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

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Decision

Matter of: Tennessee Apparel Corporation

File: B-253178.3; B-253178.4

Date: September 21, 1993

Ronald K. Henry, Esq., Kaye, Scholer, Fierman, Hays & Handler, for the protester.
Frederic T. Rekstis, Esq., Kostos and Lamer, P.C., for Isratex, Inc., an interested party.
James L. Ropelewski, Esq., Department of Justice, for the agency.
Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where solicitation specifies either of two materials for manufacture of trousers and government is satisfied that both materials meet its needs and operational requirements, protester's argument that solicitation fails to state agency's minimum needs--because one material allegedly is in short supply and does not meet specifications--is essentially a contention that agency should have imposed more restrictive specification. General Accounting Office's role is to ensure that statutory requirements for full and open competition are met, not to protect the interest a protester may have in more restrictive specifications.

2. Agency reasonably exercised its discretion in deciding to use general, rather than special, standards of responsibility in solicitation for supply of materials and machines for manufacture of trousers.

3. Protest that agency-furnished clothing pattern and square inch table that are inconsistent and ambiguous, is denied where use of both items permits bidders to arrive at reasonable estimates of cloth necessary for cut garments.

4. Awardee's submission, under restrictive legend, of information bearing on responsibility matter did not violate requirements for public bid opening.

5. Where solicitation specifies brand name or equal items, but effectively does not require submission of descriptive literature, awardee's bid is responsive where it sufficiently identifies proposed items to allow agency to determine equality.

6. Awardee's submission of signed copies of amendments with its bid satisfies requirement that bidder acknowledge all amendments to solicitation.

DECISION

Tennessee Apparel Corporation (TAC) protests the solicitation terms and the award to Isratex, Inc., under invitation for bids (IFB) No. 1PI-B-0487-93, issued by Federal Prison Industries, Inc. (UNICOR), for the supply of cut garments and sealing tape, and the lease of tape sealing equipment. TAC challenges the sufficiency of the IFB for a number of reasons and argues that it is the low responsive bidder.

We deny the protest.

BACKGROUND

On March 16, 1993, UNICOR issued a solicitation for a firm, fixed-price contract for 140,712 cut garments of Extended Cold Weather Camouflage (ECWC) trousers, 1,070,000 yards of seam sealing tape, and the lease of 19 sets of tape sealing equipment, including installation, 100 hours of training, maintenance, and removal of the 19 sets. The IFB required that the garments be made of material that complies with the requirements of MIL-C-44187B "Cloth, Laminated, Waterproof and Moisture Vapor Permeable," (hereinafter "cloth specification") and meet the requirements of MIL-T-44189C, "Trousers, Cold Weather, Camouflage" (hereinafter "trouser specification"). The cloth specification lists two acceptable plastic films for use in the laminated material: microporous polytetrafluoroethylene film, known as Gore-Tex and manufactured by W. L. Gore and Associates, and polyolefin microporous membrane fully saturated with a hydrophilic urethane, developed by the 3M Corporation and known as Thintech.[1]

Immediately prior to the bid opening date, TAC protested the solicitation alleging that it: failed to state the agency's minimum needs as to its specification of Thintech and Thintech's ability to comply with operational requirements;

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[1]Thintech refers to both the camouflage cloth laminate based on the membrane and the membrane itself.

contained an ambiguity between the sample pattern and square inch table provided by the agency; failed to set out appropriate responsibility standards; and should have been conducted as a negotiated procurement.[2]

TAC and Isratex were among the four firms which submitted bids. TAC, which offered to supply Gore-Tex, was the highest bidder, while Isratex, which offered Thintech, was the low bidder. Based upon its review of Isratex's bid, TAC supplemented its protest to challenge the responsiveness of Isratex and the other bidders. Based upon a determination of urgent and compelling circumstances significantly affecting the interests of the United States, UNICOR subsequently awarded the contract to Isratex notwithstanding the pendency of the protest. TAC then protested the award essentially reiterating its earlier protest grounds.

MINIMUM NEEDS

TAC contends that the Gore-Tex cloth it proposes to use for the ECWC trousers is superior to Thintech and claims that the IFB fails to set forth UNICOR's actual minimum requirements because it permits the use of Thintech, which allegedly does not comply with certain operational requirements.[3] In particular, TAC argues that Thintech: will not meet the "no leakage" specification in conjunction with a cold-flex test; is subject to delamination (separation of the different cloth layers); and is subject

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[2]TAC also argued that the IFB had not indicated that UNICOR had an adequate power source and ventilation for the tape sealing machines. UNICOR amended the IFB to correct this matter prior to bid opening.

[3]TAC also argues that it is inappropriate to specify Thintech since neither 3M nor any other concern manufactures it any longer. While this is apparently so, UNICOR advises that the source identified by Isratex is a known supplier of the material and has been approved by the Defense Personnel Support Center (DPSC), UNICOR's customer for this purchase, as an acceptable source. TAC's speculation that Isratex's current contracts will exhaust its Thintech supply does not provide a basis for sustaining its protest.. Independent Metal Strap Co., Inc., B-231756, Sept. 21, 1988, 88-2 CPD ¶ 275.

to damage from heat during application of seam sealing tape.[4] TAC bases its arguments on various test results over the last several years which detail instances where Thintech passed and failed the specified tests.

The agency is required to specify its needs in a manner designed to promote full and open competition. See LaBarge Prods., Inc., B-232201, Nov. 23, 1988, 88-2 CPD ¶ 510. Restrictive provisions should only be included to the extent necessary to satisfy the agency's minimum needs. The contracting agency which is most familiar with its needs and how best to fulfill them must make the determination as to its needs in the first instance. Similarly, it must reasonably determine the type, and amount of testing necessary to ensure that a particular product will meet these stated needs. Constantine N. Polites & Co., B-239389, Aug. 16, 1990, 90-2 CPD ¶ 132.

Here, defining the requirements and testing necessary to determine the acceptability of various materials for use in the ECWC trousers is the responsibility of the U.S. Army's Natick Laboratories. The agency has advised our Office that notwithstanding a continuing controversy over the relative merits of Gore-Tex and Thintech, Natick is satisfied that Thintech meets all operational requirements. Natick's assessment was based in part on laboratory evaluations of Thintech which found the cloth met the specified operational requirements, and field tests from January to May 1990, which showed no difference between Thintech and Gore-Tex in performance and durability. Over the past 2 years, additional analysis and field testing, as well as laboratory tests on the latest Thintech production fabric from a DPSC procurement, show that the material meets all specification performance requirements.[5]

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[4]TAC also challenges the adequacy of a durability specification based on five wash/dry cycles. TAC observes that a Test and Evaluation Command independent assessor believes that more wash/dry cycles are required, while Natick engineers and technicians maintain that the current specification is sufficient. This information is taken from draft minutes of a Project Review Meeting which reflects that Natick is satisfied with the current five wash/dry cycle specification, and the apparent intra-agency disagreement does not provide a basis for finding the current specification unreasonable.

[5]In its latest protest, TAC asserts, on information and belief, that Natick is conducting further testing on Thintech which has or will demonstrate the material failure of Thintech. Apart from the speculative nature of these

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For example, while some tests revealed a tendency for parkas using alternative materials, including Thintech, to delaminate, they were inconclusive as to whether this was a defect with the material or a defect in manufacture of the parkas. With regard to heat sensitivity in the seam sealing process, the trouser specification provides specific guidance for machine settings to avoid any problems. The protester's disagreement with the agency and its assertion that these adjustments are difficult to maintain in production, do not make the agency's determination of acceptability of the material unreasonable. See Constantine N. Polites & Co., supra.

Protesters have made similar allegations about the failure of both Gore-Tex (Barrier-Wear, B-240563, Nov. 23, 1990, 90-2 CPD ¶ 421) and Thintech (Tennier Indus., Inc., B-252338, June 18, 1993, 93-1 CPD ¶ 471) to meet the requirements of the same military specification. We concluded, as we do here, that the fact that different tests produce different results is not sufficient to demonstrate that the agency's technical judgment was unreasonable. The purpose of our Office's role in resolving bid protests is to ensure that the statutory requirement for full and open competition in the award of government contracts is met, not to protect any interest a protester may have in more restrictive specifications. Accordingly, TAC's contention that the agency should have used additional, more restrictive specifications in order to meet the protester's definition of the agency's minimum needs is not a basis for challenging the agency's specifications. See C.R. Daniels, Inc., B-221313, Apr. 22, 1986, 86-1 CPD ¶ 390; Cryptek, Inc., B-240369, Nov. 1, 1990, 90-2 CPD ¶ 357.

PATTERN AMBIGUITY

TAC argues that the sample pattern and square inch table it received from UNICOR were inconsistent and ambiguous making a realistic projection of the requirements "practically impossible." TAC observes that the square inch totals appear to be consistent with totals on a prior DPSC procurement for trousers. Those trousers were composed of fewer and in some cases different components than those

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[5](...continued)
allegations, we note that, even if they proved true, the alleged test results were not before the contracting officer at the time the IFB was issued nor when he made his award determination, and are not relevant to our assessment of the reasonableness of his determinations.

listed on the furnished pattern.[6] Based on our review of the record, we find the pattern and table were sufficient to provide for accurate bidding.

The agency furnished a medium regular (MR) pattern and a table listing the total number of square inches for each required size. The agency explains that square inch tables are used for reference to determine the relative material usage by size and that a prudent manufacturer will analyze the actual pattern furnished and use the table to approximate material usage for other sizes. Thus, the bidder could use the MR pattern to determine that the actual square inch requirement is 4,020 square inches. The table lists 3,500 square inches for this size, and bidders can create a percentage factor based on the relationship between these two totals to apply to the other listed square inch totals in order to arrive at a reasonably accurate measurement of the material required. TAC should be aware of this and other methods to determine the volume of the material requirement since it has been manufacturing similar items for several years.

In this regard, only TAC claims ambiguity, and it simultaneously maintains that its bid was fully responsive. It provides no specific examples of any possible price impact of the alleged ambiguity, and its bid makes no mention of potential discrepancies. Further, its prices are consistent with those of the other bidders. Under these circumstances, we find no basis to conclude that the pattern or table were ambiguous or otherwise prevented TAC from making an accurate bid based on them.

RESPONSIBILITY

TAC next argues that because of the unique nature of the items solicited and the complexity involved in performance of the contract, UNICOR should have used special standards of responsibility under the solicitation. See Federal Acquisition Regulation (FAR) § 9.104-2. According to TAC, these special standards should include the preaward: verification of seam sealing tape compatibility; confirmation of supply availability; submission of a sample; consideration of past performance; and confirmation of a testing and quality assurance program.

Before awarding a contract, a contracting officer must make an affirmative determination that the prospective contractor is responsible. FAR § 9.103(b). The determination of a

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[6]For example, the prior procurement called for trousers which included two leg inserts, while the trouser specification here calls for four inserts.

prospective contractor's responsibility rests principally within the broad discretion of the contracting officer. See Firm Reis GmbH, B-224544; B-224546, Jan. 20, 1987, 87-1 CPD ¶ 72. General standards for responsibility are listed in FAR § 9.104-1.

Here, the contracting officer determined that the general responsibility factors were sufficient to properly evaluate the "special" matters identified by the protester. We see no reason to disagree. Seam sealing compatibility and quality assurance considerations would be evaluated by reviewing a firm's organization, experience, accounting and operational controls, technical skills, production, construction, and technical equipment and facilities, or the ability to obtain them. FAR §§ 9.104-1(e),(f).[7] Adequate supply of material would be evaluated by consideration of the firm's ability to comply with the required or proposed delivery or performance schedule. FAR § 9.104-1(b). Past performance would be evaluated by reviewing the firm's performance record and record of integrity and business ethics. FAR §§ 9.104-1(c),(d).

With regard to a bid sample, such samples shall not be required unless there are characteristics of the product that cannot be described adequately in the specification. FAR § 14.202-4(b)(1). The contracting officer determined, and we agree, that the essential characteristics of the product are sufficiently described in the IFB to obviate the need for a bid sample. In this regard, the solicitation includes two detailed military specifications concerning the cloth and the trousers to be made from it. Moreover, bid samples "will be used only to determine the responsiveness of the bid and will not be used to determine a bidder's ability to produce the required items." FAR § 14.202-4(b)(2). The protester's mere disagreement with the contracting officer's judgment does not make the determination unreasonable. See Constantine N. Polites & Co., supra.

TYPE OF PROCUREMENT

TAC next argues that UNICOR should have used competitive negotiation instead of sealed bidding in this procurement. The Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253(a) (1988), eliminated the previous statutory preference for a sealed bid procurement. However, contracting officers still must solicit sealed bids if (1) time permits; (2) award will be made on the basis of

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[7]Further, the IFB provides detailed requirements for testing and quality assurance which must be met by the successful bidder.

price and price-related factors; (3) discussions are unnecessary; and (4) the agency reasonably expects to receive more than one sealed bid. 41 U.S.C. § 253(a)(2)(A); FAR § 6.401(a). Negotiated procedures are only authorized if sealed bids are not appropriate under 41 U.S.C. § 253(a)(2)(A). 41 U.S.C. § 253(a)(2)(B); UXB Int'l, Inc., B-241028, Jan. 16, 1991, 91-1 CPD ¶ 45. The determination of which competitive procedure is appropriate essentially involves the exercise of business judgment by the contracting officer. KIME Plus, Inc., B-231906, Sept. 13, 1988, 88-2 CPD ¶ 237.

TAC contends that negotiation was required to determine the various special standards of responsibility detailed above, as well as to evaluate the training to be provided by the contractor. The agency responds that the four criteria mandating sealed bidding were present in this procurement. We find that the agency's decision to use sealed bid procedures was reasonable.

As observed by the agency, the detailed specifications identified in the IFB made price and price related factors the only relevant evaluation criteria and made discussions unnecessary. Since the various matters identified by TAC as necessary for discussions concern a bidder's capacity or capability to perform at the given price, they involve only issues of responsibility. Information to resolve these matters may be requested of or provided by bidders, e.g., through conduct of a preaward survey, without necessitating the conduct of discussions. Advance Gear & Mach. Corp., B-228002, Nov. 25, 1987, 87-2 CPD ¶ 519. Thus, with regard to the supply of 100 hours of training on use of the seam sealing machines, the agency states that it required the training only to ensure that UNICOR would be able to use them properly to assemble the garments. The agency determined that no technical evaluation of training capabilities was necessary. Whether a given bidder is capable of providing the necessary training is simply a matter of responsibility.

RESPONSIVENESS OF ISRATEX'S BID

TAC next contends that the bid of Isratex is nonresponsive because of various omissions in its bid package. We have reviewed the bid submitted by Isratex and find that the contracting officer properly concluded it was responsive.

Section E of the IFB, "Inspection and acceptance," provided for submission of certificates of compliance and test results with each shipment, stating that testing had been performed in accordance with the listed specifications. The IFB also required bidders to furnish the name and address of the laboratory(ies) where each component or end item would

be tested, and the name and address of the source of the material to be supplied. Isratex furnished this information, but marked the sheet "confidential."

TAC contends that Isratex's bid cannot be considered because marking the laboratory/source information "confidential" violated the requirement for public bid openings. We disagree. Under CICA, bids are to be opened publicly. 41 U.S.C. § 253a. We have interpreted this requirement to mean that a restriction upon disclosure of bid information renders the bid nonresponsive if it prohibits the disclosure of sufficient information to permit competing bidders to know the essential nature and type of products offered, or those elements of a bid relating to quantity, price, and delivery terms. See Colt Indus., B-225483, Mar. 16, 1987, 87-1 CPD ¶ 288; VACAR Battery Mfg. Co., Inc., B-223244.2, June 30, 1986, 86-2 CPD ¶ 21.

Here, the information did not relate to the essential nature of the products to be furnished. The IFB required a listing of unit and extended prices for cut garments and seam sealing tape meeting the stated cloth and trouser specifications, but did not require identification of the brand name of either of these items. Isratex's bid clearly disclosed its prices and by signing its bid, agreed to furnish cloth and tape meeting the specifications, in the quantities and on the delivery schedule specified.[8] We find that the listing of sources, components, and the laboratories where the components would be tested concerns the bidder's capability to perform, a matter of responsibility, not responsiveness. Since the information in question did not concern the nature or type of products furnished, failure to make this aspect of Isratex's bid public did not render the bid nonresponsive. See Colt Indus., supra.

TAC next contends that Isratex failed to submit descriptive literature for two items of "equal" equipment as required by the IFB. 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. Aidco, Inc., B-249736; B-249736.2, Dec. 11, 1992, 92-2 CPD ¶ 407. Where the solicitation requires it, a bidder must include sufficient descriptive literature with its bid to demonstrate the offered product's

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[8]While the protester claims that without this information it would not know that Isratex proposed to supply Thintech garments, we note that the name Thintech does not appear on the sheet marked "confidential."

compliance with all specified requirements. JoaQuin Mfg. Corp., B-240777, Dec. 18, 1990, 90-2 CPD ¶ 498. Where descriptive literature is effectively not required, a bid may not be rejected for failure to submit such literature. Aidco, Inc., supra.

The IFB identified three brand name items of equipment to be supplied for use in assembling and testing the finished trousers and listed several salient characteristics of each. The IFB required bidders to insert the brand name of any equal product in the space provided on the bid schedule or to otherwise clearly identify it in the bid. The IFB further provided that the evaluation of bids and determination as to equality of the product offered would be the responsibility of the government and would be based on information furnished by the bidder or identified in its bid, as well as other information reasonably available to the purchasing activity. While the IFB cautioned bidders to submit sufficient information, and provided examples of descriptive literature, it did not require any specific item of information, and allowed bidders to make references to information previously furnished or information otherwise available to the purchasing activity. Accordingly, the IFB effectively did not require submission of any descriptive literature. See Aidco, Inc., supra. Rather, the IFB notified bidders that their failure to provide or identify sufficient information ran the risk of a finding of nonresponsiveness.

Isratex identified the brand name and model number of both "equal" items which it proposed. With regard to an Isratex model, it also explained that the model met all salient characteristics and was being used on two identified Defense Logistics Agency contracts for the same type work. UNICOR reviewed the information furnished, as well as commercially available information, and concluded the items were equal. For example, the contract specialist found Isratex's bid of a Queen Light model to be equal to the specified Gore model based on the specialist's observation of a machine demonstration and review of a product brochure. Since the protester has not identified any salient characteristic of the brand name items which Isratex's equipment does not meet, and the agency is satisfied of their equality, we have no basis to find the bid nonresponsive for failure to submit additional information.

TAC next contends that Isratex failed to properly execute its certificate of independent price determination and failed to properly acknowledge receipt of all amendments to the solicitation. We find no merit in either of these allegations.

Clause K.1 of the IFB, "Certificate of Independent Price Determination" (FAR § 52.203-2) requires that the bidder certify that it has arrived at its prices independently and has not engaged in activities which would constitute collusive bidding. The certificate provides a blank space for insertion of names and titles of the principals responsible for price determination. TAC argues that Isratex's bid was nonresponsive because its certificate did not include the names of any principals in the blank. TAC has misread the requirements of this clause. The clause provides that each signature on the offer is considered a certification by the signatory that he or she is either (1) the one responsible for the determination of the prices and has not done anything contrary to the certification or (2) is the authorized agent of those principals responsible for the determination of prices and that neither the agent nor the principals have violated the certification. It is plain from Isratex's bid that its president's signature on the bid was intended as a certification that he was the one responsible for determining the prices and making the certification. Since he was the principal and not acting as an agent, there was no need to include the name of any other principal.

With regard to IFB amendments, the IFB cover sheet stated that failure to acknowledge all amendments in Block 14 on the Standard Form (SF) 33 or failure to sign and return all amendments prior to bid opening was a basis for finding the bid nonresponsive. Although Isratex included signed acknowledgements of all the amendments as part of its bid, it only identified one amendment in Block 14 of its SF 33. Thus, TAC concludes that Isratex's bid is nonresponsive. We disagree.

Generally, a bid which does not include an acknowledgment of a material amendment must be rejected because absent such an acknowledgment, the bidder is not obligated to comply with the terms of the amendment, and its bid is thus nonresponsive. Tri-Tech Int'l, Inc., B-246701, Mar. 23, 1992, 92-1 CPD ¶ 304. Here, in addition to the warning on the IFB cover sheet, the IFB incorporated by reference FAR § 52.214-3 which provides four alternative means of acknowledging receipt of any amendment: by signing and returning it; by indicating it on the SF 33 itself; by letter or telegram; or by telefacsimile.

TAC appears to interpret the warning on the IFB cover sheet to mean that a bidder must acknowledge amendments both on the SF 33 and by signing and returning the amendments. Such an interpretation is inconsistent with the requirements of FAR § 52.214-3. Where a dispute exists as to the actual meaning of a solicitation requirement, we will resolve the matter by reading the solicitation as a whole and in a

manner that gives effect to all provisions of the solicitation. Honeywell Regelsysteme GmbH, B-237248, Feb. 2, 1990, 90-1 CPD ¶ 149. To be reasonable, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Id. We interpret the cover sheet warning to mean that one must acknowledge the amendments by taking either step listed, but not both. While Isratex did not complete Block 14, by signing and returning each of the amendments prior to bid opening and attaching them to its bid, Isratex acknowledged the amendments and thus, was properly found responsive.

The protest is denied.

for James F. Hinchman
General Counsel