



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Maintenance and Repair

File: B-251223

Date: March 19, 1993

G. Michael Van Alstine for the protester.
Theresa Young, Esq., Department of the Navy, for the agency.
Christine F. Bednarz, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Protest to the General Accounting Office is timely filed under the Bid Protest Regulations where it is filed within a reasonable time after an agency had an opportunity to respond, but did not respond, to a timely agency-level protest.
2. Bid for chemical sealant, whose descriptive literature did not show that the offered product met the invitation for bid requirements regarding adhesion, set-time or self-application, was properly rejected as nonresponsive under the solicitation's descriptive literature clause.
3. Where agency properly rejects the low bid as nonresponsive, the low nonresponsive bidder is an interested party to protest, as a matter of equal treatment, that the agency should have rejected the awardee's bid as nonresponsive for the same reasons that the protester's bid was rejected, even though other bidders were in line for award if protest were sustained.
4. Bid for chemical sealant is nonresponsive where the required descriptive literature does not demonstrate compliance with the invitation for bid requirements that the sealant bond to asphalt or surfaces previously coated with lead-based paint; the fact that the bid took no exception to these requirements does not satisfy the descriptive literature requirement to provide sufficient data to demonstrate compliance with the requirements.

DECISION

Maintenance and Repair protests the rejection of its bid and the award of a contract to Terradyne Environmental Services, Inc., under invitation for bids (IFB) No. M00681-92-B-0042, issued by the United States Marine Corps, Oceanside, California, for a quantity of chemical sealant.

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

The IFB required bidders to furnish descriptive literature with their bids establishing the offered product's compliance with the IFB requirements and warned that failure to so establish the product's compliance would require the bid's rejection. The IFB set forth 13 requirements that the chemical sealant must satisfy. Of relevance to this protest, the IFB required sealant that: (1) encapsulated surfaces previously painted with lead-based paint; (2) bonded with asphalt, concrete and steel surfaces; (3) hardened within a maximum 6-hour "set-time"; and (4) was easy to apply by brush, roller or squeegee. An amendment to the IFB further clarified that the government intended to apply the sealant to a concrete floor and an asphaltic parking lot, and that the sealant would be applied by the government using in-house personnel.

Six bidders responded by the September 2, 1992, bid opening date. The protester submitted the apparent low bid at \$38,662.80; RJ Corporation submitted the second-low bid at \$39,193.50; and Terradyne submitted the third-low bid at \$39,512.60. The agency evaluated the descriptive literature accompanying each of these bids. On the basis of this evaluation, the agency determined that the protester's bid was nonresponsive because its descriptive literature failed to show that the offered sealant, "Polafloor P.U.R. Thin Set," complied with the four IFB requirements listed above with regard to adhesion, set-time, and self-application. The agency also rejected RJ Corporation's bid for deficient descriptive literature. Terradyne's descriptive literature satisfied the agency that its offered sealant, "Ultra Bloc," complied with all IFB requirements. On September 18, the agency made award to Terradyne as the low, responsive bidder.

By letter dated September 18, 1992, the agency notified Maintenance and Repair of the rejection of its bid and the award to Terradyne. The rejection notice stated that the protester's Polafloor sealant did not comply with the specifications, but did not give any specific reasons for this determination. By letter dated September 23, 1992, the protester advised the agency that it disagreed that its product was unacceptable and that it refused to "accept [the

agency's) brief explanation for awarding a contract to a higher bidder." Maintenance and Repair further advised the agency in that letter that it would forward a copy of "this protest letter" to the General Accounting Office (GAO) for review. The protester also provided the agency with a copy of its GAO protest letter, which also opposed the rejection of its bid for no stated reason. The agency did not respond to Maintenance and Repair's protest letter.

Our Office did not receive Maintenance and Repair's correspondence at that time,¹ but first received correspondence from Maintenance and Repair on November 4. In this protest letter, Maintenance explained that it recently learned that GAO had never received a copy of the September 23 protest, which it was now resubmitting since the agency had ignored its agency-level protest.

The agency requests that we dismiss Maintenance and Repair's protest as untimely, since it was not filed within 10 days of September 18, when the agency advised the protester of the rejection of its bid. See 4 C.F.R. § 21.2(a)(2) (1992). Where, as here, the protester elects to file a timely agency-level protest,² the time for filing at our Office begins to run with the protester's receipt of actual or constructive knowledge that the agency has acted adversely to its protest. 4 C.F.R. § 21.2(a)(3). Here, the agency admits that it ignored Maintenance and Repair's September 23 agency-level protest. Since an agency's failure to respond to a protest is itself an adverse action, see Sterling Env'tl. Servs., Inc., B-234768, May 12, 1989, 89-1 CPD ¶ 455, a subsequent protest to our Office, filed after the agency has had reasonable time to respond to the agency-level protest, is timely. See Mobility Sys. and Equip. Co., B-243332, Apr. 25, 1991, 91-1 CPD ¶ 412. We therefore find Maintenance and Repair's protest is timely.

We agree with the agency that Maintenance and Repair's descriptive literature did not show compliance with the IFB requirements. For example, Maintenance and Repair's

¹Maintenance and Repair speculates that its September 23 protest to our Office may have been lost in the mail.

²Contrary to the agency's apparent belief, Maintenance and Repair's September 23 letter to the agency was clearly an agency-level protest, disputing the agency's determination of its nonresponsiveness and the resulting decision to award to a higher bidder. While the protest is terse, its brevity is attributable to the agency's failure to advise the protester of the reasons for its bid's rejection. See Universal Techs. Inc.; Spacecraft, Inc., B-248808.2 et al., Sept. 28, 1992, 92-2 CPD ¶ 212.

literature does not address bonding to asphaltic surfaces; instead, it includes a product summary chart that lists several sealants, including Polafloor, and designates the substrates to which each sealant will bond. The chart indicates that Polafloor bonds to substrates such as concrete, but does not bond to substrates such as asphalt. The chart also reflects that Polafloor is for use on floors, not surfaces such as parking lots. In addition, the narrative description of Polafloor that accompanies the chart only mentions the sealant's "outstanding adhesion to concrete," without reference to asphalt-bonding.³ While the protester points to another section of the product literature stating that Polafloor "stands up to vehicular traffic and diverse industrial activities," this is insufficient to assure that it bonds to asphalt surfaces since vehicular and other activities occur on a variety of surfaces.

Maintenance and Repair's descriptive literature also contradicted the IFB's 6-hour set-time requirement, stating that Polafloor would not harden until 24 hours after application and that foot traffic could not resume before this time. Likewise, while the IFB required easy application of the sealant that was amenable to in-house use, the protester's literature cautioned that "only skilled coating applicators should use this product." Finally, the protester's descriptive literature did not address the sealant's adhesion to surfaces previously coated with lead-based paint.

Where, as here, an IFB requires descriptive literature to establish the offered product's conformance with the specifications, a bid accompanied by descriptive literature that fails to clearly show such conformance with the specifications must be rejected as nonresponsive. Joaquin Mfg. Corp., B-228515, Jan. 11, 1988, 88-1 CPD ¶ 15. Since the protester submitted descriptive literature that either contradicted or disregarded various IFB specifications, the agency properly rejected Maintenance and Repair's bid as nonresponsive, and this aspect of the protest is denied. See American Material Handling, Inc., B-250938, Mar. 1, 1993, 93-1 CPD ¶ ____; Wright Tool Co., B-242800; B-242800.3, May 30, 1991, 91-1 CPD ¶ 522.

In its comments on the agency report, Maintenance and Repair protests that if its bid is considered nonresponsive, the agency should have rejected Terradyne's bid as nonresponsive

³In contrast, the product summary chart identifies another sealant, Drivecoate, as suitable for asphalt-bonding on below-grade surfaces, and the accompanying narrative description underscores Drivecoate's use "for protection of blacktop driveways and parking lots."

because Terradyne's descriptive literature similarly failed to show compliance with the specifications.

In general, a nonresponsive bidder, such as Maintenance and Repair, is not an interested party eligible to protest an award to another firm where there are other apparently responsive bidders that would be in line for award if the protest were sustained. 4 C.F.R. §§ 21.0(a), 21.1(a); K & M Elec. Corp., B-247450, Apr. 23, 1992, 92-1 CPD ¶ 387. However, this rule does not apply where a bidder protests that it was denied equal treatment because the agency rejected its nonconforming bid while accepting a competitor's similarly nonconforming bid. NJCT Corp., B-224246, Feb. 13, 1987, 87-1 CPD ¶ 159; Raymond Corp., B-224577, Jan. 8, 1987, 87-1 CPD ¶ 36; Dillingham Ship Repair, B-218653, Aug. 14, 1985, 85-2 CPD ¶ 167. In other words, we view a protester as an interested party when the basis for protest is that the protester and one or more competitors were treated disparately. Dillingham Ship Repair, supra. Therefore, Maintenance and Repair is an interested party to argue that Terradyne's descriptive literature was defective just as its own literature was defective. Tel-Med Info. Sys., 66 Comp. Gen. 504 (1987), 87-1 CPD ¶ 561; NJCT Corp., supra; Raymond Corp., supra.

The protester argues that Terradyne's descriptive literature fails to show that its offered sealant, Ultra Bloc, complies with the IFB specifications requiring adhesion to asphalt and to surfaces previously coated with lead-based paint. We agree.

Terradyne's descriptive literature omits any information bearing upon Ultra Bloc's ability to bond with surfaces previously coated with lead-based paint--one reason given for the rejection of Maintenance and Repair's bid. While the agency argues that Terradyne's bid is nonetheless responsive because it did not take exception to the lead-based paint adhesion requirement, the IFB imposes an affirmative obligation upon the bidder to demonstrate compliance with the specifications through sufficiently detailed descriptive literature. The fact that Terradyne took no exception to the lead-based paint adhesion requirement does not satisfy this affirmative obligation. See BSC Indus., Inc., B-237299, Feb. 5, 1990, 90-1 CPD ¶ 152.

We also agree that Terradyne's descriptive literature fails to specify that Ultra Bloc will bond to asphalt--another reason that Maintenance and Repair's descriptive literature was found deficient. The awardee's descriptive literature included the results of adhesion tests between Ultra Bloc and a list of various substrates, not including asphalt.

Despite the absence of any descriptive literature in the bid claiming asphalt-bonding, the agency alleges that this capability is implicit in the literature's assurance that Ultra Bloc has excellent adhesion to most surfaces and that any adhesion failure is due to faulty substrate material, not Ultra Bloc. The difficulty with the agency's argument is that the literature never identifies the surfaces or substrates to which Ultra Bloc will bond. While the agency argues that Ultra Bloc's stated composition--a blended asphalt urethane--demonstrates that it will adhere to asphalt, it has provided no support for this contention.

Thus, while Maintenance and Repair's bid was nonresponsive, the agency should also have rejected Terradyne's bid as nonresponsive, and we sustain Maintenance and Repair's protest on this basis.

It is impracticable to recommend corrective action in this case, since delivery under the contract was required within 30 days of award. Because award was made to a nonresponsive bidder, as alleged by the protester, the protester is entitled to recover its costs of filing and pursuing the protest. 4 C.F.R. § 21.6(d). The protester is not entitled to its bid preparation costs, however, since it submitted a nonresponsive bid. The protester should submit its certified claim for costs directly to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is denied in part and sustained in part.

for Milton J. Foster
Comptroller General
of the United States