



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: CardioMetrix

File: B-270777

Date: March 27, 1996

Robert J. Loring, Ph.D., for the protester.

Monika S. Rueda for Sekot Laboratories, Inc., an intervenor.

Jonathan Cramer, Esq., Department of Justice, for the agency.

Sylvia Schatz, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where solicitation contemplated award of a fixed-price requirements contract, bid was properly rejected for failure to offer fixed price where fee schedule contained legend stating that "[a]ll prices are subject to change without notice."

DECISION

CardioMetrix protests the rejection of its bid under invitation for bids (IFB) No. 125-0212, issued by the Federal Bureau of Prisons, U.S. Department of Justice, for clinical laboratory testing for the inmate populations of the Federal Correctional Institute/Federal Prison Camp in Miami, Florida.

We deny the protest.

The IFB contemplated the award of a fixed-price requirements contract. The bid schedule stated as follows:

"The [g]overnment intends to make a single award based upon price alone. The low bid will be determined by the combined overall lowest priced regular fee schedule utilizing ten (10) regular fee schedule tests listed in this section, considering the discount offered, if any, along with the aggregate total of the special pricing of the twenty (20) tests listed in this section. I/we will provide all regular fee schedule tests at _____% discount."

In addition, the statement of work (SOW) provided:

"A breakdown of all available tests with their regular fee schedule shall be provided with the entire bid. Failure to submit the entire regular fee schedule will consider the bid to be non-responsive.

"Special pricing is being requested for twenty (20) tests listed in section B of this solicitation package. The estimated quantities reflect a twelve (12) month period. All other tests that do not reflect special pricing will be paid from the regular fee schedule that is provided by the contractor with a ___% discount, if offered. A discount offered, if any will include, but will not be limited to the ten tests listed in section B of this solicitation package."

Although CardioMetrix's bid was apparently low, the Bureau rejected it as nonresponsive because the included fee schedule contained the following legend: "All prices are subject to change without notice." The Bureau concluded that this qualifying language rendered CardioMetrix's bid nonresponsive for failure to offer a fixed price. Award thus was made to the second low bidder, Sekot Laboratories, Inc.

CardioMetrix principally contends that since its fee schedule containing the legend was submitted for informational purposes only, and was not part of the price evaluation, the legend did not cause its bid to be nonresponsive.¹

A bid that does not offer to perform at a fixed price where a fixed-price contract is contemplated must be rejected as nonresponsive. See Federal Acquisition Regulation § 14.404-2(d); U.S. Coast Guard--Advance Decision, B-252396, Mar. 31, 1993, 93-1 CPD ¶ 286.

While the fee schedule was not used for bid evaluation, it was not to be submitted, as CardioMetrix contends, for informational purposes only. The SOW, as indicated, clearly required offerors to submit the entire regular fee schedule for all available tests; their failure to do so would result in their bids being determined nonresponsive. Given that a fixed-price contract was to be awarded, this

¹CardioMetrix also states that it has had numerous government contracts with the Bureau and other agencies for testing similar to that required here, and that its offers have never been rejected as nonresponsive due to similar legends on its fee schedules. However, agency actions in connection with other procurements are irrelevant to the determination of whether the bid properly was rejected under the current procurement; each procurement stands on its own. See Discount Machinery & Equip., Inc., B-248321, July 22, 1992, 92-2 CPD ¶ 44.

requirement clearly was included to ensure that fixed prices--i.e., the regular fee schedule prices--would be established for the unevaluated fee schedule items. By submitting a qualified fee schedule, CardioMetrix provided prices that were variable to the extent that they should change; this constituted a failure to agree to perform the fee schedule tests at a fixed price, as required by the IFB. Its bid therefore was nonresponsive and properly was rejected.

CardioMetrix also argues that, since the fee schedule was to be submitted in "as is" condition, without changes or qualifications, its bid would have been found nonresponsive had it removed the legend. This argument is untenable. First, since CardioMetrix's interpretation of the IFB would require bidders with qualifying legends on their fee schedules, essentially, to submit nonresponsive bids, the interpretation is unreasonable. In any case, to the extent CardioMetrix may have interpreted the IFB as precluding removal of the legend, this created a material inconsistency with the requirement for fixed prices; the resulting ambiguity as to whether the fee schedule could be changed to eliminate variable pricing should have been protested prior to bid opening. Bid Protest Regulations, section 21.2(a)(1), 60 Fed. Reg. 40,737, 40,740 (Aug. 10, 1995) (to be codified at 4 C.F.R. ¶ 21.2(a)(1)).²

The protest is denied.

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²CardioMetrix maintains that the legend should not have rendered its bid nonresponsive because it was merely pre-printed on its master fee schedule and was not intended to qualify its prices. However, only material available at bid opening may be considered in making a responsiveness determination. Since the bid contained the qualifying language, and did not include any indication that this language did not represent its intent, it rendered the bid nonresponsive; post-bid opening explanations cannot be considered in determining the responsiveness of a bid. Gelco Payment Sys., Inc., B-234957, July 10, 1989, 89-2 CPD ¶ 27.