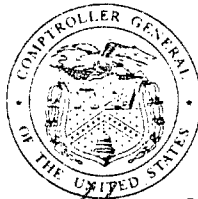


DECISION



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

[Allegation that Other Bidders Did Not Meet Solicitation Specifications] 9726

FILE: B-193064

DATE: April 5, 1979

MATTER OF: Worcester Electrical Associates

[~~Specifications to Solicitation Involved Matter of Responsiveness~~]

DIGEST:

~~Rather than Responsibility~~

1. Specification requiring bidders to submit Underwriter Laboratories (UL) listing cards on equipment being offered involved matter of responsiveness rather than responsibility since purpose of requirement was to enable agency to evaluate bids to determine whether products being offered conformed to industry recognized standards of safety and performance.

2. Where bidder offers equipment that meets IFB's UL listing card requirement but fails to submit UL cards with bid as proof of this compliance, such deficiency is minor informality which can be cured after bid opening.

3. Protester is not entitled to bid preparation costs where Government has not acted arbitrarily or capriciously in allowing successful bidder to cure minor informality in bid.

+ claims bid prep. costs

Worcester Electrical Associates (Worcester) protests the award of a contract to SES Co., Inc. (SES) under project No. 78-002 issued by the Veterans Administration Medical Center (VA), Bedford, Massachusetts.

The solicitation requested bids for audio/visual nurse call and radio entertainment systems to be installed in several buildings at the VA Hospital, Bedford, Massachusetts. Of the four bids received, SES's offer of \$132,543 was low while Worcester's offer of \$160,250 was third low.

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Paragraph 1.8 of the solicitation's Technical Purchase Description requires in part:

"Each prospective bidder shall furnish with his proposal the UL listing cards for the Nurse Call equipment described in his bid."

Worcester was the only bidder to submit UL listing cards with its bid and, as a result, contends that all the other bids were nonresponsive. VA, on the other hand, argues that this bid requirement was a matter of responsibility. That is, the purpose for asking a bidder to submit UL listing cards is to determine the bidder's capability to deliver equipment that is reliable and provides for the patient's safety. Thus, VA maintains that the failure of SES to furnish this data with its bid did not preclude consideration of the SES bid since data pertaining to responsibility may be submitted, as was the case here, after bid opening but prior to award.

Worcester initially filed a protest with the contracting officer, but that protest was denied and the award previously made to SES was allowed to stand. Worcester then filed a protest with our Office arguing that since only its bid satisfied the UL listing card requirement it should be awarded the contract or, in the alternative, that it should be awarded bid preparation costs.

The first issue to be resolved is whether the requirement in question is a matter of responsiveness or responsibility.

Basically, it may be stated that invitation requirements which concern a bidder's general capacity to perform in accordance with contract terms are matters of responsibility, while requirements directed primarily to the item being procured, rather than to the prospective contractor, concern bid responsiveness. See 49 Comp. Gen. 9 (1969). Thus, if a requirement goes to the bidder's capability to deliver equipment that conforms to the specifications, it bears on the responsibility of the bidder. On the other hand, if the purpose

of the requirement is to enable the agency to evaluate the bid to determine the characteristics of the products being offered, then this requirement must be complied with as a matter of bid responsiveness since it goes to the legal obligation that would result upon acceptance of the bid. Cubic Western Data, Inc., B-189578, October 7, 1977, 77-2 CPD 279; Western Waterproofing Company, Inc., B-183155, May 30, 1975, 75-1 CPD 306.

As noted above, VA believes that the requirement for UL listing cards was a matter of responsibility. However, in our view, the purpose of these cards was to provide evidence that the equipment being offered conformed to certain industry-recognized standards of safety and performance, rather than reflecting on the bidder's capacity or ability to furnish and install audio/visual nurse call and entertainment systems. Clearly, then, the purpose of the requirement was to enable the agency to evaluate the bids to determine that the nurse call system offered met the safety and performance standards--a matter of responsiveness rather than responsibility.

However, we do not believe that under the facts presented VA was required to reject the SES bid as nonresponsive.

We have held that the test to be applied in determining the responsiveness of a bid is "whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation, and upon acceptance will bind the contractor to perform in accordance with all the terms and conditions thereof." 49 Comp. Gen. 553, 556 (1970). In this connection, Federal Procurement Regulations (FPR) § 1-2.404-2(a) (1964 ed. amend. 121) provides that any bid which fails to conform to an essential requirement of the solicitation, such as the specifications, is to be rejected as nonresponsive. However, FPR § 1-2.405 (1964 ed. circ. 1) recognizes that occasionally bids will be considered nonresponsive because the bids contain certain minor informalities or irregularities, which are defined as merely matters of form and not substance or as

pertaining to some immaterial or inconsequential defect or variation from the exact requirement of the solicitation, the correction or waiver of which will not be prejudicial to other bidders. Therefore, the regulation provides that the contracting officer shall either give the bidder an opportunity to cure any deficiency resulting from that minor informality or irregularity, or waive such deficiency, whichever is to the advantage of the Government.

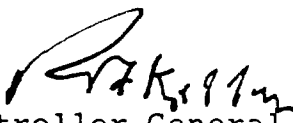
The record indicates that the UL listing cards for the equipment SES offered predated the SES bid; that SES provided this data immediately after bid opening when informed of the omission; and that paragraph 1.8 does not advise bidders that failure to comply with its provisions will require the rejection of their bids as nonresponsive.

Since the equipment SES was offering in its bid had in fact met the UL requirement prior to the submission of the bid, we believe that the failure to submit proof of this compliance (the UL listing cards) with the bid was a minor informality within the meaning of FPR § 1-2.405 and the contracting officer properly allowed this deficiency to be cured after bid opening. This conclusion is further supported by the fact that paragraph 1.8 does not require the rejection of a bid as nonresponsive if UL listing cards are not submitted along with the bid.

In regard to Worcester's request for bid preparation costs, such costs can be recovered where the Government has acted arbitrarily or capriciously with respect to a claimant's bid or proposal. Pacific West Constructors, B-190387, January 24, 1978, 78-1 CPD 63. Here, however, as noted above, there was no arbitrary or capricious action on the part of the Government. Accordingly, there is no basis for allowing the recovery of bid preparation costs.

VA states that it believes the technical specifications used in this solicitation need revision and as a result is taking steps to see that, in the future, bidders are clearly advised of the nature of the UL listing card requirement and the effect if they fail to comply. In light of this, we wish to point out that, although we have generally raised no objection to a requirement stating that a product of a procurement conform with a set of standards adopted by a nationally recognized organization in the field, or to a requirement for independent laboratory certification that such standards are met, we have held that a requirement that the articles offered bear a specific label showing approval by a particular testing laboratory is unduly restrictive and improper. See 33 Comp. Gen. 573 (1954); 36 Comp. Gen. 425 (1956); 39 Comp. Gen. 563 (1960); Arctic Marine, Inc., B-182321 May 14, 1975, 75-1 CPD 311; Acorn Building Components, Inc., B-185605, July 1, 1976, 76-2 CPD 1. Therefore, any revision of the technical specifications in question should incorporate this rule where appropriate.

For the reasons set out above, the protest and claim are denied.


Deputy Comptroller General
of the United States