



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hampton Roads Leasing, Inc.

File: B-244887

Date: November 25, 1991

David A. Hearne, Esq., Outland, Gray, O'Keefe & Hubbard, for the protester.
Leslie F. Pfahl, for Link-Belt Construction Equipment Company, an interested party.
Robert M. Roylance, Esq., and Paul M. Fisher, Esq., Department of the Navy, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In a sealed bid procurement, the reservation of the right to change product design and specifications, contained in unsolicited descriptive literature, does not render the bid nonresponsive where the bidder did not incorporate the literature into its bid or otherwise describe in its bid the same product model contained in the unsolicited descriptive literature.
2. Protest allegations challenging the responsiveness of the low bid, first raised in the protester's comments on the agency's report, which responded to earlier protest allegations that the low bid was nonresponsive for other reasons, are untimely raised under the Bid Protest Regulations, since the protester reviewed the awardee's bid at bid opening and knew or should have known the basis of these allegations when it filed its earlier protest.

DECISION

Hampton Roads Leasing, Inc. protests the award of a contract to Link-Belt Construction Equipment Company under invitation for bids (IFB) No. N62470-90-B-7074, issued by the Department of the Navy, for cranes for the Norfolk Shipyard, Portsmouth, Virginia. Hampton Roads contends that Link-Belt's low bid is nonresponsive for various reasons.

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

The IFB contemplated the award of a contract for the purchase of a mobile hydraulic lattice boom crane with options to: (1) purchase a second crane, (2) lease a third crane for 12 months,¹ and (3) purchase the leased crane at the expiration of the lease. Offerors were required to provide their pricing for the basic and option requirements and were informed that award would be made to the responsive, responsible offeror with the lowest total price for the base and option items.

At the June 7, 1991, bid opening, the Navy received five bids. Link-Belt's low bid was \$2,030,788, while Hampton Roads's second low bid was \$2,064,001. Award was made to Link-Belt on July 16, and Hampton Roads protested on July 22.

Hampton Roads first protests that a pre-printed legend contained in unsolicited descriptive literature submitted with Link-Belt's bid rendered the firm's bid nonresponsive. That legend states "[w]e are constantly improving our products and therefore reserve the right to change designs and specifications."

The Federal Acquisition Regulation (FAR) provides that unsolicited descriptive literature generally will be disregarded, and not be considered as qualifying the bid, except where "it is clear from the bid or accompanying papers that the bidder's intention was to qualify the bid." FAR §§ 14.202-5(f), 14.202-4(g). The FAR also provides that descriptive literature should not be required unless the procuring agency needs to establish before award exactly what the bidder proposes to furnish and whether the product offered meets the specifications. FAR § 14.202-5(b).

Thus, we have found that pre-printed legends in unsolicited descriptive literature regarding prices and/or data being "subject to change" were not material and do not alone show

¹Offerors were informed that the government reserved the option of extending the lease for the crane for up to an additional 24 months.

an intention to qualify the bid.² See Tektronix, Inc.; Hewlett-Packard Co., 66 Comp. Gen. 704 (1987), 87-2 CPD ¶ 315; Champion Road Mach. Int'l Corp., B-211968, Oct. 4, 1983, 83-2 CPD ¶ 416. This is so because, where descriptive literature is not required for evaluation, the bid, to be responsive, need only contain a commitment to perform in accordance with the IFB specification requirements and is not required to contain a description of the exact item offered. See Arista Co., 53 Comp. Gen. 499 (1974), 74-1 CPD ¶ 34. Only if unsolicited descriptive literature provided in a bid describes the same name or model number as the equipment offered in the bid, such that it is clear that the bidder intends to provide that specific product, or the bid expressly incorporates the unsolicited descriptive literature, is there a sufficient relationship between the bid and the literature to require that the literature be considered in determining whether the bid is responsive. See Marco Equip., Inc.; Scientific Supply Co., 70 Comp. Gen. 219 (1991), 91-1 CPD ¶ 107, recon. denied, B-241329.3, May 21, 1991, 91-1 CPD ¶ 490; Caprock Vermeer Equip., Inc., B-217088, Sept. 3, 1985, 85-2 CPD ¶ 259.

Here, the IFB did not solicit descriptive literature or contemplate the pre-award evaluation of any specific product. Rather, bidders were merely required to unequivocally offer to perform without exception in accordance with all the material terms and conditions of the IFB. Link-Belt took no exception to any of the IFB specifications in its bid, nor did the firm refer to its unsolicited descriptive literature in the bid or reference in its bid any specific model of crane that it intended to supply. Under these circumstances, there is not a sufficient relationship between the unsolicited descriptive literature and the bid to find that the reservation in the unsolicited descriptive literature's pre-printed legend of the right to change specifications without notice clearly indicated the bidder's intent to reserve the right to deviate from the IFB's specifications. See Arista Co., *supra*. Accordingly, we find that the unsolicited literature submitted with Link-Belt's bid did not clearly show an intent to qualify the firm's bid, and, therefore, the Navy

²Hampton Roads, in arguing that Link-Belt's unsolicited descriptive literature rendered its bid nonresponsive, mistakenly relies on our decision in North Park Village Homes, Inc., B-216862, Jan. 31, 1985, 85-1 CPD ¶ 129. Unlike the IFB here, which did not solicit descriptive literature, the solicitation in North Park required the submission of descriptive literature, and, thus, the descriptive literature "clearly was part of North Park's bid" and was required to be considered.

properly disregarded the legend. FAR §§ 14.202-5(f), 14.202-4(g).

Hampton Roads also protested that Link-Belt's bid is nonresponsive because Link-Belt, in addition to providing the required monthly pricing for the option to lease the crane for 12 months, also provided lower monthly rates for the lease of the crane for months 13 through 36. The Navy responded in detail to this allegation, asserting that Link-Belt's bid was low and responsive no matter what prices were used for this item. The protester in its comments failed to respond to the agency's response, and we consider the issue to be abandoned. See TM Sys., Inc., B-228220, Dec. 10, 1987, 87-2 CPD ¶ 573.


Hampton Roads finally protests that Link-Belt's bid is ambiguous because Link-Belt provided that all lease payments would "apply toward [the] purchase price, less [interest] on the declining balance at 2.5 [percent] above prime," and contends that the awardee's bid must be rejected because the firm failed to date its signed Certificate of Procurement Integrity. Those issues were first raised in the protester's September 4 comments on the agency report, and the Navy argues that these allegations are untimely under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1991). Hampton Roads's president admits that he reviewed Link-Belt's bid at the June 7 bid opening, but asserts he did not have an opportunity to fully review the bid until it received a copy of the bid in the agency report on the protest; Hampton Roads contends that its protest allegations which were filed within 10 working days after receiving the agency report, are timely.

Our Bid Protest Regulations do not contemplate the unwarranted piecemeal presentation of protest issues. See Armstrong Motorcycles Ltd., B-238436; B-238436.2, June 5, 1990, 90-1 CPD ¶ 531. Here, Hampton Roads, after its review of Link-Belt's bid at the June 7 bid opening, filed a detailed protest, contesting the responsiveness of the firm's bid on several specific grounds. At that time, Hampton Roads knew or should have known the basis of its other allegations that Link-Belt's bid was nonresponsive.³ Id. The protester was required to protest these issues within 10 working days of July 16, the date it learned that the agency intended to award the contract to Link-Belt, and

³The notation regarding the application of lease payments to the purchase price of the crane, of which Hampton Roads complains, is contained on the same page of Link-Belt's bid as the additional leasing pricing that Link-Belt timely protested in its initial protest letter.

its piecemeal presentation of these issues on September 4 is untimely.⁴ 4 C.F.R. § 21.2(a)(2).

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel

⁴Hampton Roads also argues that these protest allegations were not new protest grounds but merely amplified its initial protest allegation that Link-Belt's bid was nonresponsive. We disagree. A bid protest must set forth a detailed statement of the legal and factual grounds of protest. 4 C.F.R. § 21.1(b)(4). Here, as required, Hampton Roads in its initial protest timely raised specific, detailed objections to the responsiveness of Link-Belt's bid. The allegations concerning the ambiguity of the awardee's offer to apply lease payments to the purchase of the crane and the failure to date the Certificate of Procurement Integrity, while also concerning the responsiveness of the bid, are different objections than that earlier raised. Hampton Roads recognized this distinction in its comments where it characterized these new objections as "additional and supplemental" protest grounds.