed brand names/models would be considered acceptable:

"NOTE: THE EQUIPMENT THAT IS LISTED IN THE ATTACHMENTS THAT IS TO BE FURNISHED BY THE SUCCESSFUL CONTRACTOR SHALL BE THE BRAND NAME INDICATED IN THE ATTACHMENTS."

Nowhere did the IFB state that the procurement was being conducted on a brand name or equal basis. Furthermore, the IFB did not include the standard "Brand Name or Equal" clause which, among other things, requires offerors to include descriptive literature with their bids so that the procuring agency can evaluate alternative items for acceptability. Department of Defense Supplement to the Federal Acquisition Regulation (DFAR) § 210.004(b)(3)(ii)(B) and § 252.210-7000. The IFB also did not contain specifications identifying physical, functional or other characteristics (i.e., salient characteristics) for each of the items of equipment listed as would have been required by the FAR and the DFAR if bids were in fact being solicited on a brand name or equal basis. FAR § 36.202(c); DFAR § 210.004(b)(3)(i)(B). In addition, the IFB did not request manufacturers' names, brand names and model numbers for bids based on use of equal equipment as would have been required by DFAR § 210.004(b)(3)(ii)(A) had this been a brand name or equal procurement.

Notwithstanding the fact that the IFB referred to "recommended equipment"² and required some engineering and design work involving the listed equipment, the solicitation must be read as a whole and in a manner that gives effect to all of its provisions. National Projects, Inc., 69 Comp. Gen. 229 (1990), 90-1 CPD ¶ 150. We think it should have been clear to all bidders from reading the entire IFB that the Marine Corps did not intend to accept bids of other than the brand name equipment listed in the IFB.³ In view of the express requirement for furnishing the brand name items listed in the attachments; the total absence of any reference to brand name or equal in the IFB; and the fact that the IFB included none of the standard clauses, submission requirements, or evaluation provisions associated with brand name or equal procurements, we find unreasonable

²The Marine Corps says that the use of "recommended" was a mistake, and that "required" should have been used instead.

³In this regard, the Marine Corps asserts that a representative of GPS was present at the pre-bidding site visit when the agency representative responded to another bidder's question by stating that only the brand name items listed were to be offered. GPS denies having heard this discussion.

GPS' interpretation of the IFB as allowing bids using alternative equipment.

To the extent that GPS charges that the IFB was ambiguous because the term "recommended equipment" and the requirement for engineering and design work were inconsistent with the IFB's express brand-name bidding requirement, GPS should have requested clarification from the contracting officer before bid opening. In any event, as this alleged solicitation defect was apparent from reading the IFB, but GPS did not protest before bid opening, this issue of the protest is untimely. 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991).

In view of our finding that the IFB required bidders to offer only the brand name items of equipment that were listed in the IFB attachments, we next find that the Marine Corps properly rejected GPS' bid.

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 IFB's material terms and conditions. Westec Air, Inc., B-230724, July 18, 1988, 88-2 CPD ¶ 59. Where a bidder provides information with its bid that modifies or takes exception to an IFB's requirements, the bid must be rejected as nonresponsive. Northwestern Motor Co., Inc., B-244334, Sept. 16, 1991, 91-2 CPD ¶ 249.

Here, GPS's bid included a cover letter, an executive summary, and lists of the products GPS was recommending, as well as the standard bid forms provided as part of the IFB. In its cover letter, GPS stated that it was providing the Marine Corps with a "proposal." In its executive summary, GPS stated:

"Wherever possible or feasible, General Projection has recommended equipment of greater reliability and 'user-friendliness' at a minimum in conjunction with a better value to the Corps."

GPS's executive summary also contained a section entitled "MAJOR EQUIPMENT DISCUSSION" wherein GPS described the major items of audiovisual equipment it was offering and explained why it was offering those alternative items of equipment instead of the brand names and models listed in the IFB.

The Marine Corps properly rejected GPS's bid as nonresponsive, because GPS did not offer to furnish the equipment listed by brand name and model number in the IFB. The IFB clearly warned all bidders that their bids must be based upon furnishing the listed brand name models only. In essence, GPS's bid attempted to modify the IFB's

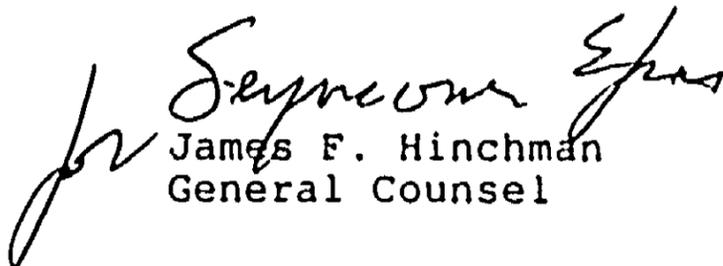
requirements concerning the major items of audiovisual equipment. As GPS's bid was not an unequivocal offer to provide the exact thing called for in the IFB, acceptance of the bid would not bind GPS to the IFB's material terms and conditions, and the bid was properly rejected as nonresponsive. Northwestern Motor Co., Inc., B-244334, supra.

Finally, GPS argues that, if the IFB truly requires only the brand name products listed in the attachments, then D&P's bid also should have been rejected as nonresponsive. Specifically, GPS asserts that three of the brand name products listed in the IFB's equipment lists are not available in the marketplace.

As previously stated, a responsive bid is an unequivocal offer to provide the exact items called for in the IFB. Here, D&P's bid only set forth prices to do the various items of work set out in the IFB without taking any exceptions to the specifications, indicating that D&P would be obligated to do the work and furnish the listed equipment if the Marine Corps accepted its bid. As D&P's bid represented an unqualified offer to do the work and supply audiovisual equipment in accord with all material requirements, D&P's bid is responsive. See Hicklin GM Power Co., B-222538, Aug. 5, 1986, 86-2 CPD ¶ 153.

The Marine Corps reports that the listed brand names/models were available when the IFB was issued. The Marine Corps concluded that even if some of the models are no longer being manufactured, D&P would still be able to obtain them in the marketplace, and the contracting officer made an affirmative determination regarding D&P's responsibility. Since the determination of a prospective contractor's responsibility involves a wide degree of discretion and business judgment, our Office will not review the Marine Corps' determination absent a showing of possible fraud or bad faith on the part of the contracting agency or an alleged failure of the agency to apply definitive responsibility criteria. Diversified Computer Consultants, B-230313; B-230313.2, July 5, 1988, 88-2 CPD ¶ 5.

The protest is denied.


James F. Hinchman
General Counsel