



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: GNB Technologies, Industrial Battery Company

File: B-262187

Date: December 4, 1995

L. Stephen Quatannens, Esq., Gardner, Carton & Douglas, for the protester.

James B. Coker, for Yuasa-Exide, Inc., an interested party.

A. F. Thibodeau, Esq., and Cynthia S. Guill, Esq., Department of the Navy, for the agency.

Katherine I. Riback, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester's bid was properly rejected as nonresponsive where, on its face, it took exception to a material requirement.

2. Allegation that contracting agency should have rejected low bid as nonresponsive is denied where bid takes no exception to the solicitation's material requirements.

DECISION

GNB Technologies, Industrial Battery Company protests the rejection of its bid and the award of a contract to Yuasa-Exide, Inc. under invitation for bids (IFB) No. N47408-94-B-2033, issued by the Department of the Navy for lead calcium and antimony hybrid batteries.

We deny the protest.

The IFB, issued on March 29, 1995, contemplated the award of a fixed-priced requirements contract for a variety of batteries, battery systems, and related services, such as battery disposal, to support the Navy's uninterrupted power support (UPS) systems. These systems provide a constant level of electrical power and are installed in critical communication and intelligence centers where maintenance of the highest level of reliability and continuity of operation are critical.¹

¹Normally, commercial power is fed through the UPS system; however, in the event of a power failure, each UPS system has a battery backup to keep the system from
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To demonstrate that they were capable of successful performance, bidders were instructed to submit with their bids a "comprehensive response to the requirements of the Invitation to Bid to enable the Government to evaluate offeror's understanding of and capability to perform the Navy's requirements as set forth in . . . this solicitation." The solicitation did not contain a descriptive literature requirement.

The IFB specifications provided, in pertinent part, that battery types D through J shall consist of single cell units and that battery types K through S shall have a maintenance-free valve regulated design, with a pressure valve limit of less than 4 pounds per square inch (psi).²

Five bids were received by the May 25 bid opening date. The protester submitted the apparent low bid at \$65,120,595; and Yuasa-Exide submitted the second-low bid at \$76,083,679. The agency determined that the protester's bid was nonresponsive and, on July 20, made award to Yuasa-Exide, Inc., as the low, responsive bidder. This protest followed.

The Navy viewed the protester's bid as nonresponsive because while the IFB required that battery types K through S have a pressure valve limit of less than 4 psi, in its bid GNB offered N through S batteries with a pressure relief vent valve which operates in the range of 3 to 7 psi.

To be responsive, a bid, as submitted, must represent an unequivocal offer to perform, without exception, in accordance with requirements set forth in the IFB so that the bidder will be bound to perform in accordance with all the material terms and conditions. Contech Constr. Co., B-241185, Oct. 1, 1990, 90-2 CPD ¶ 264. A deficiency or deviation which goes to the substance of the bid by affecting price, quality, quantity, or delivery of the article offered is a material deviation that requires the bid to be rejected as nonresponsive. Seaboard Elecs. Co., B-237352, Jan. 26, 1990, 90-1 CPD ¶ 115.

The agency explains that the pressure valve limit requirement is material because it is safety related and significantly affects battery quality; the vents in maintenance-free batteries are prone to failure and excess pressure may rupture a container.

¹(...continued)

crashing. If there is a power failure and the battery backup is underpowered or malfunctioning, the entire system will shut down.

²The term "valve regulated" is applied to these types of batteries because each cell is filled with a self-resealing pressure relief vent valve which is supposed to open if the internal pressure of the cell exceeds the vent valve's limit.

The requirement for a pressure valve limit of less than 4 psi was intended to provide a margin of safety to prevent rupture of any battery container, irrespective of any nuances of a particular bidder's container design. By proposing N through S batteries that use a pressure relief vent valve which operates in the range of 3 to 7 psi, GNB's bid took exception to an IFB specification requirement. Since the pressure valve limit requirement was material, the contracting officer properly determined that GNB's bid was nonresponsive because it did not constitute an unequivocal offer to perform in accordance with all material IFB requirements.³

GNB contends that its particular battery design makes the pressure valve limit unnecessary. This argument is untimely. In essence, GNB is contesting the unqualified specification requirement that K through S batteries have a pressure valve limit of less than 4 psi. Under our Bid Protest Regulations, such protests based on alleged improprieties in a solicitation, which are apparent prior to the bid opening time, must be filed prior to that time. 4 C.F.R. § 21.2(a) (1995).

GNB argues that if its bid is considered nonresponsive, the agency should have rejected Yuasa-Exide's bid as nonresponsive as well, because it also fails to meet the pressure valve limit of less than 4 psi.

In general, a nonresponsive bidder, such as GNB, is not an interested party eligible to protest an award to another firm where there are other apparently responsive bidders that would be in line for award if the protest were sustained. 4 C.F.R. §§ 21.0(a), 21.1(a); K & M Elec. Corp., B-247450, Apr. 23, 1992, 92-1 CPD ¶ 387. However, this rule does not apply where a bidder protests that it was denied equal treatment because the agency rejected its nonconforming bid while accepting a competitor's similarly nonconforming bid. Maintenance and Repair, B-251223, Mar. 19, 1993, 93-1 CPD ¶ 247; Raymond Corp., B-224577, Jan. 8, 1987, 87-1 CPD ¶ 36; Dillingham Ship Repair, B-218653, Aug. 14, 1985, 85-2 CPD ¶ 167. In other words, we view a protester as an interested party when the basis for protest is that the protester and one or more competitors were treated disparately. Id. Therefore, GNB is an interested party to argue that Yuasa-Exide's bid was defective just as its own bid was defective. Tel-Med Info. Sys., 66 Comp. Gen. 504 (1987), 87-1 CPD ¶ 561.

³GNB's bid was also determined to be nonresponsive because of a number of other factors, such as the fact that the bid materials show that its offered battery types D through J do not meet the IFB requirement that these batteries be single cell units. While GNB's proposed D, E, F, and G battery types meet the specified voltage requirements and the power delivery capabilities, the materials submitted clearly indicate that they consist of two individual cells packaged in a single container. However, because we find that GNB's bid was nonresponsive to the IFB's pressure valve limit requirement, we need not address GNB's protest of these other matters.

By signing its bid Yuasa-Exide bound itself to comply with the pressure valve limit requirement and nothing on the face of its bid limited, reduced, or modified its obligation to perform in accordance with this requirement. In this regard, unlike GNB's bid, Yuasa-Exide's bid did not include any information bearing upon whether its proposed K through S batteries meet the pressure valve limit of less than 4 psi. A bid which, on its face, takes no exception to the IFB's requirements is responsive, since it is an unqualified promise to do the exact thing called for in the solicitation. Hicklin GM Power Co., B-222538, Aug. 5, 1986, 86-2 CPD ¶ 153. Since Yuasa-Exide's bid did not qualify the pressure valve limit requirement, the bid was responsive to this requirement.

The protest is denied.

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