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DECISION

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

B-196470

FILE: DATE: February 21, 1980

MATTER OF: EMI Medical, Inc. DLG03945

[Protest of Bid Rejection as Nonresponsive]

DIGEST:

1. No legal requirement exists which prohibits bidder from clarifying printed descriptive literature with letter accompanying bid, and where low bidder offers equipment which meets specification requirements plus features which are not required, bid is acceptable.

2. Contracting officer's refusal to accept bidder's clarification of preprinted descriptive literature was not reasonable where result was rejection of bid for equipment which met agency's minimum needs and award of contract at higher price.

3. Where contract is improperly awarded because of contracting officer's interpretation of contract specifications, agency should explore feasibility of such termination of contract for convenience of Government, as is consistent with fair and reasonable treatment of parties and in best interest of Government, i.e., at a reasonable cost and compatible with agency's need for equipment.

EMI Medical Inc., protests the award of contract #V797P-6696 by the Veterans Administration (VA) for six computerized tomography (CT) whole body scanners to Pfizer, Inc. The award was made under invitation for bids (IFB) No. M6-3-79. EMI's low bid was rejected as nonresponsive after the contracting officer concluded that its equipment, as described in the descriptive literature submitted in accordance with the requirements of the IFB, did not meet the specification requirements. AGC00016 DLG03946

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The portion of the specification in issue requires that the equipment "be capable of reconstructing absorption measurements and displaying the computed image in 45 seconds or less;" IFB amendment 2 stated that "the 45 seconds * * * applies to all of manufacturers standard tomography scan modes regardless of the quantity of data collected." The issue in this case is the interpretation of the foregoing specification.

CT body scanning equipment combines low level x-ray imaging and data processing so as to visualize cross sectional "slices" of the human body for medical diagnostic purposes. The patient being "scanned" reposes on a couch or table which is precisely moved through the x-ray source. The x-ray source rotates around the patient in a full circle (360 degrees) emitting controlled "beams" as it rotates. Unlike familiar x-ray equipment, the "beams" do not expose film; rather they are received by "receptors" or "detector arrays" which, depending on the manufacturer either rotate with the x-ray source (rotate/rotate geometry) or are fixed throughout the circle (rotate/stationary geometry). The equipment views the patient at various points (which correspond to the angular position of each degree or partial degree of the circle) throughout its 360 degrees of rotation, and the electronic data acquired by the detector array is processed by a computer which ultimately "reconstructs" the image for display on a video monitor. Without here attempting to elaborate on the precise mathematics involved with each scan "slice," the number of individual data elements to be processed by the computer is a function of the number of views taken times the number of individual elements in the detector array for each 360 degrees of rotation, or close to 200,000 data elements for the EMI equipment in its 360 (one view per degree of rotation) scan mode. The reconstruction time in question is the time necessary for the computer to process this data to reconstruct the video image. The image is not transitory because the data is stored in the computer and can be recalled; the video image can be photographed; or the data can

be printed as hard copy. Finally, a technique used to increase picture resolution is to increase the amount of data collected, i.e., resolution increases as the number of views increases.

The EMI equipment proposed operates on the rotate/rotate geometry and has the capability of scanning in 3 distinct scan modes, i.e., 360 (1 view per degree of rotation), 540 (1 view per 2/3 degree), and 1080 (1 view per 1/3 degree). For the EMI equipment complete scans can be accomplished in 5, 10 or 20 seconds as selected by the equipment operator. EMI claims that as a practical matter, picture resolution does not improve beyond the 540 scan mode, and there is no evidence on the record to contradict that assertion. The Pfizer equipment offered operates on the rotate/stationary geometry principle and as we understand it, the number of views is fixed by the position of the stationary detectors, i.e., 600 in the case of the Pfizer equipment. However, the IFB did not specify any particular data collection geometry, and indeed the IFB's avowed purpose, according to the contracting officer was to maximize competition by not limiting acceptable equipment to any specific design.

EMI's preprinted descriptive literature, submitted with its bid showed scan speeds as 5, 10 or 20 seconds; scan modes as 360, 540 or 1080; and reconstruction time as "40 seconds or less for 360 views." However, accompanying the bid was a letter which stated that:

> "The 'standard operating modes' of the EMI-6000 General Diagnostic CT Scanner System are:
>
> 1. 360 views
>
> 2. 540 views
>
> "EMI certifies reconstruction time for both modes shall be 45 seconds or less.

> "The third mode, 1080, views, is a specialized technique used only for radiation therapy planning studies and not utilized in routine diagnostic studies, in other words, an extra capability not required in the specifications."

The contracting officer rejected the EMI bid as nonresponsive, on the theory that any scan made available on the system is a "standard feature;" the 1080 scan mode will not reconstruct in 45 seconds or less and therefore the equipment does not comport with the specifications. The contracting officer does not suggest that the EMI equipment operating in its 360 or 540 modes does not meet its requirements, and at a conference held on this protest, he admitted that the EMI equipment would be acceptable if the 1080 scan mode were not included in the equipment or the printed literature. In this respect, EMI suggests that it could have deleted that capability if it thought that was necessary to meet the specification requirements.

To be responsive, a bid must comply in all material respects with the IFB, i.e., where a bidder has promised to deliver exactly what was called for in the invitation, within the time periods specified, and in accordance with the terms and conditions of the invitation, the bid is responsive. J. Baranello and Sons, 58 Comp. Gen. 509 (1979), 79-1 CPD 322. The purpose of a descriptive literature requirement is to determine if the supplies offered comply with the requirements of the specifications, and where such literature indicates a deviation from such specifications, the bid is properly rejected as nonresponsive. See E-M Southwest, Inc., B-193299, March 29, 1979, 79-1 CPD 217. We are aware of no requirement, however, which prohibits a bidder from clarifying its preprinted descriptive literature by a letter accompanying the bid which obligates the bidder to contract performance as required. Indeed Pfizer amplified its own printed literature for that purpose.

As we have noted earlier, the contracting officer based his decision to reject the EMI bid solely on the

basis that the 1080 scan mode is available on the system, with no consideration of the qualifying language of the EMI letter. Thus in his report on the protest, the contracting officer stated "there is no alluding to radiation therapy planning application for any of the views," and "if the 1080 view scan mode is available on the system, and whether used or not, it is a standard feature and not a specialized feature as cited in EMI's letter." We find the contracting officer's conclusion unreasonable under the circumstances. For example, under the IFB, the EMI equipment sans the 1080 mode was acceptable according to the VA's interpretation of its own specification.

Moreover, we believe it was reasonable for EMI, the manufacturer, to conclude that "manufacturers standard tomography scan mode" meant scan modes used for standard rather than specialized clinical applications; that it was necessary to clarify what is essentially sales literature prepared for other purpose so as not to run afoul of the language of the specification; and that it was not called upon to eliminate an equipment feature which was ordinarily included in its equipment to meet what might otherwise be interpreted as the requirements of the specifications. A bidder should not be prohibited from offering more than is required, so long as the item is otherwise in accord with the specifications and award is not based on the unsolicited features. To interpret the specifications otherwise has the effect of restricting rather than enhancing competition, the opposite effect desired by the agency. The final result was that the agency awarded a contract for a higher price, when from the record, it appears the lower priced unit would meet the agency's avowed minimum needs.

Pfizer has also suggested that the EMI equipment, as described in its literature, failed to meet § 1.f.3 of the specifications requirements that the physician's station provide for "independent manipulation of image content separate from operator's console." Pfizer, however, relies on its assertion of a generally understood "CT industry" standard and the ordinary interpretation of "independent manipulation" for its belief, but no evidence on our record is available to affirm or dispute

that claim. The VA has not raised such an objection either in its original rejection of the EMI bid or after the matter was raised by Pfizer, and the asserted deficiency is not apparent from the record. In this respect, we point out that it is not generally the function of this Office to determine the technical adequacy of equipment offered to the Government, since that function is the primary responsibility of the procuring agency, which enjoy a reasonable range of discretion in these matters. Therefore, in the absence of a clear showing that the agency's determination was arbitrary or unreasonable, it will not be disturbed by GAO. Cf. ITEL Corporation, B-192139.7, October 18, 1979, 79-2 CPD 268 (a case involved with the determination of the technical adequacy of a proposal under a negotiated procurement). We believe the contracting officer's statement that but for the 1080 scan mode, EMI's equipment was acceptable, can be reasonably taken to mean it disagrees with Pfizer in this respect.

As our discussion indicates, we believe the award should have been made to EMI in this instance, and an appropriate remedy would ordinarily be a recommendation that the contract awarded to Pfizer be terminated for the convenience of the Government. However, there are many factors involved in our consideration of whether such a recommendation would be in the best interest of the Government, including the cost to the Government, the extent of performance and the delays such a recommendation might entail. See Cohu, Inc., 57 Comp. Gen. 759 (1978), 78-2 CPD 175. In this respect, the procurement has been delayed for several months, and termination and reaward may only enhance the delay in the delivery of essential medical equipment further. Also, Pfizer claims it has obligated itself to the extent of $1,686,000 for the parts and components necessary to manufacture the equipment. The foregoing is not wholly meaningful, however, because it does not take into consideration the actual liability the Government would incur by a termination of the Pfizer subcontracts, or the commercial value to Pfizer of the components already delivered to it. Under these

circumstances, and in view of the $165,000 total difference in bid prices between EMI and Pfizer, we recommend the agency explore the feasibility of such termination of the Pfizer contract for the convenience of the Government and award to EMI as would be consistent with the fair and reasonable treatment of both EMI and Pfizer. We emphasize that any agreement with the parties be made with the best interest of the Government in mind, i.e., at a reasonable cost and compatible with the VA's need for this equipment.

The protest is sustained.

Deputy Comptroller General
of the United States