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DECISION



Under Proc 1

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

FILE: D-186893

DATE: December 23, 1976

MATTER OF: Monogram Industries, Inc.

DIGEST: Where IFB does not comply with FPR § 1-2.202.5, regarding submission of descriptive literature to be used in evaluation of bids, failure of bidder to submit literature with bid does not require rejection of bid where procuring agency finds that acceptable product can be procured without such literature. However, where requested literature appears to be of type necessary to evaluation of bids, Secretary of Agriculture is advised that steps should be taken to assure future compliance with FPR.

On May 24, 1976, the United States Department of Agriculture, Forest Service, issued invitation for bid (IFB) No. R2-76-45 for oil flush toilet systems to be delivered to various destinations.

Two bids were received in response to the IFB. The low bid was submitted by Sarmax Corp. (Sarmax) and the other bid was from Monogram Industries, Inc. (Monogram).

Monogram protested to our Office the responsiveness of Sarmax's bid prior to any award being made. However, the Forest Service determined that an immediate award was necessary in view of the onset of winter at the locations where the systems were to be installed and on July 16, 1976, made award to Sarmax notwithstanding the pendency of the protest.

Monogram's protest is based on its contention that Sarmax, by failing to submit with its bid descriptive data required by the IFB, was nonresponsive.

The IFB, under the section entitled "Specifications for Oil Flush Toilet Systems," contained the following language with regard to the data in dispute:

"1.04 Submittals

- "A. Certification -** The manufacturer shall provide written certification indicating the oil flush system conforms to these specifications and an engineering structural analysis to

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verify capability to withstand soil load conditions. Include complete shop drawings of the system.

"B. Tests - The manufacturer shall provide one copy of the test report of the flushing fluid:

"1. Indicating the oil is nontoxic and nonhazardous.

"2. Insuring that no viable aerobic, anaerobic, or coliform microorganisms are present in the flush fluid and toilet bowl after the system has been in operation for an extended period of time.

"C. Operation and Maintenance Manual(s) - The manufacturer shall provide manual(s) that contain sufficient information to insure satisfactory operation and maintenance of the system to include:

"1. Sequence of operation.

"2. Routine maintenance schedule.

"3. Trouble shooting and repair data.

"4. Plumbing and wiring diagrams.

"5. Special parts and equipment identification and supply source."

Monogram submitted the above data with its bid but Sarmax did not. Following bid opening, the contracting officer contacted Sarmax and requested the information, which was submitted by Sarmax by letter of July 2, 1976.

Monogram argues that the above information constituted descriptive data of the type necessary for the Government to evaluate the suitability of the item offered and, therefore, under past decisions of our Office, was required to have been submitted with the bid. See 40 Comp. Gen. 132 (1960) and Lansmont Corporation, B-184734, October 9, 1975, 75-2 CPD 227.

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The contracting officer takes the position that this data was not needed to evaluate the bids but was required, mainly, that the Forest Service would be able to properly design and construct the buildings which would house the successful bidder's system. The contracting officer states that, because of information submitted by both bidders prior to the issuance of the IFB, when the Forest Service was drafting the specifications, he knew both systems were capable of complying with the specifications. Accordingly, the data did not have to be submitted at bid opening but only prior to award in order to determine the prospective awardee's capability to perform (i.e., his responsibility). Bow Industries, Incorporated, B-181328, December 12, 1974, 74-2 CPD 330.

Upon review of the record before our Office, we cannot conclude that the three items of data to be submitted only went to a bidder's capability to perform and not to the type of equipment being offered. The IFB contained only 2-1/2 pages of performance type specifications for the oil flush toilet system without any design specifications or drawings. We believe that the data requested was of the type necessary to ascertain the acceptability of an offered system and, therefore, should have been submitted at bid opening. The acceptability of the system could be determined by the data to be submitted under paragraphs 1.04 A and B.

However, the IFB did not comply with the requirements of section 1-2.202.5 (1964 ed.) of the Federal Procurement Regulations (FPR) by including the paragraph on descriptive literature which is required to be inserted in solicitations where such data will be used for bid evaluation.

In 48 Comp. Gen. 659 (1969), we made the following observation regarding descriptive literature:

"We have recognized that in procuring highly specialized equipment an administrative agency may require bidders to supply specific descriptive data on specific components of items being procured to enable it to conclude precisely what the bidder proposes to furnish and what the Government would be binding itself to purchase by making an award. 36 Comp. Gen. 415 and B-158740, May 3, 1966. However, from

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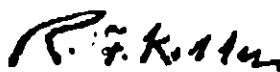
the earliest stages of the development of the present day usage of descriptive data requirements we have taken the position that, if such information must be submitted with the bid, the invitation should define the purpose and effect of the requirement, including the effect to be given to the required data in evaluation of bids and the extent to which it will be embodied in the contract; should contain an affirmative statement to the effect that such material must describe items which would be in strict compliance with the specifications; and should declare that a failure to submit such material with the bid would preclude its consideration. 36 Comp. Gen. 376."

The views expressed in 36 Comp. Gen. 376 (cited above) were incorporated in the FPR § 1-2.202.5.

Therefore, where an invitation does not advise bidders that the failure to submit descriptive literature with its bid will require rejection of the bid and, also, the purpose for which the literature will be used, a bid should be considered for award, even if it does not contain the descriptive literature, where the agency determines that an acceptable product could be procured without the literature. 48 Comp. Gen. 659, supra.

Accordingly, as the Forest Service has indicated it did not require the data to ascertain the acceptability of the system, we find the award to Sarmax to have been proper under the circumstances of the instant case.

However, we are recommending to the Secretary of Agriculture that steps be taken in the future to carefully review the type of descriptive literature required to assure that the requirements of the FPR are met where applicable.


Deputy Comptroller General
of the United States