



Comptroller General
of the United States

23345

Washington, D.C. 20548

Decision

Matter of: LORS Medical Corporation

File: B-259829; B-259829.2

Date: April 25, 1995

Jacob B. Pompan, Esq., and Gerald H. Werfel, Esq., Pompan, Ruffner & Werfel, for the protester.
William E. Thomas, Jr., Esq., Department of Veterans Affairs, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Bidder's failure to return with its bid two pages of the invitation for bids (IFB) does not render the bid nonresponsive where the omitted pages are incorporated into the bid by reference, thus resulting in a submittal in such a form that acceptance would create a valid and binding contract requiring the bidder to perform in accordance with all material terms and conditions of the IFB.

2. Allegation that contracting agency should have rejected low bid as nonresponsive for failure to include information requested by invitation for bids is denied where the omitted information concerns the contractor's apparent ability and capacity to perform the contract, and thus relates to responsibility rather than responsiveness, and may be provided at any time prior to award.

3. Where a protester initially files a timely protest, and later supplements it with new and independent grounds of protest, the later raised allegations must independently satisfy the General Accounting Office's timeliness requirements.

DECISION

LORS Medical Corporation protests the proposed award of a contract to Respiratory Rentals under invitation for bids (IFB) No. 558-14-95, issued by the Department of Veterans Affairs (VA) for pick-up and delivery of various prosthetic items. LORS argues that the VA should reject Respiratory Rentals's bid as nonresponsive.

We deny the protest.

The IFB, issued as a total small business set-side, contemplated the award of a fixed-price, indefinite quantity/indefinite delivery contract for a base period with up to two 1-year options. For the base and option periods, bidders were required to submit unit and extended prices to pick up, clean, and deliver estimated quantities of 13 different types of medical equipment listed in the IFB as contract line item numbers (CLIN) 1-13; a unit and extended price for an estimated total service distance of 20,000 miles (CLIN 14); and a total price for CLINs 1-14. The IFB contained Federal Acquisition Regulation (FAR) § 52.217-5, the standard "Evaluation of Options" clause, which states that the government would evaluate bids for award purposes by adding the total price for all options to the total price for the basic requirement.

The agency received three bids by the time set on December 14, 1994, for bid opening, with the following total prices, including option periods: Respiratory Rentals, \$79,725; LORS, \$119,730; and American Medequip, \$192,780. The government's independent estimate for the three contract periods was \$228,030.

As relevant to LORS's protest, pages 16 and 17 of the IFB, part of the work statement and specifications, contained sections C-21 through C-27, which imposed certain obligations on the contractor. For example, the contractor is to have in place procedures for reporting incidents involving patients; procedures for notifying patients in case of equipment hazards or recall; and a quality assurance program. The contractor also is to provide patients with a written statement of their rights and responsibilities. Section C-27 of the IFB requested the following information to be submitted with the bid: the bidder's policies and procedures for handling, cleaning, and storing equipment, infection control and a Quality Assurance Program; Material Safety Data Sheets (MSDS) for all chemicals used in cleaning the equipment; personnel policies and procedures for employee orientation and education training; an adhesive telephone label with the bidder's name, address, and telephone number; an emergency response plan and equipment recall plan; a tag used to identify clean equipment; and

¹The equipment listed included: hospital beds (electric and nonelectric); overbed and freestanding trapezes; lift transfers; wheelchairs (standard, folding, and electric); portable wheelchair ramps; whirlpool units; shower/commode chairs; suction apparatus (surgical and electrical); and geriatric chairs.

evidence of accreditation by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO).

Respiratory Rentals failed to return with its bid pages 16 and 17 of the IFB. The firm also failed to provide with its bid any of the information listed in section C-27. LORS argues that as a result of these omissions, the VA should have rejected Respiratory Rentals's bid as nonresponsive.²

Failure to return part of an IFB package does not automatically render a bid nonresponsive. Rather, the general rule is that where a bidder fails to return with its bid all of the documents which were part of the IFB, the bid must be submitted in such a form that acceptance would create a valid and binding contract requiring the bidder to perform in accordance with all the material terms and conditions of the IFB. Werres Corp., B-211870, Aug. 23, 1983, 83-2 CPD ¶ 243. Here, Respiratory Rentals submitted a signed standard form (SF) 33, which included a Table of Contents listing all sections comprising the bidding documents. Respiratory Rentals's return of the signed SF 33 served to incorporate all the provisions listed in the Table of Contents, including those set out in sections C-21 through C-27. See Image Contracting, B-253038, Aug. 11, 1993, 93-2 CPD ¶ 95. Thus, by returning the signed SF 33, Respiratory Rentals agreed to be bound by those terms, even though the firm did not return pages 16 and 17 with its bid.

LORS relies on our decision in International Signal & Control Corp.; Stewart-Warner Corp., 55 Comp. Gen. 894 (1976), 76-1 CPD ¶ 180, to argue that Respiratory Rentals's bid is nonresponsive. In that case, International Signal omitted several pages of the IFB from its bid, including the "Table of Contents" page which listed all sections comprising the bidding documents. In addition,

²LORS also argues that given the disparity between Respiratory Rentals's bid price, and the prices of the other bidders and the government estimate, the VA must evaluate whether Respiratory Rentals's bid contained a mistake. A protester does not have standing to claim an error in a competitor's bid since it is the responsibility of the contracting parties--the government and the low bidder--to assert rights and bring forth the necessary evidence to resolve mistake questions. Sabreliner Corp., B-231200, Aug. 31, 1988, 88-2 CPD ¶ 194. To the extent that LORS argues that Respiratory Rentals's bid price is unreasonably low, the submission of a significantly lower price indicates no more than a below-cost bid, which bidders are free to submit and agencies properly may accept. See MEI Envt'l Servs.--Recon., B-231401.2; B-231401.3, June 16, 1988, 88-1 CPD ¶ 579.

International Signal's bid was accompanied by a cover letter which rendered its bid ambiguous. We concluded that since International Signal's intention to be bound by all material provisions of the IFB was unclear, its bid was nonresponsive. Unlike in that case, here LORS has presented no argument, and there is no evidence in the record, upon which we could reasonably conclude that Respiratory Rentals does not intend to be bound by all material provisions of the IFB.

LORS's argument that Respiratory Rentals's failure to submit with its bid the information requested by section C-27 rendered its bid nonresponsive is also without merit. The information required by section C-27 of the IFB pertains to how the contract performance requirements will be met, rather than to the performance requirements themselves. Thus, it relates not to bid responsiveness, but to bidder responsibility, that is, the bidder's apparent ability and capacity to perform contract requirements. For example, the requirement that the contractor have personnel policies, training and orientation procedures, and an adequate quality assurance program in place, relates to the firm's apparent ability and capacity to perform the contract. See, e.g., Accurate Indus., B-232962, Jan. 23, 1989, 89-1 CPD ¶ 56. Similarly, the requirement that bidders provide evidence of JCAHO accreditation--a matter on which LORS specifically focuses--is a definitive responsibility criterion, see HME Inc., B-251067.2, Apr. 13, 1993, 93-1 CPD ¶ 314, which may be satisfied at any time prior to award. Norfolk Dredging Co., B-229572.2, Jan. 22, 1988, 88-1 CPD ¶ 62.

Responsibility is determined not at bid opening, but at any time prior to award based on any information the agency receives up to that time, notwithstanding any IFB requirement that such information be provided with the bid. See CardioMetrix, B-255748.2, June 13, 1994, 94-1 CPD ¶ 364. Even though the IFB stated that "[f]ailure to submit proof of qualifications as requested [by section C-27] will render a bid nonresponsive," the terms of a solicitation cannot convert a matter of responsibility into one of responsiveness. See Integrated Protection Sys., Inc., B-254457.2; B-254457.3, Jan. 19, 1994, 94-1 CPD ¶ 24; The ARO Corp., B-222486, June 25, 1986, 86-2 CPD ¶ 6. Accordingly, we have no basis to question the agency's decision to allow Respiratory Rentals to submit the information requested by section C-27 after bid opening.

On February 22, 1995, LORS supplemented its protest, arguing that prior to bid opening, the contracting officer improperly provided Respiratory Rentals oral information concerning the IFB which was not provided to other bidders. In response to this allegation, the contracting officer states that before bid opening, she informed all present

that a bidder had raised two questions concerning the IFB; explained what the questions were; stated that the VA had responded to them; and advised that, notwithstanding the questions, the VA had decided to proceed with bid opening. In a sworn statement to our Office, a LORS employee who attended the bid opening generally confirms the contracting officer's statement. Specifically, the LORS employee states that prior to bid opening, a VA official informed her that another bidder had raised questions concerning the IFB; that the VA had responded to those questions; and that no changes would be made to the IFB.

Our Bid Protest Regulations require that a protest be filed within 10 working days after the basis of the protest is known or should have been known. See 4 C.F.R. § 21.2(a)(2) (1995). Where a protester initially files a timely protest, and later supplements it with new and independent grounds of protest, the later raised allegations must independently satisfy our Office's timeliness requirements. Little Susitna Co., 65 Comp. Gen. 652 (1986), 86-1 CPD ¶ 560. Our Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues. Id. Here, it is undisputed that the VA informed all present at bid opening, including LORS, of the inquiry concerning the IFB. Accordingly, any objections LORS may have had to the VA's actions in this regard should have been raised within 10 days of the bid opening date, or by December 29. Since LORS raised this allegation for the first time in its supplemental protest, which was filed well after that date, this issue is untimely.

The protest is denied.

/s/ Ronald Berger
for Robert P. Murphy
General Counsel