



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Cuernilargo Electric Supply

File: B-229942

Date: May 10, 1988

DIGEST

Descriptive literature clause in an invitation for bids which merely states in general terms what categories of descriptive literature might be required is defective due to lack of specificity. It is, thus, improper for the procuring agency to reject a bid as nonresponsive for failure to include adequate descriptive literature.

DECISION

Cuernilargo Electric Supply protests the rejection of its apparent low bid and the award of supply contracts to North Coast Electric and Steiner Electric Company under invitation for bids (IFB) No. SB-87-0028, issued by the Bureau of Indian Affairs, United States Department of the Interior. The solicitation was for the procurement of electrical distribution transformers. Cuernilargo was low bidder for four line items but its bid was rejected as nonresponsive for failure to provide adequate descriptive literature.

Seventeen bids were received at bid opening. Award was split among three firms--two of which were North Coast and Steiner. The IFB contained a total of 47 line items grouped under six specifications, and included the standard descriptive literature clause.

Cuernilargo's bid was low for four of the three phase pad-mounted transformers, listed as line items 12, 13, 20 and 21 in the IFB. Cuernilargo's bid was rejected as nonresponsive, however, for failure to include adequate descriptive literature in that it failed to address one feature required by the specifications and transformers of the capacity of that purchased under line item 21; and depicted unacceptable or unclear equipment dimensions. Three of the transformers (items 12, 20 and 21) on which Cuernilargo was the low bidder were awarded to North Coast. The other transformer (item 13) was awarded to Steiner.

We sustain this protest because the solicitation was defective in that it failed to adequately advise bidders of the nature and extent of the descriptive literature required. The record also indicates that while rejecting Cuernilargo's bid for insufficient descriptive literature, the contracting agency made awards to other bidders whose descriptive literature contained identical or similar deficiencies.

This is a sealed bid procurement of electrical transformers which not only contains complete specifications for each type of equipment being purchased, but the standard descriptive literature clause which appears at Federal Acquisition Regulation (FAR) § 52.214-21. In addition, the bid schedule required with respect to each line item that the bidder indicate next to its price the "Manufacturer's Name" and the "Catalog No. Offered."

The three firms whose bids are at issue here responded to the IFB's descriptive literature requirement by submitting brochures published by the equipment manufacturers. We see no evidence that any of these bidders made any attempt to index, cross-reference or correlate the information in the brochures with specific requirements of the IFB specifications. The contracting agency apparently reviewed the brochures against the specifications and if a specification requirement was described, mentioned, listed (even as an "option") or depicted in the brochure the descriptive literature was deemed adequate to show that the product offered met the specifications. If not, the descriptive literature was deemed inadequate and the bid rejected. The descriptive literature requirement was therefore broadly applied to the specifications but the information necessary to satisfy the contracting agency appears to have been minimal.

We note that the entries bidders were to make on the bid schedule were not of great help to the contracting agency, perhaps because (the brochures suggest) electrical equipment manufacturers do not always make it a practice to identify particular transformers by an individual catalog or model number since within certain limits customers have the option of selecting different combinations of features. Each transformer sold is therefore "customized" to the buyer's requirements. As a result, all the brochures submitted for the line items at issue described general product lines of widely varying capacity and with different possible combinations of features from which the customer could select to meet its requirements.

Each of these three bidders did identify the "Manufacturer's Name" of the equipment it offered. With regard to the four line items under protest, both the protester and Steiner offered Balteau Standard equipment and North Coast offered Westinghouse equipment. As for the "Catalog No. Offered," however, the information was not specific. North Coast entered in its bid "Pow-R-Pad," which identifies an entire line of Westinghouse equipment, descriptive literature for which was attached to the bid. Steiner simply entered "As Specified" under "Catalog No. Offered" and attached to its bid pages from Balteau Standard's brochures S6.3040.0 and S6.3040.5. The protester, who also offered Balteau Standard equipment, entered "S6.3040.5" as the "Catalog No. Offered" and submitted a brochure bearing that number. As a result, while it could be discerned from each of these bids what brand of equipment each bidder offered and from what product line each was offering, none provided a catalog or model number unique to a particular item of equipment by means of which it could be easily determined that the specifications were met. Instead, the contracting agency had to review brochures describing a manufacturer's entire product line of transformers of widely varying capacity within a particular type. This seems to have caused particular difficulty in determining whether the specification's dimensional requirements would be met.

As we noted above, the IFB contained the descriptive literature clause which appears in the Federal Acquisition Regulation (FAR) at § 52.214-21. Although paragraph (b) of this clause refers to descriptive literature "required elsewhere in this solicitation," the IFB contains no additional references to a requirement for descriptive literature. Nor does the agency's report contain a justification for the agency's inclusion of the descriptive literature clause in the IFB, as required by FAR § 14.202-5(c) (FAC 84-5).

As we stated in Koch Corporation, B-223874, Nov. 10, 1986, 66 Comp. Gen. _____, 86-2 CPD ¶ 544, affirmed on reconsideration Jan. 8, 1987, 87-2 CPD ¶ 27, involving a similar situation:

When descriptive literature is required by an IFB to be submitted with bids, the adequacy of the literature in showing compliance with the delineated specifications is a matter of responsiveness, and where the literature does not show compliance the bid must be rejected. Harnischfeger Corp., B-220036, Dec. 19, 1985, 85-2 CPD ¶ 689. However, where the need for descriptive literature can be justified, the IFB must clearly establish the nature and extent of the descriptive material asked for, the purpose to

be served by such data, and whether all details of such data will be considered an integral part of the awarded contract. FAR, 48 C.F.R. § 14.202-5(d)(1); Wholesale Office Furniture, Inc., B-216081, Dec. 4, 1984, 84-2 CPD ¶ 618; Air Plastics, Inc., 53 Comp. Gen. 622 (1974), 74-1 CPD ¶ 100. Therefore, the IFB must definitely set forth the components or specifications for which descriptive literature is required, and literature is not required to show compliance with specifications beyond those set forth. Viereck Co., B-218237, June 3, 1985, 85-1 CPD ¶ 630; Computer Sciences Corp., B-213134, May 14, 1984, 84-1 CPD ¶ 518. Moreover, our Office has consistently held that a descriptive literature clause is defective where it merely recites categories of general subjects which might require description since it does not establish a common basis for the evaluation of bids. See Air Plastics, Inc., 53 Comp. Gen. 622, *supra*; 46 Comp. Gen. 1 (1966); 42 Comp. Gen. 598 (1963).

Here, as in Koch, the descriptive literature clause merely states in general terms that descriptive literature-- "required elsewhere in the solicitation"--would be required. The IFB fails to specify elsewhere the nature and extent of the descriptive literature required. Because the IFB's six specifications each contain many different requirements, from reading the IFB's descriptive literature clause a bidder would not reasonably be aware of what literature, if any, was required, and for what purpose. The rejection of Cuernilargo's bid as nonresponsive for failure to include adequate descriptive literature and the award to the second low bidder was, therefore, improper. See Koch Corporation, 66 Comp. Gen. at ____, 86-2 CPD ¶ 544 at 4. We therefore sustain the protest.

Our review of the record also indicates that bidders were treated disparately in that contracts were awarded to firms whose descriptive literature contained deficiencies identical or similar to those for which the protester's bid was rejected. We recognize that of these three bidders, the protester submitted the least literature descriptive of these four line items and omissions in that literature resulted in the rejection of its bid. At the same time, however, we note that Steiner's bid was accepted for line item 13 even though the dimensional data it submitted was identical to the protester's, which the contracting agency had found deficient. North Coast was awarded line item 12 even though its descriptive literature listed a required feature as an "option," and was awarded line items 20 and 21 even though the "typical" dimensions of the products it

offered were shown as exceeding the maximum depth permitted by the IFB specifications.

What this record demonstrates is that the IFB did not adequately advise bidders the nature and extent of, or the purpose for, the descriptive literature required; that bidders responded to the requirement by the submission of commercial brochures applicable to entire product lines; that because to some degree this type of electrical equipment can be customized to meet the buyer's needs, some of the features required by this IFB were listed as "options" in the literature; and that as to dimensions, manufacturers did not always measure the same surfaces of the equipment as shown in the specification and even then stated those dimensions as "maximum" or as "typical." All these factors contributed to uncertainty and disparate treatment in the bid evaluation process.

In addition, as we stated above, the Department of Interior's report to our Office does not contain a justification for inclusion of the descriptive literature clause in the IFB, as required by FAR § 14.202-5(c) (FAC 84-5). In these circumstances, it is unclear whether there existed an adequate justification for descriptive literature under this IFB.

The only remaining issue is the remedy. In *Koch*, we recommended that the contracting agency reexamine whether descriptive literature was in fact necessary to evaluate the responsiveness of the bids and then, as appropriate, either make award to the low, responsive and responsible bidder without regard to descriptive literature or to resolicit for its requirements under a properly drafted solicitation. That remedy is not available here, however, since the contracts under protest were awarded on November 19, 1987, have a 90-day delivery schedule, and the contracting agency was not required to, and did not, suspend performance under the provisions of the Competition in Contracting Act of 1984, 31 U.S.C. § 3551-3556 (Supp. III 1985), since Cuernilargo's protest was not filed within 10 days after the award. Since the protester has been unreasonably excluded from this procurement and no other remedy is appropriate, we find the protester is entitled to recover its bid preparation costs and the costs of pursuing its protest, including attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1987). By separate letter, we are advising the

Secretary of the Interior of our finding; Cuernilargo should submit to the Department of the Interior the documentation required to establish the amount to which it is entitled.

The protest is sustained.

A handwritten signature in cursive script that reads "Milton J. Fowler". The signature is written in black ink and is positioned above the typed name.

Acting Comptroller General
of the United States