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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

**FILE:** B-186638

**DATE:** October 12, 1976

**MATTER OF:** Techniarts

**DIGEST:**

1. Notwithstanding that agency violated procurement regulations by failing to refer issue of small business firm's capacity to SBA before rejecting firm's bid for lack of capacity, bid was not acceptable for award if it was not responsive at bid opening, even though nonresponsiveness was not proffered by agency as reason for rejection until submission of report responsive to protest against initial rejection.
2. Although this Office has serious doubts concerning agency's determination that bid was nonresponsive, no remedial action is possible since contract has been performed.

Invitation for bids (IFB) No. 100-22-6 was issued on February 23, 1976, by the United States Information Agency (USIA) to solicit bids for the design and construction of an audio mixing control console. Delivery was to be not more than 90 calendar days after the successful bidder was notified of award.

Seven bids were received and opened on April 9. USIA determined that the low bid was technically deficient and it was, therefore, rejected. During the technical review of the second low bid, submitted by Techniarts, the reviewing officials requested, in a memorandum dated April 19, clarification on certain items as follows:

- "1. We need a listing of projects of equal scope which bidder has recently and successfully completed and names of individuals now using these products. We would like to be able to see an example of their work.
- "2. What is the make and model number of the proposed faders? Can a manufacturer's specification sheet be supplied?
- "3. Since the proposed amplifiers are not self-powered, redundant power supplies and indicators must be furnished

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as specified, and on the sketch of the front panel layout, no L.E.D. indicators are shown to indicate proper operation of each of the redundant power supplies. Where are these indicators located? It is preferred that the L.E.D.'s be visible by the console operator when seated in normal operating position.

- "4. Can a block diagram and specification of components of the IFB system be supplied?
- "5. The panel sketch shows only four (4) buttons on the foldback VU meter selector. Should it not require five (5) buttons: Four (4) for the four IFB channels and the fifth for the foldback channel?"

On April 21, the contracting officer contacted Techniarts regarding those items, and by letter dated April 24 Techniarts provided additional information concerning each of the 5 items. However, Techniarts' bid was subsequently rejected by the contracting officer, who noted on the abstract of bids that Techniarts was "non-responsive because of lack of proof of performance of equal scope of this project."

Award was made to the third low bidder, Sphere Electronics, Inc., on May 13. The contracting officer states that all bidders were informed by telephone of such award on that date. Techniarts, however, although admitting that it received a telephone call from the contracting officer on May 13, denies that it was informed at that time of the award of the contract to Sphere.

By letter dated May 13 from the contracting officer, and beginning "Re our telecon today," Techniarts was furnished a copy of a May 7 memorandum from the technical review officials which stated in part:

"\* \* \* What we had hoped for was an experience factor on the part of the vendor with the potential for yielding a superior product. We believe the essence of our specifications indicates this. This is not what we anticipate if this bid is accepted. \* \* \* The Agency has tried very hard (IOA/C and IMV/OW) to be objective in helping this

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bidder qualify by seeking amendments to his original deficient submission and conscientiously evaluating the technical and qualifying information received.

"In summary, IMV/OW would like to see the bidder's submission rejected on the basis that the bid, subsequent information, and Agency investigation failed to establish that the bidder has successfully completed any similar project of equal scope recently or at any other time, \* \* \*"

Upon receipt of that letter and memorandum, Techniarts submitted to the contracting officer comments on the issue of its experience, and stated that if it received notice of award to Sphere, it would immediately file a protest with the appropriate activity. By letter dated May 25, the contracting officer responded to Techniarts' comments, stating in part: "\* \* \* As you were advised by the undersigned on May 13, award was made to Sphere Electronics, Inc., on that date. \* \* \* [T]he award to Sphere is justified and will not be disturbed."

Techniarts subsequently filed a protest with our Office against the rejection of its bid on the basis that, since Techniarts is a small business, USIA improperly failed to submit the matter of what was essentially Techniarts' "capacity" to the Small Business Administration (SBA) for its consideration. In this connection, Federal Procurement Regulations (FPR) § 1-1.708-2(a) (1964 ed. amend. 71) provides in part:

"If a small business concern has submitted an otherwise acceptable bid or proposal but has been found by the contracting officer not to be responsible as to capacity or credit, and if the bid or proposal is to be rejected for this reason alone, SBA shall be notified of the circumstances so as to permit it to issue a certificate of competency. \* \* \* The award shall be withheld pending either SBA issuance of a certificate of competency or the expiration of 15 working days after SBA is so notified, whichever is earlier \* \* \*."

In its report responsive to the protest, USIA agrees that the official reason given Techniarts for the rejection of its bid

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concerned Techniarts' capacity, a matter that properly should have been referred to the SBA for its consideration before award was made to Sphere. However, notwithstanding USIA's failure to make the required referral, USIA argues that the protest should be denied since Techniarte's bid as originally submitted was in fact non-responsive because of Techniarts' failure to furnish with its bid the information requested by the contracting officer on April 21. The deficiencies in Techniarts' bid which the USIA argues rendered the bid nonresponsive are stated in the agency report as follows:

"1. No make, model, or manufacturer's specification sheet for faders.

"2. LED indicators for redundant power supplies not shown on sketch of front panel layout to indicate they would be furnished and would be visible by the console operator when seated in normal operating position.

"3. Block diagram and specification of components of the IFB system not supplied.

"4. Panel sketch showed only four buttons on the fold-back VU meter selector instead of five buttons specified and required."

In this connection, paragraph 1(b) of the solicitation, pertinent to at least the first and third alleged deficiencies, provided as follows:

"All bids shall be accompanied with complete and concise descriptive information including a console sketch with master panel layout. A block diagram shall indicate system design. Individual modules shall be clearly identified with accompanying performance specifications. Failure to include these specified items will result in rejection of the bid."

USIA contends that the contracting officer should have rejected Techniarts' bid as nonresponsive upon discovery of the alleged deficiencies, and acted improperly by requesting clarifying

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information. USIA therefore considers Techniarts' April 24 submission as an unacceptable late bid modification.

In comments submitted in response to the agency report, and in comments filed subsequent to a conference concerning the protest held in our Office on July 16, Techniarts questions USIA's contention that Techniarts' bid was not responsive, a contention raised only after USIA realized, in response to Techniarts' original protest, that it had improperly failed to refer the matter of Techniarts' responsibility to the SBA as clearly required by regulation. Techniarts further argues that the deficiencies alleged by USIA concern either matters that were not required in the IFB, or requirements which Techniarts in fact substantially complied with. Specifically, Techniarts states that, consistent with industry practice, the "faders" it proposed to use are not considered "modules" in the context of paragraph 1(b) of the solicitation (see alleged deficiency number 1); that the IFB did not specify that LED indicators must be on the front panel layout (see number 2); that it submitted a block diagram adequate to indicate system design, which was all that paragraph 1(b) required (see number 3); and that the IFB did not require 5 buttons on the foldback VU meter (see number 4). Techniarts argues that the 4 points raised in the USIA report, originally brought to its attention by the contracting officer on April 21:

"\* \* \* may be seen only as additional bits of information requested for clarification of some very minor points. It is in this vein that they were asked; it is in this vein that they were answered; and it is in this vein that our answers were accepted as totally satisfying to the USIA. \* \* \*

In addition, Techniarts contends:

"\* \* \* To attempt to use these points, six weeks after the award, as a reason for rejection shows arbitrary and capricious handling of a totally responsive bid."

It is clear that USIA's determination that Techniarts was non-responsible for reasons of capacity without referral to SBA was in

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violation of FPR § 1-1.708-2(a) (1964 ed. amend. 71). USIA admits that fact in its report. However, it is a fundamental principle of formal advertising that a bid which does not conform to the requirements of a solicitation must be rejected as nonresponsive, unless the deviation is immaterial or is a matter of form rather than substance. A deviation is considered material, and is cause for rejection, if it affects price, quantity or quality. FPR § 1-2.301(a) (1964 ed. amend. 118); 52 Comp Gen. 265, 266 (1972). Thus, and notwithstanding that USIA did not comply with the applicable procurement regulations concerning Techniarts' capacity, we agree with USIA that Techniarts' bid could not be considered for award if in fact it was not responsive as originally submitted. That determination must apply even where, as here, nonresponsiveness is not proffered as the reason for rejection until well after a bid is initially rejected on other grounds.

In regard to the above, USIA has apparently determined that the first and third deficiencies in Techniarts' bid as alleged in USIA's report justified finding the bid nonresponsive on the basis of paragraph 1(b) of the solicitation, quoted above. However, an IFB must state definitely the components for which descriptive data is required, see B-146211, October 6, 1961, and must clearly establish in the greatest detail practical the nature and extent of data needed. 46 Comp. Gen. 1, 5 (1966). We do not believe that the generalized language of paragraph 1(b) resolves the disagreements between Techniarts and USIA as to the definition of a "module" for purposes of submitting performance specifications, and as to the extent of detail needed in the block diagram to indicate "system design;" concerning the latter, we have been advised that block diagrams are essentially general, nondetailed sketches. In such circumstances, it is clear that the paragraph lacked sufficient particularity to put bidders on notice of what was desired. Cf. 42 Comp. Gen. 598 (1972). Moreover, in view of the detailed specifications which bidders were required to meet, we do not consider that the failure of a bidder to fully comply with paragraph 1(b) could affect its obligation, in the event of an award, to furnish a product acceptable to the Government. See 49 Comp. Gen. 398, 400 (1969). Accordingly, and notwithstanding the admonishment in paragraph 1(b) that "Failure to include these specified items will result in rejection of the bid," Techniarts' bid could not properly be rejected as nonresponsive on the basis of that paragraph.


The remaining two alleged deficiencies are apparently based on failure to comply with the specifications of the IFB. In

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such connection, we have consistently held that the drafting of specifications to meet the Government's minimum needs and the determination whether items offered meet specifications are properly the function of the procuring agency. 50 Comp. Gen. 193, 199 (1970). Where there may be a difference of technical opinion, we will accept the judgment of the procuring agency unless such judgment is clearly or unmistakably in error. 49 Comp. Gen. 195, 198 (1969).

However, we find no clear requirement in the IFB that LED indicators for the redundant power supplies must be shown on the front panel layout or be easily visible to the console operator (see alleged deficiency number 2). In addition, we find no clear indication in the IFB that 5 buttons are "specified and required" on the VU foldback meter selector (see number 4). In view thereof, at least those two allegations appear to be based on the suggestions and preferences of the technical review officials as reflected in their April 19 memorandum to the contracting officer, set forth above, and not on the solicitation's listed requirements.

Notwithstanding the above, no remedial action would be possible at this point, since we have been advised that the contract has been performed. However, since our review of the record clearly indicates that USIA violated the procurement regulations by utilizing extremely irregular procedures in the evaluation of Techniarts' responsibility and the responsiveness of its bid, we are advising the Director of USIA by separate letter of the need to take appropriate action to prevent a recurrence of such irregularities in future procurements.

  
Deputy Comptroller General  
of the United States