

12844 *Financial Proc I*



DECISION

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

FILE: B-196394

DATE: February 13, 1980

MATTER OF: James G. Biddle Company *DLG-0390#*

DIGEST:

1. GAO will not question agency's determination that protester's bid is nonresponsive where protester's item does not satisfy IFB's commercial item requirement by failure of bid's supporting data to show compliance.
2. Protester's allegation that awardee's bid is nonresponsive, not raised until several months after notification of award, in comments on agency's protest report, is untimely and not for consideration since it raises new and independent ground for protest which does not independently satisfy timeliness criteria of GAO's Bid Protest Procedures.

The James G. Biddle Company (Biddle) protests the award of a contract to Aul Instruments, Inc. *CNG01381*
 (AUL), under invitation for bids (IFB) No. DAAB07-79-B-2008 issued by the United States Army Communications and Electronics Materiel Readiness Command *DLG-02664*
 (Army), Fort Monmouth, New Jersey.

The IFB solicited bids for 430 JETDS Type No. ZM-21 ohmmeters and required bidders to offer only commercial items. The solicitation also allowed bidders to modify their commercial items in order to meet specification requirements. If this was done, bidders were also required to certify in writing that the modifications would not adversely affect the engineering integrity of the offered commercial item.

According to the Army, Biddle's bid did not formally certify that its proposed modifications would not adversely affect the engineering integrity

[Protest Against Contract Award]
~~008667~~
 111564

of its commercial item nor did it submit sufficient data to allow the Army to make such a determination. In the Army's opinion, this rendered Biddle's bid nonresponsive. In addition, the Army believes Biddle's bid to be nonresponsive because Biddle failed to submit certain sales data which the IFB required in the commerciality section.

Biddle argues that even though it failed to certify the engineering integrity of the proposed item in the exact manner prescribed by the IFB, its bid provided substantial supportive documentation which, if considered in connection with its leading reputation in the industry, complied in substance with the IFB requirement. In addition, the record indicates that Biddle attempted to submit the sales data called for by the IFB after bid opening. Finally, in response to the agency's report to our Office regarding its initial protest, Biddle raises for the first time the argument that the Aul bid was non-responsive and should be rejected.

For the reasons indicated below, we find no basis to question the conduct of this procurement.

The IFB's subsection C.115, as amended, provides in pertinent part:

"1. Offers will be considered only from manufacturers who offer, in compliance with the requirements of solicitation, commercial items. A commercial item within the terms of this solicitation is a privately developed product currently or previously sold in substantial quantities to the general public, to industry or to the Government.

* * * * *

"3. In meeting the term 'commerciality' as used in this provision, offerors must submit with their bids the following:

Factual and verifiable data, including the data prescribed by Subsection C.117 to this solicitation, conclusively establishing that the offered item meets the commerciality requirements of this solicitation. See Subsection C.117, COMMERCIAL DATA.

"4. * * * To qualify for an award, the offer must show that the item he is offering meets all solicitation requirements including the criteria referenced above, and in Subsection C.116 of this solicitation. If all solicitation requirements are not met or if the bid is not accompanied by the data required by this solicitation, the bid shall be rejected as being nonresponsive."
(Emphasis added.)

Subsection C.116, entitled "MODIFICATIONS TO OFFERED COMMERCIAL ITEMS," provides in pertinent part:

"1. Modifications to an offeror's commercial item must not adversely affect the engineering integrity of the item. Engineering integrity is defined as the intrinsic reliability, performance, and general engineering acceptability inherent in items procured for use by commercial companies.

"2. If it is necessary for the offeror to modify its commercial item in order to meet the solicitation requirements, the offeror must certify in writing with his bid that the modifications will not adversely affect the engineering integrity of the offered commercial item. The Government alone shall determine if the proposed modifications made to an offeror's commercial item adversely affect the engineering integrity of the offered item."

It is undisputed that Biddle did not submit a written statement with its bid formally certifying that its proposed modifications would "not adversely affect the engineering integrity of the offered commercial item." The Biddle bid did contain two published bulletins and a written statement explaining how it intended to supply an ohmmeter combining features from the two ohmmeters described in the attached bulletins. Moreover, at the end of this written statement, Biddle further explained:

"To verify our commerciality refer to the bulletins enclosed, and we further advise that we are currently supplying several commercial instruments which have been assigned national stock number as follows:

Cat. 21159 NSN 6625-00-141-3558
Cat. 21805 NSN 6625-00-376-5105"

The above constitutes the bid material Biddle believes was sufficient for the Army to determine that the proposed modifications would not adversely affect the engineering integrity of the ohmmeter that Biddle would supply so as to render its bid responsive.

As noted above, the IFB required a commercial item and, if modified to meet the specification requirements, a certification that the proposed modifications would not adversely affect the item's engineering integrity (a matter concerning the quality of the product offered). Although Biddle did not make the explicit certification that the Army apparently wanted, its bid was not rejected simply because it failed to use certain "magic words." Rather, the Army technically evaluated the bid but concluded that it could not determine compliance with the commerciality requirement from the data Biddle provided.

We believe that a situation analogous to the one presented here is where a procuring agency requires bidders to furnish descriptive literature as part of bids. Generally, such a requirement is intended to aid the agency in determining whether the product offered or a modified version conforms to the specifications and other requirements of the invitation. See, e.g., Kem Equipment, Inc., B-182849, July 17, 1975, 75-2 CPD 43; Kaiser Aerospace to Electronics Corporation, B-190148, February 14, 1978, 78-1 CPD 124. A failure to comply with a proper descriptive literature requirement will ordinarily result in rejection of the bid as nonresponsive. Stacor Corporation; Isles Industries, Inc., 57 Comp. Gen. 234 (1978), 78-1 CPD 68; Kaiser Aerospace to Electronics Corporation, supra.

Here, Biddle's supporting data, if adequate, could have been interpreted by the Army as being responsive to the IFB's commerciality requirements involving certification and product modification. See, e.g., The Entwistle Company, B-192990, February 15, 1979, 79-1 CPD 112. However, without resolving whether the Biddle bid contained a sufficient certification, the fact remains that the Army concluded that it did not have sufficient information to establish that the proposed modifications would not adversely affect the item's engineering integrity. We believe that such a determination is a matter within the agency's discretion which our Office will not question absent a clear showing that the agency's decision is erroneous or arbitrary. Cf. Atlantic Research Corporation, B-179641, February 25, 1974, 74-1 CPD 98.

Biddle clearly disagrees with the Army's technical decision, but in support of its position only argues that the documentation submitted, plus its high position in the industry, adequately satisfies the solicitation's commerciality requirement. We do not believe that this amounts to a clear showing that the agency's decision is erroneous or arbitrary, and mere disagreement with an agency's discretionary decision is not grounds to disturb it. See, e.g., Idaho Forest Industries, Inc., B-189676, December 27, 1977, 77-2 CPD 504. Consequently, we have no basis to question the Army's evaluation of Biddle's bid or its subsequent decision to reject that bid as nonresponsive.

In light of this conclusion, it is not necessary for us to consider whether Biddle's bid was also nonresponsive for failing to supply the sales data required by the IFB.

Finally, Biddle argues that Aul's bid is non-responsive. However, it did not raise this issue at the time it first filed its protest (October 10, 1979), but only later (January 11, 1980) when commenting on the agency's report which had been submitted to our Office in response to the initial protest.

Where, as here, a protester initially files a timely protest and later supplements it with new and independent grounds, we have held that these later-raised bases must independently satisfy the timeliness criteria of our Bid Protest Procedures. Our Procedures require a protest of this type to be filed "not later than 10 days after the basis for protest is known or should have been known, whichever is earlier." See 4 C.F.R. § 20.2(b)(2) (1979). Annapolis Tennis Limited Partnership, B-189571, June 5, 1978, 78-1 CPD 412. Moreover, we have held that a protester which is challenging an award or proposed award on one ground should diligently pursue information which may reveal additional grounds of protest. Tymshare, Inc., B-193703, September 4, 1979, 79-2 CPD 172.

Biddle argues that Aul's bid is nonresponsive because, although it contained the certification required by subsection C.116, the bid did not include sufficient data on the proposed modification or, in Biddle's opinion, offer a commercial item. The information necessary for Biddle to make these allegations was available at the time of bid opening. Yet, Biddle did not raise these arguments until several months after the protester was notified of the award (approximately October 1, 1979). In light of this, we believe that Biddle failed to diligently pursue the information which would have revealed this additional ground for protest. Tymshare, Inc., *supra*. Accordingly, the question of whether Aul's bid is responsive was not raised in a timely manner and, therefore, is not for our consideration.

B-196394

7

The protest is denied in part and dismissed in part.

R. J. Killen

DEPUTY Comptroller General
of the United States