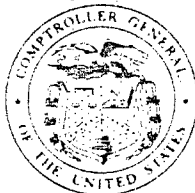


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Proc I

DECISION



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

10,529

FILE: B-194188

DATE: June 19, 1979

MATTER OF: Blazer Industries, Inc.

DL601877

DIGEST:

[Protest Alleging IFB Specifications Were Restrictive]

1. To extent that protest alleges that IFB specifications were restrictive, it is untimely and not for consideration on merits, where issue is not raised until after bid opening.
2. IFB requirement for descriptive literature, stated in general terms, was defective because it failed to comply with FPR § 1-2.202-5 requirement that descriptive data clause specify in detail what data is required and extent data will be considered in bid evaluation. Nevertheless, data submitted with bid may not be disregarded for purposes of determining bid responsiveness where bidder is offering system described by literature. Therefore, low bid was properly rejected where literature showed material deviations.
3. Low bid was properly determined to be nonresponsive. Award to only other bidder was improper where that bid contained material deviations from specifications. Solicitation should have been canceled and readvertised. Due to passage of delivery date, corrective action is impracticable; however, agency advised of procurement deficiency to prevent recurrence in future.
4. Protest prosecution costs are not recoverable against Government.
5. Even though awardee's bid should have been rejected as nonresponsive, claim for bid preparation costs by low nonresponsive and only other bidder is denied since agency was not arbitrary or capricious toward claimant-bidder and disappointed claimant-bidder would not have received award because bidder was nonresponsive and Government should have canceled solicitation and readvertised.

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6. Post-bid-opening agency requests for and consideration of clarifications from bidders whose bids were patently nonresponsive were improper.

Blazer Industries, Inc. (Blazer), has protested the Department of the Treasury, Internal Revenue Service's (IRS), award of a contract to AC Manufacturing Co., ~~c/o Airpac System (AC)~~, for computer room air conditioning under invitation for bids (IFB) No. IRS 79-9. Blazer, the low bidder, alleges that its bid "meets or exceeds all functional requirements of the specifications," any deviation is de minimis in nature or a minor informality and, therefore, the IRS should have waived or corrected the deviations and considered the bid responsive. Blazer requests that the contract awarded be terminated and award of a new contract made to Blazer or, alternatively, that bid preparation and protest prosecution costs be awarded to Blazer. AGC00004
DLG01876

On November 30, 1978, IRS issued an IFB for the purchase of a computer room air-conditioning system. This procurement was advertised in the Commerce Business Daily and solicitations were mailed to nine vendors. Bid opening, after an amendment, was scheduled for and was held on December 20, 1978. Award was made to AC on February 15, 1979.

By letter, dated January 22, 1979, Blazer advised IRS that its "standard 'computemp' system far exceeds the basic specification outline," but it specifically acknowledges areas where its product deviates from the specifications set forth in the IFB. For instance:

"(A) Drain pans specified call for a rust proof coating, however, Blazer only provides stainless steel. Stainless steel is itself rust proof so that the lack of a coating is inconsequential in terms of the specification. It is far superior in nature since there is no coating to fail in extended use.

"(B) Motors on the larger units call for 7.5 HP. Blazer uses 5.0 HP motor in conjunction with larger fans. Note that the supply fan motor is the only part of the system which operates continuously regardless of the load. Thus the Blazer model meets the functional

need at a lower power cost over the life cycle. The deviation here is again inconsequential since, as the performance data indicates, the unit meets and exceeds the 224,000 BTU/hr. Total Cooling Capacity and 192,000 BTU/hr. Sensible Cooling Capacity."

IRS argues, among other things, that Blazer's protest concerns the alleged restrictiveness of the specifications. Blazer believes its protest concerns the evaluation of a bid and only refers to the potentially restrictive nature of the specifications as an alternative argument.

To the extent that Blazer's protest may be viewed as raising an issue concerning the restrictiveness of the specifications, its protest is untimely filed. Our Bid Protest Procedures require that protests based upon alleged improprieties in the solicitation must be filed prior to bid opening. 4 C.F.R. § 20.2(b)(1) (1978). Blazer's protest in this regard, filed on February 23, 1979, more than 9 weeks after bid opening, is untimely and not for consideration on the merits.

As to the responsiveness of Blazer's bid, the IFB, in section 5.0 - Notice to Bidders, provided:

"5.1 Bids shall include brochures, catalog data, certified test data, installation, operating and maintenance instructions for all component parts of the system."

Blazer complied with this clause and submitted extensive descriptive literature concerning its Computemp System. It is clear from the record that the IRS considered the aforementioned clause as a descriptive literature clause and evaluated the bids accordingly.

The IRS contends that Blazer's bid was rejected as nonresponsive because the descriptive literature revealed that "Blazer's bid failed to meet the required specifications in several material ways." With respect to Blazer's Model 200 WG, the IRS supports its determination with the following:

1. "Blazer's System showed one drycooler for each computer air conditioning unit for a total of 4 units. Specifications called for one drycooler for two computer air conditioning units, a total of 2 drycoolers. Installation of these two additional drycoolers would require substantial changes in the completed construction drawings, additional space, piping and control systems and redesign of electrical feeder. Changes in the construction drawings could cause a minimum of 30 days delay. A 30-day delay in the installation of the computer system, in this case, would cause the Government an estimated amount of \$280,000.00 in delay and changes costs."
2. "Hot gas water heater for use in humidification was required. Blazer specified use of an electric immersion heater rated at 7 kw. Based on 4 units using 7 kw of humidification 50% of the time for 24 hours a day, 365 days a year at \$.045 per kw-hr., means an additional annual operating cost to the Government of \$5,518.80."
3. "Blazer's system does not provide for a standby pump for each drycooler, or for automatic and alternating changeover of these pumps from normal operation to standby as required in the specifications."
4. "The status panel on Blazer's model does not include power loss, loss of airflow, high/low humidity, and glycol pump failure, as required by the specifications."
5. "The government specified external static pressure of 0.5" WG with 7.5 HP fan as compared to 0.3" WG with 5 HP fan which Blazer wanted to provide. This means that in any condition where the external static pressure exceeds 0.3" WG, the Blazer unit would deliver less air, hence, less air conditioning capacity. Blazer only uses a 5 HP motor for circulating the

same amount of air, the government required a 7.5 HP motor to be assured that the capacity required to maintain desired computer room conditions is adequate at all times, the energy conservation difference between the 5 HP motor and the 7.5 HP motor notwithstanding."

In regard to Model 100 WG, the IRS argues:

- "1. Blazer's system does not provide for a standby pump. There was no reference to automatic and alternating changeover of the pumps from normal pump to standby pump as required in the specifications.
- "2. Blazer's system does not provide for a condensate pump as required by the specifications.
- "3. The status panel on Blazer's model does not include power loss, loss of airflow, high/low humidity, glycol pump failure and condensate pump failure as required in the specifications.
- "4. Blazer's system does not provide for a supply air plenum."

Essentially, it is Blazer's position that since the descriptive literature clause did not comply with the requirements of the Federal Procurement Regulations (FPR) § 1-2.202-5(d)(1) (1964 ed. amend. 13), it was improper for the IRS to use such literature to determine the responsiveness of Blazer's bid. FPR § 1-2.202-5(d)(1), supra, provides, in pertinent part:

"When descriptive literature is required, the invitation for bids shall clearly state what descriptive literature is to be furnished, the purpose for which it is required, the extent to which it will be considered in the evaluation of bids and the rules which will apply if a bidder fails to furnish it before bid opening or if the literature furnished does not comply with the requirements of the invitation for bids.* * *"

We agree with Blazer that the instant descriptive literature clause did not comply with FPR's requirements and, therefore, there was a deficiency in the solicitation. McGraw-Edison Company, B-181473, February 13, 1975, 75-1 CPD 95. Moreover, we note that the record furnished our Office by the IRS does not contain any justification for inclusion of the descriptive literature clause. See FPR § 1-2.202-5(c). However, we do not agree with Blazer that under these circumstances the descriptive literature submitted by Blazer should have been ignored by the IRS. Descriptive literature submitted with a bid may not be disregarded for purposes of determining bid responsiveness where the bidder is offering the system described by such literature. 46 Comp. Gen. 1 (1966); Alben Engineering Corporation, B-181912, March 6, 1975, 75-1 CPD 135; Dominion Road Machinery Corporation, 56 Comp. Gen. 334 (1977), 77-1 CPD 89; Spectrolab, Inc., B-189947, December 7, 1977, 77-2 CPD 438.

Based on the foregoing we believe that the Blazer bid failed to conform to the specifications and as such was properly rejected as nonresponsive. With respect to Blazer's argument that any deviation found in its bid is de minimis or a minor informality, we disagree. It is our view that the deficiencies set forth above go to the substance of the bid by materially altering the obligation of Blazer to furnish the required system which may not be waived or cured and required the bid to be rejected as nonresponsive. In this regard, we observe that Blazer does not deny the IRS's comments, stated above, except to say that they "are in major part utterly ludicrous." In addition, it appears that the rule that deliberate exceptions to an invitation requirement, here the specifications, cannot be waived as trivial or minimal governs in this circumstance. Abbott Power Corporation, B-192792, April 30, 1979.

Furthermore, Blazer observes that the AC bid also deviated from the specifications, and "If the Blazer bid is rendered nonresponsive for this reason then * * * [AC] is also nonresponsive." We agree. The IRS evaluated AC's bid concluding:

"[AC] meets all the specifications including required capacities and equipment design concept. Clarification is required on the following items:

"a. Model CDXC-23

"* 5 Hp. pumps should be quantity of (4) instead of (2). (This is believed to be a typographical error. Automatic alternating and changeover of pumps are specified and shown in installation plans for each of the two drycoolers.)

"* Same operating description of the pumps as indicated for the Model CUXC-12 should apply to the Model CDXC-23.

"b. Model CUXC-12

"* Glycol pump failure is not included in the status display panel."

On January 17, 1979, by letter, the IRS requested clarification of AC's bid. AC responded by letter, dated January 19, 1979. The request and subsequent acceptance of AC's clarification were improper since at least one of the deviations between AC's bid and the specifications was material (omission of glycol pump failure indicator). This conclusion is supported by the following matters of record. The contracting officer states, after listing the above-quoted material deviations of Blazer's bid, which omitted a glycol pump failure indicator that:

"Blazer's bid was determined to be nonresponsive based upon the above detailed material deviations from the specifications and was given no further consideration for award." (Our emphasis added)

In addition, an IRS legal memorandum states, after incorporating the contracting officer's statement by reference and specifically mentioning the failure of the status panel to include a glycol pump failure indicator, that "None of these deviations are minor

or de minimus as alleged and each has significant impact on the price, quantity or quality of the item procured."

Therefore, AC's bid should have been rejected as nonresponsive also. In these circumstances, Blazer and AC having been the only bidders, the IRS should have canceled the solicitation and readvertised. Moreover, the deficiency in the data clause alone would have warranted cancellation. See Alben Engineering Corporation, supra. There were other issues raised with respect to AC's bid which need not be discussed since they have been rendered academic.

With regard to remedial action, since the IFB required delivery within 56 calendar days after the award date, February 15, 1979, any recommendation for corrective action is rendered impracticable. Nonetheless, by separate letter we are pointing out to the Secretary of the Treasury the deficiencies in this procurement to prevent a recurrence in the future.

In regard to Blazer's request for protest prosecution costs, we have held that the costs of pursuing a protest are not compensable. Documentation Associates - Claim for Proposal Preparation Costs, B-190238, June 15, 1978, 78-1 CPD 437. Accordingly, Blazer's claim for such costs is denied.

Concerning Blazer's request for bid preparation costs, we have held that such costs may not be recovered unless the agency's actions were arbitrary and capricious towards the bidder-claimant. Morgan Business Associates, B-188387, May 16, 1977, 77-1 CPD 344. However, not every irregularity will give rise to the right to be compensated for the expenses by undertaking the bidding process. T & H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345. There is a second requirement applied by our Office that the complained-of agency action deprived the bidder-claimant of an award to which it was otherwise entitled. United Power & Control Systems, Inc.; Department of the Navy--Reconsideration, B-184662, December 27, 1978, 78-2 CPD 436; Morgan Business Associates, supra. First, since the Blazer bid was properly rejected as non-responsive, the IRS did not act arbitrarily or capriciously toward Blazer in the evaluation of its bid.

Insofar as accepting the AC bid, we take cognizance of the few deviations of AC vis-a-vis the multiple deviations of Blazer's bid and similarly do not find the standard met. Moreover, Blazer has not demonstrated that it would have been entitled to award had the IRS acted properly and canceled the solicitation. At best, Blazer would have had the opportunity to submit another bid. Accordingly, Blazer's claim for bid preparation costs is denied.

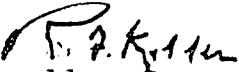
Finally, Blazer alleges that the IRS delayed in responding to Blazer's intention, expressed orally, to protest if its bid was rejected as nonresponsive. Specifically, Blazer states:

"IRS delayed in providing their 'reasons' for rejecting the Blazer bid for three weeks after award despite repeated requests for the details and despite the provisions of FPR 1-2.408 that 'if the request is made by an unsuccessful bidder whose bid price was lower than that of the successful bidder, sufficient information will be furnished in the reply to fully explain the basis for the award.' To say merely that 'we took theirs, we rejected yours as non-responsive' hardly qualifies as a full explanation. To get anything further required numerous phone calls, a request for information under the Freedom of Information Act and much frustration.

"Further, as we noted in enclosure 2 to our letter of 2/26/79, we had clearly informed IRS [at a meeting on January 23, 1979] of an intention to take this matter to the GAO were the bid to be found non-responsive. This was, and should have been treated as, a protest to the procuring agency against the actions taken. IRS chose, however, to finish the award process in secret and disregard the provisions of the Bid Protest Procedures and FPR 1-2.407-8(a) and (b)(3). This action compromises the proper and effective remedy of an award to Blazer Industries. We cannot construe this as anything other than a deliberate and conscious attempt to circumvent the

Bid Protest Procedures applicable to pre-award protests."

Under the applicable procurement regulations, there is no requirement that an agency must give a bidder determined to be nonresponsive a preaward rejection notification setting forth the reasons for the rejection. In any event, we note that Blazer was aware that the agency was having problems with its bid. Also, it is clear that Blazer had enough knowledge, well before award, to furnish the agency with a detailed letter (dated January 22, 1979), discussing the areas of concern relating to how its system met or exceeded the specifications. Moreover, Blazer had the benefit of a clarification meeting which in the context of formal advertising was improper under those circumstances. See Spectrolab, Inc., supra. (We observe that a similar impropriety existed in permitting AC a post-bid-opening clarification.) Rather than protest at the time of the meeting and be certain of preserving its rights, Blazer simply voiced an intention to protest (which is not a protest) but failed to do so. It is apparent that in this circumstance Blazer was more aware of the possibility that its bid would be determined nonresponsive than in the normal situation where the agency does not conduct an improper clarification meeting and just rejects the bid. In our view with respect to the issue of delay, the IRS similarly did not violate any procurement regulation. In conclusion, we find nothing in the record to indicate a deliberate attempt to prevent Blazer from filing an effective protest.


Deputy Comptroller General
of the United States