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DECISION

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

FILE: B-221341 **DATE:** April 8, 1986

MATTER OF: Loral Packaging Inc.

DIGEST:

1. Protest that bidder was prejudiced by its receipt of a copy of the solicitation only 1 day before bid opening, as a result of which it overlooked a bid sample requirement and, therefore, submitted a nonresponsive bid, is untimely because the protest of the time available for bid preparation was not filed until after bid opening.

2. A bid which was not accompanied by required bid samples was properly rejected by the procuring agency as nonresponsive where the solicitation clearly required samples of all offered items including brand name items designated as acceptable.

3. New allegations and grounds for protest which were first raised by the protester in its comments on the agency report are dismissed as untimely. New grounds for protest first raised after the initial filing of a protest must independently satisfy the timeliness requirements.

4. In view of prior procurement history, there is no reason to question the contracting officer's determination that reasonable prices have been obtained.

Loral Packaging Inc. (Loral) has protested the rejection as nonresponsive of its low bid on six of eight items under invitation for bids (IFB) No. M1-29-86 issued by the Veterans Administration (VA) Marketing Center at Hines, Illinois (Center), for prescription bottles and safety caps. Loral also has objected to award to other bidders on the basis that award would be at excessive and unreasonable prices.

The agency has proceeded with award on the basis of a written determination by the head of the procuring activity

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that urgent and compelling circumstances affecting the interest of the United States would not permit waiting for a decision. See 31 U.S.C.A. § 3553(c)(2) (West Supp. 1985).

The protest is dismissed in part and denied in part.

Loral's bid was rejected since it did not submit bid samples by the time set for receipt of bids as was required by the solicitation. Loral in part asserts that its failure to submit bid samples should be excused since it received a copy of the solicitation only 1 day prior to the December 3 bid opening. The protester advises that it was not aware of the solicitation, which had been issued on November 1, 1985, until November 14, when it received, from a private glass and bottle wholesaler, a request for quotations for prescription needs which it recognized as normally associated with a VA bid. (We note, however, that Loral had constructive notice of the procurement in October since a synopsis of the solicitation was published in the Commerce Business Daily (CBD) on October 17, 1985, and the notice advised of the December 3 bid opening date. See Neighborhood Ranger, Inc., B-220717, Oct. 23, 1985, 85-2 C.P.D. ¶ 452, and G&L Oxygen and Medical Supply Services, B-220368, Jan. 23, 1986, 86-1 C.P.D. ¶ 78.)

Loral states that since it had not received a copy of the solicitation from the VA as of the time of the wholesaler's inquiry, it telephoned the Center on November 18 to ask that it be mailed a copy. At that time, it appears, the Center advised Loral that its name had been removed from the bidders list because Loral had not bid on the prior year's procurement, a solicitation which Loral now advises it never received. On November 27, Loral again called the Center and was told that copies of the solicitation had already been mailed to it but that an additional copy would be mailed. In view of the impending bid opening date the Center, as a courtesy, suggested that Loral use the services of a certain local bid agent in Hines. On the morning of December 2, Loral telephoned its bid to the agent, using the quantities quoted in the November 14 telephone call from the wholesaler. About an hour and a half after it had telephoned its bid to the agent, Loral opened its morning mail and found a copy of the solicitation. Loral therefore had a copy of the IFB in its possession a day before bids were opened. The Center had also provided the local agent with a copy of the solicitation prior to bid opening.

Loral's bid was low on six of the eight bottle sizes requested, but was rejected by the agency as nonresponsive since it was not accompanied by the bid samples which were required by the solicitation. Loral's protest letter shows that it was not aware of the bid sample requirement until it received a call from the contracting officer on December 11 asking if the samples had been submitted in accordance with the solicitation's requirements. Loral indicates in its protest that its failure to submit bid samples was at least in part attributable to its receipt of the solicitation only 1 day before bid opening. Loral had not protested either to the agency or our Office prior to bid opening that it had insufficient time to properly prepare a bid and, to the extent that Loral's December 24 protest to our Office is construed as such a protest, it is untimely. 4 C.F.R. § 21.2(a)(1) (1985) and P&P Brothers General Services, B-219678, Oct. 22, 1985, 85-2 C.P.D. ¶ 438.

In any event, we are not persuaded that Loral's failure to submit bid samples should be waived because it did not receive the solicitation until the day before bid opening. The bid sample requirement was clearly and prominently set forth in the solicitation and should have been noticed by potential bidders, or their agents, even upon a quick reading. The bid sample requirement was set out in capital letters on page two of the solicitation immediately above the description of the first bid item. Furthermore, section "H" of the solicitation, "Special Contract Requirements," contains at pages 17 and 18 the bid sample clause set forth in Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.214-20 (1984), and the agency bid sample clause which is set forth at 48 C.F.R. § 852.214-73 (1984). Together these two clauses and related information make up more than one page of the solicitation. Under the circumstances, we cannot agree with Loral that it should not be held responsible for not having noticed the bid sample requirement and we hold that it had clear notice that bid samples were required. See Asgard Technology, Inc., B-216146, Oct. 11, 1984, 84-2 C.P.D. ¶ 400, in which we rejected the protester's argument that its failure to submit the required bid samples should be excused because such requirement was not prominently placed in the IFB where the requirement had appeared on the last page of the solicitation.

Loral also points out that copies of the solicitation which it received on December 16 contained a yellow cover sheet which brought to the attention of potential bidders the office where the bid samples were to be delivered. Loral

asserts that the solicitation copy which it received on December 2 did not have such a cover sheet and that, if it had, Loral would have been alerted to the bid sample requirement and would have submitted the samples. The solicitation, however, clearly set forth on pages 2, 17 and 18 the requirement for bid samples. Thus, we believe that the fact that the solicitation which Loral received on December 2 may not have contained the cover sheet concerning the bid samples does not provide a basis for holding that Loral did not have notice of the bid samples requirement prior to the December 3 bid opening.

Loral also contends that the agency should not have rejected its bid as a result of the failure to provide bid samples, but should have waived the omission as a "technicality." A bid is responsive if it unequivocally offers to perform without exception the exact thing called for in the solicitation so that upon acceptance the contractor will be bound to perform in accordance with all of the invitation's material terms and conditions. Edw. Kocharian Co., Inc., 58 Comp. Gen. 214 (1979), 79-1 C.P.D. ¶ 20. Where the language of a solicitation states that a sample must be submitted by the time for bid opening, the failure to do so generally is a material deviation from the solicitation's requirements which renders the bid nonresponsive. Asgard Technology, Inc., B-216146, supra, and Townhouse Carpets and Interiors, B-215928, Aug. 20, 1984, 84-2 C.P.D. ¶ 202. Here, the solicitation clearly requested the submission of the samples by the time set for the receipt of bids. Since Loral did not submit the required bid samples the agency properly determined that its bid was nonresponsive. Although the protester has indicated its willingness to submit bid samples, it may not be considered for award by submitting bid samples after the bid opening. A bidder may not be permitted to make its nonresponsive bid responsive by submitting bid samples after bid opening since that would be tantamount to permitting it to submit a new bid. See Interface Flooring Systems, Inc., B-206399; B-207258, Apr. 22, 1983, 83-1 C.P.D. ¶ 432.

In connection with its contention that the requirement for bid samples should be waived as a technicality, Loral points out that the "Lermer" brand vials which it offered in its bid are designated in the solicitation as "acceptable" products. In view of this product "acceptability" Loral asserts, the required bid samples are really "immaterial and unnecessary."

As indicated by Loral, the solicitation provides in the item description for each size bottle that certain specified products "are known to be acceptable." Among the several brand name products designated as acceptable for each size bottle is the "Lermer" vial model specified. However, notwithstanding the solicitation's designation of "acceptable" products, page 18 of the solicitation specifically provides after the bid sample clauses as follows: "NOTE--Bid Samples are required of each bidder including samples referenced as 'known to be acceptable.'"

The agency advises that it did not waive the bid sample requirement even for the brand name items which were listed as acceptable since it had received complaints about the quality of the medical supplies which it had been acquiring. In view of the solicitation's provision requiring samples of all items, including those designated as "known to be acceptable," Loral was not excused from the obligation to submit bid samples even though it offered "Lermer" vials.

Although not a matter raised by the protester, we do note that the solicitation failed to set out the characteristics for which the bid samples would be examined. Where bid samples are required, the solicitation should list the characteristics which the samples are required to meet. See MLR, Inc., B-218379.2, Aug. 2, 1985, 85-2 C.P.D. ¶ 123, and ATD-American Co., B-214859, Aug. 27, 1984, 84-2 C.P.D. ¶ 229. An intra-agency memorandum from the contracting officer indicates that bid samples were required because the solicitation's description of the bottles and caps could not adequately describe characteristics such as "workmanship"; that bid samples would allow the agency to evaluate the current level of "workmanship"; and that satisfactory samples would serve as a standard against which the delivered items would be compared. As already stated, the agency has advised that it has received complaints about the quality of products that it has procured for distribution. We compute that this procurement is for in excess of 29 million prescription bottles and caps, and the record shows that many of these bottles would be used for mailing prescriptions out to veterans. Under the circumstances, we believe that the agency's bid sample requirement was reasonable notwithstanding the agency's failure to set out the characteristics which the samples were required to meet.

In its comments on the agency report filed with our Office on February 24, Loral for the first time asserts that the agency may have made a "deliberate attempt" to exclude Loral from competing under the solicitation due to its removal from the bidders mailing list. This basis for protest is dismissed as untimely. Our Bid Protest Regulations require that a protest be filed within 10 working days after the basis of the protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1985). Each new basis for protest which is first raised after the initial filing of a protest must independently satisfy the timeliness requirements. Westinghouse Electric Corp., B-215554, Sept. 26, 1985, 85-2 C.P.D. ¶ 341 at 4. Since the basis for the new grounds of protest was known to the protester by December 2, 1985, Loral's protest that the agency may have deliberately attempted to exclude it from competition is untimely and, thus, is dismissed.

Lastly, the protester contends that award should not be made to the low responsive, responsible bidders since their prices are excessive and unreasonable--by Loral's estimate, 20 to 25 percent higher than its bid price.1/

The contracting officer determined that award to the low responsive, responsible bidders would be at reasonable prices since the prices on most of the items are lower or comparable to prices awarded in June 1984. The authority vested in the agency contracting officer to determine the reasonableness of bid prices is extremely broad and our Office will not question the contracting officer's determination unless it is unsupported or there is a showing of bad faith or fraud. Eclipse Systems, Inc., B-216002, Mar. 4, 1985, 85-1 C.P.D. ¶ 267. Furthermore, a determination of price reasonableness may be based upon comparison with such things as a government estimate, past procurement history, current market conditions, or any other relevant factors. Ralph Construction Inc., B-220006, Dec. 12, 1985, 85-2 C.P.D. ¶ 650. Accordingly, we have no basis upon which to question here the contracting officer's determination of the reasonableness of bid prices. Finally, although rejection of Loral's bid may

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1/ We note that in its comments on the agency report Loral alleges for the first time that award at these higher prices would violate Federal Acquisition Regulation (FAR), § 14.407-1(a), Federal Acquisition Circular No. 84-5, Apr. 1, 1985. We have not addressed this allegation since it is clearly untimely. 4 C.F.R. § 21.2(a)(2) (1985).

result in additional cost to the government on this procurement, we have consistently held that a nonresponsive bid may not be accepted even though it would result in savings to the government since acceptance of such a bid would compromise the integrity of the competitive bidding system. Avantek, Inc., B-219622, Aug. 8, 1985, 85-2 C.P.D. ¶ 150.

The protest is dismissed in part and denied in part.

for Harry R. Van Cleve
General Counsel