



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Systems Integrated
File: B-225700
Date: May 8, 1987

DIGEST

1. Where an invitation for bids required descriptive literature sufficient to determine whether the offered item conforms to the technical specifications and bidders were cautioned that the literature would be used in the technical evaluation of bids, the procuring agency properly rejected as nonresponsive a bid that included inadequate descriptive literature.
2. Where the solicitation requires descriptive literature clearly marked to show that the offered item complies with all aspects of the specifications, a bidder's statement that it will comply with the specifications is insufficient to determine the technical acceptability of the bid.
3. The procuring agency properly did not discuss deficiencies in protester's bid prior to contract award because the Federal Acquisition Regulation requires the evaluation of bids without discussions, and it is a fundamental principle of sealed bidding that responsiveness must be determined on the basis of the bid as submitted.
4. Protest that solicitation requirement for descriptive literature does not comply with the Federal Acquisition Regulation, raised after bid opening, is untimely under Bid Protest Regulations, which require that a protest of alleged improprieties in a solicitation be raised before bid opening.

DECISION

Systems Integrated (SI) protests the rejection of its bid as nonresponsive and the award of a contract to General Electric Company (GE) under invitation for bids (IFB) No. M62204-86-B-0028, issued by the United States Marine Corps Logistics Base, Barstow, California, for a dynamometer test stand. The stand will facilitate testing of

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military tracked vehicle cross-drive transmissions. SI basically contends that the Marine Corps erred in rejecting its low, responsive and technically complete bid; that discussions should have been held prior to award; and that the Marine Corps was biased against SI.

We deny the protest in part and we dismiss it in part.

Section C of the IFB set forth design requirements and mandatory specifications that the offered product had to meet. Bidders were required to submit with their bids descriptive literature that was clearly marked to show that the offered dynamometer test stand complied with all aspects of the IFB. Bidders were cautioned that the descriptive literature would be used for the technical evaluation of the bid and that the failure to submit the required literature would result in rejection of the bid. The IFB advised bidders that award would be made to the responsible bidder whose conforming bid would be most advantageous to the government, price and other factors considered.

Four bids, ranging from SI's low bid of \$1,339,564 to a high of \$1,986,360 were received by the bid opening date. After a technical evaluation, the Marine Corps rejected SI's bid as nonresponsive because SI failed to submit sufficient descriptive literature and, as a result, the agency found itself unable to determine that the bid conformed to the specifications. The Marine Corps technical review indicated that SI's bid package did not include descriptive literature to cover the material requirements for the closed loop cooling system, flush cycle system, electrical cabling, signal control station, test cell control room and the DC motoring dynamometer control. The Marine Corps also found discrepancies and a lack of sufficient details in some areas of the submitted descriptive literature. GE, second low with a \$1,449,950 bid and determined to be technically responsive and responsible, was awarded the contract.

SI filed its protest within 10 calendar days of contract award. The contracting officer, therefore, suspended contract performance pending the outcome of this protest. See Bid Protest Regulations, 4 C.F.R. § 21.4(b) (1986).

SI contends that its bid was responsive because SI stated in the bid that it would comply with the specifications. SI further contends that descriptive literature was not needed to evaluate bids anyway because the IFB's detailed specifications left no doubt as to what the contractor was obligated to provide. Citing our decision in White Plains Electrical Supply Co., Inc., 55 Comp. Gen. 340 (1975), 75-2 C.P.D. ¶ 205, SI contends that the legitimacy of the

requirement for descriptive literature is questionable if the requirement can be met by parroting back the solicitation's specifications. Finally, SI complains that although it called the contracting officer on a number of occasions, she failed to discuss the deficiencies in the bid before awarding the contract to GE.

The Marine Corps responds that the contracting officer was required by the Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.214-21(c) (1986), incorporated into the IFB, to reject SI's bid because the descriptive literature submitted failed to show that the offered product conformed to the solicitation's requirements and also contained numerous points of noncompliance. The Corps states it determined that SI's statement that it would comply with the invitation's requirements was not sufficient for evaluation of technical acceptability. With respect to discussion of deficiencies prior to award, the Corps notes that the FAR, 48 C.F.R. § 14.101(d), expressly forbids such discussions, because responsiveness must be determined at the time of bid opening from the bid itself.

Where descriptive literature is required to establish the bid's conformance with the specifications, and bidders are so cautioned, the bid must be rejected as nonresponsive if the literature submitted fails to show clearly that the offered product conforms to the specifications. Zero Mfg. Co., B-210123.2, Apr. 15, 1983, 83-1 C.P.D. ¶ 416. This is so even if the offered product in fact possesses the required features. Harnischfeger Corp., B-220036, Dec. 19, 1985, 85-2 C.P.D. ¶ 689. We will not disturb the agency's determination concerning the adequacy of required descriptive literature absent a clear showing of unreasonableness, abuse of discretion, or a violation of procurement statutes and regulations. DeVac, Inc., B-224348.2, Sept. 3, 1986, 86-2 C.P.D. ¶ 254.

We think the Marine Corps properly rejected SI's bid. SI offered a dynamometer test stand designed around standard off-the-shelf hardware with all major components purchased from GE and Hewlett Packard. SI's bid included GE descriptive literature, which generally describes the components SI proposed to use in the dynamometer test stand. For example, with regard to the closed loop cooling system, which the technical review indicated was not adequately covered by SI's descriptive literature, the submitted literature generally describes the GE inductor dynamometer

cooling system^{1/} and states that where water quality is questionable, a closed system should be used, but provides no details of the closed system. The IFB's specifications, on the other hand, required a closed loop system with a number of specified features. Similarly, with regard to the other components for which the Marine Corps determined, and SI does not deny, that descriptive literature was not provided, SI defends its bid submission by stating that the components were generally described in narrative form and the words "will comply" in the bid indicated that its offered component would meet specification requirements. A bidder's simple statement that it will comply, however, along with inadequate or no descriptive literature, is not sufficient to satisfy an IFB requirement for literature that would enable the agency to determine technical compliance. Zero Mfg. Co., B-210123.2, supra.

As to SI's contention that the specifications spelled out SI's contractual obligations, so that descriptive literature was not really needed to evaluate bids, the question when deciding bid responsiveness is, as stated above, whether the bid as submitted establishes that the offered item complies with the IFB's terms. We think it clear that merely repeating the specifications in a bid would not have been sufficient to do so here. In our decision SI cites, White Plains, we held that the failure to address an informational IFB requirement for the name of the manufacturer, catalog number and manufacturer's specifications should not have required the rejection of the bid since the procured item, electrical cable, was not unusually complex, was adequately described in the solicitation, and the record provided no adequate justification for the informational requirement. In this decision, however, the item being procured is complex, and we have no basis to conclude the Marine Corps could accept a bid, without literature, if the bid only parroted back the specifications. Instead, we think it is clear from the record that, as bidders were cautioned by the IFB, descriptive literature in fact was needed to evaluate bids.

Additionally, the inadequacy of submitted descriptive literature may not be cured by discussions or explanations offered after bid opening. Harnischfeger Corp., B-220036, supra; FAR, 48 C.F.R. § 14.101(d). The Marine Corps

^{1/} While testing rotating machinery, the GE inductor dynamometer system absorbs energy losses, which are dissipated by waterflow through the dynamometer cooling system.

therefore acted properly in refusing to discuss with SI the deficiencies in the firm's bid.

SI's allegation of discrimination is based on what the firm views as peculiar handling of this procurement by the Marine Corps. In support of its allegation SI states that the contracting officer asked for an extension of its bid acceptance period to consider the company's nonresponsive bid; SI was also low on a prior procurement for the same item and that procurement was canceled after the Marine Corps conducted an in-depth technical evaluation; and SI's bid of a dynamometer with major components manufactured by GE at a price \$160,000 lower than GE's was rejected in favor of GE's higher-priced product.

In response, the Marine Corps states that bid extensions were requested because the technical review of bids could not be completed by the December 1, 1986, deadline and SI's bid was not determined to be nonresponsive until December 5; the prior procurement was canceled because all bidders failed to meet the technical specifications; SI's low bid was rejected because it was nonresponsive; and GE was awarded the contract because it was offered the lowest-priced technically responsive bid.

Where bias is alleged, the protester has the burden to prove its case, and we will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Sage Diagnostics, B-222427, July 21, 1986, 86-2 C.P.D. ¶ 85. We have no basis on which to question the Marine Corps' action in the prior procurement and, as stated above, SI's bid in the instant competition was nonresponsive.

SI further contends that the Marine Corps acted unfairly in not using whatever literature GE had submitted to determine the technical acceptability of the GE components offered by SI. The record does not establish, however, that SI and GE offered the same components with identical options. Additionally, SI also offered Hewlett Packard components. The Marine Corps, therefore, would not have been able to determine the technical acceptability of all components offered by SI by examining descriptive literature provided by GE.

In its comments on the agency protest report, SI also contends that the following IFB statement requiring descriptive literature is vague and fails to comply with FAR, 48 C.F.R. § 14.202-5(d):

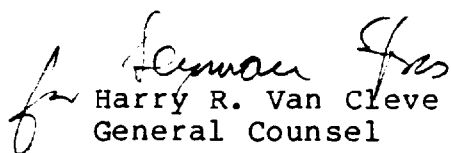
"Descriptive literature shall be submitted to show that the item offered is in compliance with all

aspects of the bid. Literature shall be clearly marked to show compliance and will be used for technical evaluation of the bid. Failure to submit the required descriptive literature will result in rejection of the bid."

The cited FAR provision requires the IFB to state clearly what descriptive literature is to be furnished; the purpose for which it is required; the extent to which it will be considered in the evaluation of bids; and the rules that will apply if a bidder fails to furnish literature or if literature furnished does not comply with IFB requirements. SI contends that it does not know what the words "the item" in the IFB statement mean, and that there should have been a listing of items requiring descriptive literature in the solicitation.

We dismiss this contention as untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1). Since the alleged impropriety in the solicitation was apparent prior to bid opening, the protest was required to be filed prior to the time. In any event, since the dynamometer was the only item required by the IFB, the words "the item" must refer to it. Additionally, section C of the IFB provides the specific requirements of the dynamometer's components that obviously would have to be clearly marked on any descriptive literature that was provided. Further, the IFB provision clearly advises of the purpose for and the consequences of not complying with the descriptive literature requirement.

The protest is denied in part and dismissed in part.


Harry R. Van Cleve
General Counsel