



Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Delta Chemical Corporation

File: B-255543

Date: March 4, 1994

Laurence Schor, Esq., Smith, Sommerville & Case, for the protester.

John V. Donaldson for Kemira Water Treatment, Inc., an interested party.

John F. Herbert III, Esq., and Timothy L. Felker, Esq., Department of the Army, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where bid included descriptive literature specifically referencing solicitation number and literature contained legend that brings into question bidder's obligation to furnish product in exact accordance with specifications, bid was properly rejected as nonresponsive.

DECISION

Delta Chemical Corporation protests the actions of the Department of the Army in connection with invitation for bids (IFB) No. DACW31-93-B-0016, issued for ground aluminum sulfate to be used for water treatment. Delta maintains that the Army improperly found that it had qualified its bid by including unsolicited descriptive literature. Delta also argues that the agency improperly overstated its minimum needs and that the bid of the awardee, Kemira Water Treatment, Inc., should have been rejected as nonresponsive.

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

The IFB solicited fixed prices for 6,200 tons of ground aluminum sulfate to be used at the Dalecarlia Water Treatment Plant in Washington, D.C. Three bids were received by bid opening; Delta submitted the apparent low bid which included four documents. Two of these documents (both of which had the IFB number typed in the upper right-hand corner) are relevant for purposes of this protest: (1) a certification statement for aluminum sulfate; and (2) a ground aluminum sulfate commercial grade data sheet.

The certification statement represents that Delta's product is manufactured in the United States and also that it meets the specifications of various trade associations such as the American Water Works Association. This certification was signed by Delta's president. The data sheet described the chemical and physical properties of Delta's aluminum sulfate. This data sheet contained a preprinted legend which provided:

"All information is offered in good faith, without guarantee or obligation for the accuracy or sufficiency thereof, or the results obtained, and is accepted at user's risk. The uses referred to are for purposes of illustration only; user should investigate and establish the suitability of such use(s) in every case. Nothing herein shall be construed as a recommendation for uses which infringe valid patents or as extending a license under valid patents."

The Army concluded that this legend rendered Delta's bid nonresponsive because it potentially would permit it to furnish a nonconforming product. Delta protested to our Office after learning of the Army's rejection of its bid.

Delta argues that the Army erred in finding its bid nonresponsive for three reasons. First, the protester contends that the legend appearing on its data sheet does not relate to the chemical or physical properties of its aluminum sulfate, but rather relates only to the information contained on the sheet. According to Delta, no descriptive literature was required by the IFB and there is no nexus between the information contained on the sheet and the product it intended to supply. Second, Delta argues that, even if the legend somehow served to qualify its bid, it relates only to the end uses of the product described in the data sheet and not to the physical or chemical properties of the product. Finally, Delta argues that the certification sheet provided with its bid overrides the data sheet because it represents that the product meets the specifications of the American Water Works Association (AWWA) standard B403-88 and was signed by Delta's president. According to the protester, this certification takes precedence over the data sheet and makes its bid an unequivocal offer to meet the specifications in AWWA standard B403-88; Delta contends that meeting that standard is tantamount to meeting the IFB's specifications, which are essentially identical.

The IFB did not require the submission of descriptive literature and, accordingly, consideration of Delta's materials is governed by Federal Acquisition Regulation (FAR) §§ 14.202-4(g) and 14.202-5(f); these provisions require an agency to disregard unsolicited descriptive

literature unless it is clear from the bid or accompanying papers that the bidder intended to qualify the bid. Where the descriptive literature describes the exact product to be furnished, or is incorporated into the bid, there is a sufficient relationship between the bid and the descriptive literature so that it may not be disregarded. Balantine's South Bay Caterers, Inc., B-250223, Jan. 13, 1993, 93-1 CPD ¶ 39; Caprock Vermeer Equip., Inc., B-217038, Sept. 3, 1985, 85-2 CPD ¶ 259.

We find that there is a sufficient relationship between Delta's bid and its descriptive literature so that it was reasonable for the Army to consider it in evaluating the bid. Delta did more than simply accompany its bid with unsolicited descriptive literature--it specifically identified these pieces of literature as pertaining to this solicitation. In this regard, the certification statement contains the notation "REF: DACW 31-93-B-0116," and the data sheet has on it the notation "RE: DACW31-93-B-0116." We think these notations provided the agency with a reasonable basis to find that Delta intended to incorporate its descriptive literature into the terms of its bid. David Grimaldi Co., B-244572, Oct. 28, 1991, 91-2 CPD ¶ 381; Balantine's South Bay Caterers, Inc., supra.

The remaining question is whether the legend served to qualify the bid. We think it clearly did. As indicated, Delta's data sheet provides that "the information" is offered "without guarantee or obligation for the accuracy or sufficiency thereof. . . ." This language effectively would allow the firm to furnish a product that does not comply with the physical and chemical characteristics specified in the data sheet. Since the specifications listed on the data sheet are largely identical to the specifications in the IFB, it follows that this language similarly would allow Delta to furnish a product that does not meet the IFB requirements. Delta's bid therefore does not constitute an unequivocal offer to furnish the exact thing called for under the IFB and is nonresponsive. See Erincraft, Inc., B-235829, Oct. 10, 1989, 89-2 CPD ¶ 332.

Delta's specific arguments are without merit. First, we fail to see how the qualifying legend could relate only to the information contained on the data sheet, and not the product itself. The data sheet states the characteristics of the offered aluminum sulfate, and a representation that the accuracy of the information is not guaranteed, in our view, can mean only one thing--that the product furnished under a contract might not possess these characteristics. This plainly constitutes a qualification of Delta's agreement to furnish a conforming product. Delta's argument that the legend related only to the intended uses of the product is similarly unpersuasive. The legend states that

"all information" is offered without guarantee. This disclaimer is in no way limited to intended uses of the product or to only some of the information on the data sheet.

Finally, we do not agree that Delta's certification sheet served to override the terms of the data sheet. At best, the certification sheet--which certified that Delta's aluminum sulfate would meet the requirements of AWWA standard B403-88--created an ambiguity with respect to what Delta intended to supply. In one place (the certification sheet) Delta represented that it would provide a product meeting the specifications of AWWA standard B403-88; in another place (the data sheet) Delta essentially represented that it would not guarantee that its product met the specifications of AWWA standard B403-88.¹ Where two reasonable interpretations of material bid terms are possible, the bid is ambiguous and must be rejected as nonresponsive. See M&G Servs., Inc., B-244531, June 27, 1991, 91-1 CPD ¶ 612. The fact that Delta's president signed the certification does not show that the firm intended to be bound only by it and not the data sheet; signed or unsigned, the data sheet was part of Delta's bid.

Delta also argues that, even if its bid was properly rejected as nonresponsive, the Army should cancel the IFB and reissue it because one of the specifications (relating to basicity) overstated the agency's minimum needs. Although the agency concedes that the basicity specification overstated its needs, this is not a basis for sustaining the protest. Prejudice is an essential element of a viable protest. Propper Mfg. Co., Inc., B-245366, Dec. 30, 1992, 92-2 CPD ¶ 14. Since, as already discussed, Delta's bid was nonresponsive in any event, for reasons unrelated to the basicity requirement, Delta was not prejudiced by the defective specification.²

Finally, Delta argues that Kemira's bid was nonresponsive. Delta is not an interested party to raise this argument. In order to be an interested party, a firm must have a direct economic interest that would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a) (1993). Since Delta's bid was nonresponsive, even if we sustained Delta's protest on this point, the third-low

¹In addition to the product information described earlier, the data sheet also represented that the firm's aluminum sulfate meets the specifications of AWWA standard B403-88.

²In any event, the record shows that Delta's bid was for aluminum sulfate meeting the agency's revised specifications.

bidder, not Delta, would be in line for award. Delta therefore lacks the direct economic interest necessary to maintain a protest on this basis.

The protest is denied in part and dismissed in part.

Robert P. Murphy
Acting General Counsel