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Van Schaik



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

Decision

Matter of: Aidco, Inc.
File: B-249736; B-249736.2
Date: December 11, 1992

Joseph J. Petrillo, Esq., Petrillo & Hordell, for the protester.
Maj. Bobby G. Henry, Jr., Esq., Department of the Army, for the agency.
John Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the rejection of a bid as nonresponsive on the basis that descriptive literature submitted with the bid failed to establish that the offered equipment conformed to the specifications is sustained where the solicitation effectively did not require descriptive literature, and the bid did not take exception to any of the solicitation's requirements.

DECISION

Aidco, Inc. protests the rejection of its low bid and the subsequent award of a contract to Hicklin Engineering, Inc. under invitation for bids (IFB) No. DAKF03-92-B-0026, issued by the Army for a transmission testing machine, associated equipment, manuals and hydraulic fluid. Aidco argues that its bid was improperly rejected as nonresponsive.

We sustain the protest.

The IFB included a series of mandatory technical specifications, installation, warranty and maintenance requirements. The mandatory specifications included the following provisions at §§ C.2.13 and C.2.16, respectively:

"Transmission support frame to be fabricated of steel frame construction capable of supporting mount overhung weight of the largest series of Allison transmission without support legs.

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"Load unit to be self-contained; not using a support tank to minimize floor space required."

The IFB also included at § L.19, the standard descriptive literature clause as set forth at Federal Acquisition Regulation (FAR) § 52.214-21, which dictated that bids be accompanied by descriptive literature as "required elsewhere in this solicitation." The clause defined such literature as information necessary to establish, for the purpose of evaluation and award, the significant details of the product offered "that are specified elsewhere in the solicitation." The clause also cautioned that failure of the descriptive literature to show that the product offered conformed to the IFB's requirements would result in rejection of the bid. Other than this FAR clause, the IFB included one other provision that mentioned descriptive literature. That provision, at § M.8, stated:

"Failure to provide descriptive literature as required by Section L of this solicitation may cause an offer to be rejected as non-responsive. Failure of descriptive literature to show that a product offered conforms to solicitation requirements may cause the offer to be rejected as non-responsive."

In response to the IFB, the agency received a bid from Aidco at \$80,745, and one from Hicklin at \$84,687. Before award was made, Hicklin complained to the contracting officer that Aidco's bid was nonresponsive because it failed to meet four of the solicitation requirements, including §§ C.2.13 and C.2.16. After reviewing Hicklin's concerns, the agency decided that Aidco's bid was responsive and awarded the contract to that firm as the low responsive and responsible bidder. After the award, Hicklin protested to the contracting officer arguing again that Aidco's bid failed to meet mandatory solicitation requirements, including §§ C.2.13 and C.2.16. Upon further review, the Army decided that Aidco's bid was nonresponsive "because the descriptive literature does not address" §§ C.2.13 and C.2.16. The contracting agency therefore terminated Aidco's contract and made award to Hicklin.

Aidco argues that the Army improperly rejected its bid as nonresponsive since the transmission testing machine which it offered, its Model 450 (Hi-Power Version), met all of the solicitation requirements. Specifically, with respect to § C.2.13, Aidco maintains that its Model 450 is fabricated of a steel frame construction capable of supporting mount overhung weight of the largest series of Allison automatic transmissions without support legs. In addition, Aidco argues that its equipment complied with § C.2.16 since the Model 450 uses the main reservoir located in the

cabinet/power unit assembly to supply necessary oil to the load unit. Aidco also argues that the descriptive literature included with its bid, which included its commercial brochure for the Model 450, is not in conflict with any of the solicitation requirements, including §§ C.2.13 and C.2.16, and does not qualify any section of its 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 solicitation's material terms and conditions. Data Express, B-234685, July 11, 1989, 89-2 CPD ¶ 28. Where descriptive literature is required to be supplied for use in the bid evaluation, a bid may be rejected as nonresponsive if the bid and the data submitted with the bid do not clearly show that the offered product complies with the specifications. Id.

The purpose of a descriptive literature clause is to require information showing the characteristics, construction, or operation of a product that affirmatively establishes conformance with solicitation requirements. The applicable regulation requires that solicitations requiring descriptive literature clearly state "what descriptive literature is to be furnished" and "the purpose for which it is required." FAR § 14.202-5(d)(1). For this reason, the standard descriptive literature clause, which was included in this IFB, refers to literature "required elsewhere in this solicitation" and the need for the literature to establish "details of the product offered that are specified elsewhere in this solicitation." FAR § 52.214-21. Where the IFB fails to alert bidders as to what specific literature is required and for what purpose it is required, the standard descriptive literature clause is rendered inapplicable. Futura Sys., Inc., 70 Comp. Gen. 365 (1991), 91-1 CPD ¶ 327.

While § M.8 mentions descriptive literature, that provision included only general advice regarding the requirement for descriptive literature and, in fact, was essentially a restatement of a portion of the standard FAR descriptive literature clause already included at § L.19 of the solicitation.¹ While both the FAR descriptive literature clause and § M.8 stated that bids could be rejected for

¹The FAR clause does not operate independently. Since it refers to "[d]escriptive literature, required elsewhere in this solicitation," that clause operates together with other solicitation requirements for the literature, and without such further guidance the clause is effectively meaningless. International Mailing Sys., Inc., B-246214, Feb. 25, 1992, 92-1 CPD ¶ 224.

failing to provide descriptive literature showing that a product offered conforms to "solicitation requirements," neither provision included a list of the particular requirements for which descriptive literature was required or a description of what type of literature was needed. This omission left to the speculation of bidders the type of descriptive literature required and the specifications for which the agency needed the literature. The specifications listed in the IFB pertain to such diverse matters as the dimensions and design of the test machine and its installation, warranty and maintenance. We note in this connection that there is no indication in the evaluation record that the agency evaluators were at all concerned whether the literature submitted showed compliance with the solicitation's warranty and maintenance requirements. Futura Sys., Inc., supra; International Mailing Sys., Inc., supra. In situations such as this, where the solicitation does not describe the use and application of descriptive literature, any literature actually furnished need not address any specific requirement, but is treated as "unsolicited" literature in bid evaluation. Id.

Unsolicited literature such as that submitted by Aidco 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. FAR §§ 14.202-5(f) and 14.202-4(g); International Mailing Sys., Inc., supra; Brown Boveri Elec., Inc., B-209338, Apr. 1, 1983, 83-1 CPD ¶ 342. Thus, although the IFB here did not include a valid requirement to submit descriptive literature for bid evaluation, the agency had a duty to ensure that the literature submitted did not evidence the bidder's intent to qualify its bid.

Here, the agency rejected Aidco's bid as nonresponsive to two specifications: § C.2.13, which required that the transmission support frame be capable of supporting the largest series of Allison transmission without additional support legs, and § C.2.16, which required the load unit to be self-contained and not use a support tank. The agency states that "it was unclear as to whether the protester met the specifications; no information on these points was listed in the descriptive literature provided by Aidco."²


²Specifically, with respect to § C.2.13, the Army's technical evaluators state that the text and pictures and diagrams in Aidco's descriptive literature did not show that "the transmission is mounted without support legs." With respect to § C.2.16, the evaluators state that the text and pictures and diagrams in Aidco's descriptive literature "did not specify, nor could it be determined from them, that their test machine met this specification."

Thus, the agency rejected Aidco's bid because the descriptive literature included in the bid failed to affirmatively show compliance with the two specification requirements. However, the test of unsolicited literature is whether it establishes that the bidder intended to qualify its bid, FAR §§ 14.202-5(f) and 14.202-4(g); International Mailing Sys., Inc., supra; Brown Boveri Elec., Inc., supra. We conclude that Aidco's bid was responsive since there is no indication in the descriptive literature or elsewhere in the bid that Aidco intended to qualify its bid. With respect to § C.2.13, the agency has referenced nothing in Aidco's bid, or the enclosed commercial brochure, that shows that the equipment needs additional support legs for the transmissions which the Army will service under the contract. The commercial brochure included with Aidco's bid includes three photographs of the offered equipment. Although two of those photographs depict transmissions attached to the test equipment with additional support legs, the protester asserts that the pictured transmissions are not among those which were listed in the solicitation as those which were to be serviced by the Army and the agency does not argue that those photographs show that Aidco had qualified its bid in this respect.

With regard to § C.2.16, which required that the load unit not have a separate support tank, the agency's technical evaluator explains that the photographs in Aidco's commercial brochure "do not show load unit to be self-contained, but shows the hydraulic support tank as an ancillary item." The support tank referred to is an "Oil Preheat and Supply Cart," depicted in one of the photographs. As Aidco points out, the brochure states that this is an optional feature, which was not required by the IFB and which was not offered by Aidco. Thus, here again, nothing in Aidco's bid took exception to the requirement.

For the reasons set forth above, we conclude that Aidco's bid was improperly rejected as nonresponsive and we therefore sustain the protest.

As a result, we recommend that the agency terminate its contract with Hicklin and award the requirement to Aidco, if otherwise appropriate. In addition, we find that Aidco is entitled to recover the costs of filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1992). Aidco should submit its claim for such costs directly to the agency.


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