



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

Decision

Matter of: Canon U.S.A., Inc.--Reconsideration
File: B-249521.2
Date: March 10, 1993

Andrew Mohr, Esq., Cohen & White, for the protester.
Christine F. Bednarz, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Request for reconsideration is denied where request primarily repeats the protester's interpretation of a solicitation provision that allegedly entitled it to a waiver of a bid sample requirement, and the initial decision denying the protest considered and rejected the protester's interpretation.

DECISION

Canon U.S.A., Inc. requests reconsideration of our decision in Canon U.S.A., Inc., B-249521, Dec. 2, 1992, 92-2 CPD ¶ 388, in which we denied its protest against the rejection of its bid as nonresponsive on various line items under invitation for bids (IFB) No. FCGE-B1-92-0107-S, issued by the General Services Administration (GSA), for the purchase of microfiche readers and microfiche reader-printers. In that decision, we found that GSA properly rejected Canon's low bid, since the bid omitted the bid sample required by the IFB and the agency properly did not waive this omission because it was unable to determine that the previously accepted product met the IFB requirements.

We deny the request for reconsideration.

In its reconsideration request, Canon argues that our decision was based upon an erroneous interpretation of the IFB's bid sample waiver provision, which states:

"At the discretion of the Contracting Officer, the requirement for furnishing bid samples has been waived for a bidder if (1) the bid states that the offered product is the same as a product offered by the bidder to the previous Solicitation

No. FCGE-B8-90-0012-N¹¹ and (2) the Contracting Officer determines that the previously offered product was accepted or tested and found to comply with specifications and other requirements for technical acceptability conforming in every material respect with those in the above referenced solicitation."

As discussed in our prior decision, the contract specialist advised Canon, prior to bid opening, that it need not supply a bid sample if Canon offered the same product that had been accepted and tested. Canon argued that the contract specialist therefore waived the requirement for a bid sample, which could not later be revoked, even if the agency discovered a material discrepancy between the offered product's stated features and the IFB requirements. According to Canon, the IFB bid sample clause made the agency's previous acceptance of the product sufficient to justify a waiver of the bid sample requirement.

We disagreed. We reasoned that an agency must decide at the time of bid opening, not before, whether a waiver of a bid sample requirement is appropriate, and that the IFB waiver clause required not only that the bidder offer a previously accepted product, but that the previously accepted product be found to conform in every material respect with the IFB specifications and other requirements for technical acceptability. Since GSA did not expressly determine that Canon's previously offered product complied with the specifications on the 1991 procurement, we found that Canon could not reasonably believe that its product was entitled to a predetermined, mandatory waiver of the bid sample requirement, where the agency was given reason to believe, after bid opening, that the offered product may not meet a specification requirement.

In its reconsideration request, Canon primarily repeats its arguments that the agency's previous acceptance of its product for the 1991 procurement amounts to a determination that its product was technically acceptable, so as to justify a waiver of the bid sample requirement. However, the determination of technical compliance required by the clause is distinguished from, and in addition to, a finding that the product had been previously accepted. In this regard, the clause clearly requires both (1) acceptance or testing of the product and (2) compliance with the specifications and other requirements for technical acceptability.

¹Solicitation No. FCGE-B8-90-0012 was the 1991 acquisition of these items.

Canon's product had been accepted under the previous contract, but had not been expressly found technically acceptable because GSA had simply granted Canon's request for a waiver of the bid sample requirement that year. Under the circumstances, we think that the clause placed the risk upon Canon that withholding a bid sample might render its bid nonresponsive if the contracting officer could not conclude that the previously accepted product complied with the specifications.

Canon argues that the contract specialist's pre-bid opening advice constituted a waiver of the bid sample requirement. We disagree. Under the terms of the bid sample clause, the agency may only waive the bid sample requirement as of bid opening if (1) the agency has previously accepted or tested the product and (2) has found the product compliant with all material requirements during the course of that acceptance or testing. The bid sample clause only permits the bidder to anticipate, before bid opening, that the requirement for furnishing a bid sample "has been waived" if both these conditions are met. If the agency has not previously determined that the offered product is technically compliant with the IFB specifications, as is the case here, then the agency must determine, based on the information available as of bid opening, whether a waiver of the bid sample requirement is appropriate.² Here, Canon's bid and other descriptive literature in GSA's contract files reasonably suggested that Canon's offered model may not meet a listed salient characteristic, that requiring 360 degree image rotation.³ Under

²This interpretation of the bid sample clause is consistent with the fundamental principle that bid responsiveness is to be judged as of bid opening and that government officials cannot waive their responsibility to reject a nonresponsive bid. See A.D. Roe Co., Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD ¶ 194; Custom Training Aids, Inc., B-236755, Jan. 5, 1990, 90-1 CPD ¶ 20; Surgical Instr. Co. of Am., B-213591, Apr. 17, 1984, 84-1 CPD ¶ 433 (decisions on waivers of bid sample requirements made after bid opening); LM&E Co., Inc., 61 Comp. Gen. 496 (1982), 82-1 CPD ¶ 603 (decision to waive first article requirements should be made after bid opening).

³Canon does not dispute that the descriptive literature submitted with its bid stated that the model had a 90 degree image rotation or that the other literature reviewed by the contracting officer also suggested this model lacked 360 degree rotation. Instead, Canon references a GSA letter recognizing the acceptability of Canon's equipment on the 1989 procurement for this equipment. As discussed in depth in our prior decision, the Canon descriptive literature

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the circumstances, GSA reasonably determined that it should not waive the bid sample requirement and should therefore reject Canon's bid as nonresponsive.

Canon's reconsideration request also revisits various other arguments raised and considered in its initial protest, e.g., whether GSA was justifiably concerned about the responsiveness of Canon's bid where the bid included literature evidencing non-compliance with the IFB requirements, whether an agency may refer to documentation outside of the bid to determine the appropriateness of waiving the bid sample requirement, and whether an agency may consider evidence submitted by the bidder after bid opening to determine responsiveness. Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must show that our prior decision may contain either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. Since Canon's additional arguments were made and considered at the time of its original protest, we decline to reconsider them now simply because Canon disagrees with our decision. R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274.

The request for reconsideration is denied.


for James F. Hinchman
General Counsel

³(...continued)

reasonably suggested that its model may have changed since the 1989 procurement, such that waiver of the bid sample requirement was no longer justified.