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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Futura Systems Incorporated
File: B-242060
Date: March 25, 1991

Mamoud Sadre and Patricia A. O'Hearn for the protester, Donald M. Suica, Esq., and Corlyss Drinkard, Esq., Internal Revenue Service, Department of the Treasury, for the agency. Barbara C. Coles, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging rejection of bid as nonresponsive for failure to acknowledge an amendment to the solicitation is sustained where the amendment merely clarifies an existing requirement in the solicitation and thus is not material.
2. Rejection of a bid for microcomputers as nonresponsive on basis that protester failed to submit descriptive literature to establish that the offered products conform to the specifications is improper where the solicitation does not require descriptive literature and there is no evidence in the protester's bid to indicate that protester took exception to the requirements.
3. Rejection of bid as nonresponsive on the basis that protester's descriptive literature shows different models of an offered product--one which conforms to solicitation requirement for .31 dot pitch and one that does not--is improper where a reasonable interpretation of the bid's entire contents does not support conclusion that bidder was offering a nonconforming model.
4. Rejection of bid as nonresponsive on the basis that protester submitted descriptive literature, which showed four different configurations of a keyboard to establish conformance to the solicitation's "enhanced keyboard" requirement, is improper where all four configurations depict enhanced keyboards and thus conform to the requirement.
5. Fact that bidder's descriptive literature merely refers to "full 1-year warranty" and does not also repeat solicitation requirement that warranty service be performed on-site does

not render bid nonresponsive where there is no clear indication in bid that the bidder does not intend to conform with warranty requirement.

DECISION

Futura Systems Incorporated protests the rejection of its bid and the subsequent award of a contract to Win Laboratories, Ltd, under invitation for bids (IFB) No. IRS-90-092, issued by the Internal Revenue Service (IRS), Department of the Treasury, for microcomputers. Futura's bid was rejected as nonresponsive because the firm failed to acknowledge an amendment to the IFB and failed to submit descriptive literature with its bid showing that the product offered conformed to the material specifications set forth in the solicitation.

We sustain the protest.

IRS issued the IFB on July 9, 1990, with bid opening scheduled for August 9. Prior to its original bid opening date, the solicitation was amended three times. Amendment No. 1 extended the bid opening date and added Federal Acquisition Regulation (FAR) § 52.214-21, entitled "Descriptive Literature." The clause defines such literature as information submitted as part of a bid that is required to establish, for the purpose of evaluation and award, the significant details of the product offered as specified in the solicitation. It advises that descriptive literature, "required elsewhere in this solicitation," must be identified to show the items to which it applies, and cautions that failure of the descriptive literature to show that the product offered conforms to the invitation's requirements will result in rejection of the bid.

Although the clause referred to descriptive literature "required elsewhere in this solicitation," the solicitation contained no additional references to the reason for or nature of the requirement for literature, nor did it explain how the literature was to be used in evaluating bids.

Amendment No. 3 extended the bid opening date, deleted the first page of section H of the solicitation, entitled "Special Contract Requirements," and substituted a new page that revised the paragraph describing the warranty period.

Futura submitted the apparent low bid (\$26,950) of the 24 bids received by bid opening on August 31. After discovering that Futura failed to acknowledge amendment No. 3, IRS determined that the amendment was material and thus that Futura's failure to acknowledge it rendered the bid nonresponsive. IRS also found Futura's bid nonresponsive on the basis that Futura failed to submit all of the required descriptive literature

and that the literature submitted did not show that the product offered conformed to the specifications in the solicitation. As a result, IRS rejected Futura's bid and made award to Win, the second low bidder, on September 28. Futura's protest to our Office followed its October 26 rejection notification.

AMENDMENT NO. 3

Futura contends that IRS improperly rejected its bid as nonresponsive for its alleged failure to acknowledge amendment No. 3 because the firm in fact acknowledged the amendment and returned it with the rest of the bid documents. The protester also asserts that, in any event, the alleged failure should have been waived since the amendment does not affect price and thus is not material. IRS disagrees, arguing that the agency never received an acknowledgment and that the amendment is material because it changed the original terms of the warranty contemplated in the solicitation.

Generally, a bidder's failure to acknowledge a material amendment to an IFB renders the bid nonresponsive, since absent such an acknowledgment the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. Pittman Mechanical Contractors, Inc., B-225486, Feb. 25, 1987, 87-1 CPD ¶ 218. The mere fact that the bidder sent the acknowledgment is not relevant in determining the responsiveness of a bid, since it is the bidder's responsibility to assure that the acknowledgment arrives at the agency. Call-A-Messenger, B-212039, Aug. 15, 1983, 83-2 CPD ¶ 211. An amendment is material, however, only if it would have more than a trivial impact on the price, quantity, quality, delivery, or the relative standing of the bidders. FAR § 14.405; Pittman Mechanical Contractors, Inc., B-225486, supra. An amendment is not material where it does not impose any legal obligations on the bidders different from those imposed by the original solicitation, for example, where it merely clarifies an existing requirement or is a matter of form. In that case, the failure to acknowledge the amendment may be waived and the bid may be accepted. Star Brite Constr. Co., Inc., B-228522, Jan. 11, 1988, 88-1 CPD ¶ 373.

Here, while the agency has asserted that the amended solicitation altered the contractor's obligation to furnish warranty maintenance, this is simply not the case. The original warranty provision stated the following:

"The Contractor shall furnish, at no cost to the Government, all maintenance (labor and parts) as specified in this contract, both during and outside the Principal Period of Maintenance, for a period of

one (1) year or the manufacturer's standard warranty, whichever is greater, beginning on the first day of the successful performance period. The warranty shall not apply to maintenance required due to the fault or negligence of the Government. All parts replaced during the warranty period shall become the property of the Contractor."

Making no substantial changes to the requirements, amendment No. 3 only substituted the following:

"The Contractor shall furnish, at no cost to the Government, all maintenance (labor and parts) as specified in this contract, during the Period of Maintenance stated in paragraph C.3.2 for a period of one (1) year or the manufacturer's standard warranty, whichever is greater, beginning on the first day of the successful performance period. The warranty shall not apply to maintenance required due to the fault or negligence of the Government. All parts replaced during the warranty period shall become the property of the Contractor."

The new language in the amendment--"during the Period of Maintenance stated in paragraph C.3.2 . . ."--merely incorporates a reference to a requirement that already was stated in paragraph C.3.2 of the solicitation.^{1/} By signing its bid and agreeing to be bound by the terms of the original IFB, Futura obligated itself to comply with paragraph C.3.2. See Collington Assocs., B-231788, Oct. 18, 1988, 88-2 CPD ¶ 363. Accordingly, since it merely referred to a requirement that already was contained in the original IFB, the amendment was not material. See B&T Int'l, Inc., B-224284, Dec. 8, 1986, 86-2 CPD ¶ 654.

DESCRIPTIVE LITERATURE

The agency argues that Futura's descriptive literature was inadequate in five areas. Of the five, the agency states that the protester failed to submit any descriptive literature to show conformance with two requirements: "DOS 3.3 or 4.01 or latest version," and "[s]ystem integration and burn-in (24 hour burn in minimum)." We find that even though Futura failed to submit descriptive literature to show conformance with the two requirements cited above, the agency nevertheless improperly rejected Futura's bid as nonresponsive.

^{1/} In relevant part, paragraph C.3.2 states that the contractor is to provide on-site maintenance with a 24-hour response time, 8:00 a.m. to 5:00 p.m. Monday through Friday.

To be responsive, a bid must represent an unequivocal offer to provide the exact thing called for in the IFB such that acceptance of the bid will bind the contractor in accordance with the solicitation's material terms and conditions. Data Express, B-234685, July 11, 1989, 89-2 CPD ¶ 28. Where descriptive literature is required to be supplied for use in bid evaluations, a bid may be rejected as nonresponsive if the bid and the data submitted with the bid do not clearly show that the offered product complies with the specifications. Id.

The literature in this case was, in a technical sense, "solicited," in that the IFB included the descriptive literature clause; however, the clause's requirement--that solicited descriptive literature must affirmatively establish conformance with the solicitation requirement--effectively was rendered inapplicable by the IFB's failure to alert bidders as to what literature was required and for what purpose. See Tektronix, Inc.; Hewlett Packard Co., 66 Comp. Gen. 704 (1987), 87-2 CPD ¶ 315. Since the IFB effectively failed to require descriptive literature for these two requirements, Futura's failure to submit such literature, standing alone, did not render its bid nonresponsive. While literature that is not needed for bid evaluation generally is considered informational only, so that the failure to furnish it with the bid is immaterial, any submitted literature will cause the bid to be nonresponsive if it establishes that the bidder intended to qualify its bid or if the literature reasonably creates a question as to what a bidder is offering. Id. Since there is no indication in its descriptive literature or elsewhere in its bid that Futura took exception to these requirements, there was no basis to find its bid nonresponsive to them.

Further, the "requirement," albeit ineffective, that bidders submit descriptive literature to show conformance with the "[s]ystem integration and burn-in (24 hour burn in minimum)" specification is inappropriate. Descriptive literature for a performance requirement, such as the system integration and burn-in requirement does not, and cannot, aid the contracting officer in evaluating the technical acceptability of an offered product. See FAR § 14.201-6(p)(1) (agencies may require descriptive literature if it is necessary to evaluate the technical acceptability of an offered product). In fact, requiring the bidder to merely reassert this performance obligation which already was imposed by the solicitation only increases the chances that a bid will be found nonresponsive without providing any greater assurance that the bidder will satisfy the government's needs. See Interad, Ltd., B-182717, June 16, 1975, 75-1 CPD ¶ 363.

With regard to the remaining alleged deficiencies in the literature that IRS cites, the agency charges that it properly found Futura's bid nonresponsive because Futura's descriptive literature for three requirements was ambiguous and thus failed to show compliance with these specifications. For example, the agency states that while the specifications required a "14 [inch] VGA color monitor (.31 dot pitch)," Futura's descriptive literature shows two different models of the monitor, one which conforms to the solicitation's .31 dot pitch requirement and the other--with a .39 dot pitch--which does not. Similarly, Futura submitted descriptive literature showing four different models of one keyboard to show conformance with the solicitation's requirement for an "enhanced 101-key keyboard" requirement.

While the agency is correct in its assertion that any submitted literature will cause the bid to be nonresponsive if it establishes that the bidder intended to qualify its bid or if the literature reasonably creates a question as to what the bidder is offering, see Tektronix, Inc.; Hewlett Packard Co., 66 Comp. Gen. 704, supra, we find that Futura's bid here was responsive.

With regard to the monitor requirement, the descriptive literature submitted by Futura describes two monitors: one which conforms to the dot pitch requirement and one which does not conform to the requirement. The intent of a bid must be construed from a reasonable interpretation of its entire contents; we simply do not think it is reasonable to conclude that Futura's literature legitimately suggests that the firm might have been offering the nonconforming model. For purposes of marketing presentation or economy, the descriptive literature of many if not most vendors describes more than one of the vendor's models. Absent any indication elsewhere in Futura's bid that it intended to qualify its bid in this respect, we find it responsive.

Nor do we find that Futura's descriptive literature showing four different keyboards rendered its bid nonresponsive to the enhanced keyboard requirement. The submission of literature showing four different models does not create an ambiguity since there is no indication on Futura's pre-printed information that any one of the four keyboards does not conform to the requirement. Unlike the descriptive literature submitted for the monitor requirement, showing that one monitor conformed to the requirement and one did not, the literature here establishes that all four models are enhanced keyboards. The models differ in current consumption, operating force, and lifetime; however, these features are not relevant since they do not pertain to any of the requirements in the solicitation.

Finally, the agency asserts that Futura's descriptive literature relating to the warranty rendered its bid non-responsive. The solicitation required a warranty "period of one (1) year or the manufacturer's standard warranty, whichever is greater, beginning on the first day of the successful performance period." In addition, as noted above, paragraph C.3.2 in part required maintenance on-site from 8:00 a.m. to 5:00 p.m., Monday through Friday. Although Futura's descriptive literature stated that Futura offers a 1-year "full warranty," the agency argues that absent an indication in the literature that Futura offered on-site maintenance, the bid was ambiguous with respect to the warranty requirement.

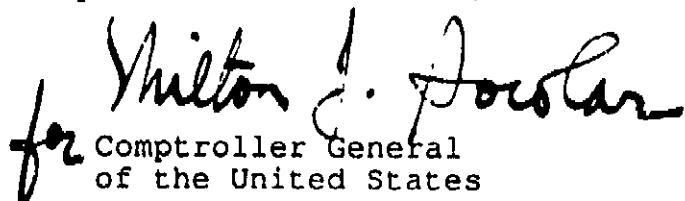
The descriptive literature submitted by Futura does not specifically address all the warranty requirements in the solicitation. However, as discussed above, the intent of a bid must be construed from a reasonable interpretation of its entire contents; we simply do not think it is reasonable to conclude that the pre-printed statement on Futura's literature legitimately suggests that the firm does not plan to offer on-site maintenance, or otherwise render uncertain Futura's intention, evidenced by signing its bid, to conform with the solicitation's warranty requirements.

In any event, it was inappropriate for the agency to require bidders to submit descriptive literature to address the warranty requirements in the solicitation, since a warranty, like the requirement for system integration and burn-in discussed above, relates to a performance obligation and does not involve the technical acceptability of an offered product. See FAR § 14.201-6(p)(1); Interad, Ltd., B-182717, supra.

CONCLUSION

Based on our finding that Futura's bid was improperly rejected as nonresponsive, we sustain the protest. The record shows that delivery under Win's contract has been completed. Accordingly, we find that Futura is entitled to recover its bid preparation costs and the costs of filing and pursuing the protest. 4 C.F.R. § 21.6(d) (1990); Comspace Corp., B-237794, Feb. 23, 1990, 90-1 CPD ¶ 217. Futura should submit its claim for costs directly to the agency. 4 C.F.R. § 21.6(e).

The protest is sustained.


for Comptroller General
of the United States