



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

Decision

Matter of: International Mailing Systems, Inc.

File: B-246214

Date: February 25, 1992

Thomas J. Bitar, Esq., and Cathleen M. DeMarco, Esq., Dillon, Bitar & Luther, for the protester. Grace Bateman, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for Pitney Bowes, and Jerry L. Collins for Friden Alcatel, interested parties. Paulette S. Roseboro, Farmers Home Administration, Department of Agriculture, for the agency. Ralph O. White, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the rejection of a bid as nonresponsive on the basis that descriptive literature submitted with the bid failed to establish that the offered equipment conformed to the specifications is sustained where the solicitation effectively did not require descriptive literature, and the bid did not take exception to any of the solicitation's requirements.

DECISION

International Mailing Systems, Inc. (IMS) protests the rejection of its low bid, and the subsequent award of a contract to Pitney Bowes, under invitation for bids (IFB) No. 1B-3157-1-0003, issued by the Farmers Home Administration, Department of Agriculture, for mailing machines. IMS complains that its bid for these machines was improperly rejected as nonresponsive because the agency concluded that descriptive literature submitted with the bid did not establish that the IMS equipment met the material terms of the solicitation.

We sustain the protest.

BACKGROUND

The IFB was issued August 16, 1991, and sought bids to provide 47 mailing machines for use in Farmers Home Administration Offices throughout the United States. The machines solicited were computerized state-of-the-art mail handling devices complete with interfacing postage meters and scales. Section C of the IFB set forth 19 performance requirements for the mail handling machines, all of which were described as mandatory.

The IFB contained the standard text of Federal Acquisition Regulation (FAR) descriptive literature clause, FAR § 52.214-21, which dictated that bids be accompanied by descriptive literature as "required elsewhere in this solicitation." The clause defined such literature as information necessary to establish, for the purpose of evaluation and award, the significant details of the product offered as specified in the solicitation. The clause also cautioned that failure of descriptive literature to show that the product offered conformed to the IFB's requirements would result in rejection of the bid. Except for this clause, the solicitation contained no other references to the reason for, or nature of, the requirement for such literature. In addition, the solicitation did not explain how such literature would be used in evaluating bids.

In response to the IFB, the agency received bids from IMS, Friden Alcatel, and Pitney Bowes. Of the three bids, IMS submitted the lowest price, and Pitney Bowes the highest. The bid prices, including all options, were as follows:

IMS	\$ 453,608.75
Friden Alcatel	\$ 601,506.00
Pitney Bowes	\$ 636,868.80

The agency found IMS's and Friden Alcatel's bids nonresponsive on the basis that the descriptive literature submitted did not establish that their offered equipment conformed to the specifications in the solicitation. Specifically, the agency stated that IMS's descriptive literature provided insufficient information to determine whether the equipment met the following mandatory requirements in the IFB: (1) a diagnostic system for operator troubleshooting; (2) postage meter print capability of up to \$99.99; (3) automatic zip to zone conversion; (4) testing laboratory approval; and (5) compliance with Federal Communications Commission (FCC) regulations.

After rejecting the bids submitted by IMS and Friden Alcatel, the agency awarded a contract to Pitney Bowes on October 2. On October 11, IMS filed this protest, and

performance has been withheld pending our decision on the protest.

CONTENTIONS BY THE PARTIES

IMS protests that the agency improperly rejected its bid as nonresponsive. First, IMS states that its bid complied with all specification requirements. In this regard, IMS points out that the agency did not conclude that the commercial brochures provided with the bid indicated noncompliance with the specifications, but merely that the brochures provided insufficient information to establish compliance in the five indicated areas. In addition, IMS challenges the agency's interpretation of its descriptive literature. According to IMS, its descriptive literature shows its compliance in three of the five areas, while in two other areas--testing laboratory approval and conformity with FCC regulations--IMS's equipment meets these requirements but its standard commercial brochure simply did not address these two elements of the specification.

The agency responds that the IFB required that bids include descriptive literature with sufficient detail to determine whether the offered equipment met the terms of the specifications. Since IMS's descriptive literature did not affirmatively establish compliance with the requirements of the specification, the agency concluded that the bids should be rejected as nonresponsive.

DISCUSSION

For two of the five IFB requirements upon which the agency concluded that IMS's bid was nonresponsive--testing laboratory approval and compliance with FCC regulations--there is no disagreement between the parties; both acknowledge that the descriptive literature provided by IMS was silent about whether the proposed equipment met these requirements. Thus, we will first address whether the failure of the descriptive literature to establish compliance with the specifications required rejection of the bid as nonresponsive.

A responsive bid is one that provides an unequivocal offer to tender 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. Seaboard Elecs. Co., B-237352, Jan. 26, 1990, 90-1 CPD ¶ 115. A deficiency or deviation that goes to the substance of the bid requires the bid to be rejected as nonresponsive. Id. Where descriptive literature is required to be supplied for use in bid evaluations, a bid may properly be rejected as nonresponsive if the bid, and the literature submitted with the bid, do not clearly show that the offered product

complies with the specifications. Data Express, B-243685, July 11, 1989, 89-2 CPD ¶ 28.

As explained above, even though the solicitation here included the standard FAR clause requiring bidders to submit descriptive literature, the IFB contained no other reference to the reason for, or nature of, the requirement. Our decisions have held that because the FAR clause for descriptive literature operates together with other solicitation requirements for such literature,¹ failing to provide such further guidance elsewhere in the IFB renders the clause effectively meaningless. Futura Sys., Inc., B-242060, Mar. 25, 1991, 70 Comp. Gen. _____, 91-1 CPD ¶ 327; Tektronix, Inc.; Hewlett Packard Co., 66 Comp. Gen. 704 (1987), 87-2 CPD ¶ 315.² In these situations, we have concluded that the literature actually furnished should be considered akin to "unsolicited" literature since it is not required for bid submission or evaluation. Futura Sys., Inc., supra; Tektronix, Inc.; Hewlett Packard Co., supra.

However, despite the status of such literature as "unsolicited," rejection of a bid as nonresponsive is required by the FAR if the contracting officer concludes that the bidder clearly intended to qualify its bid by including the unsolicited information. FAR §§ 14.202-5(f) and 14.202-4(g). In addition, our Office has held that a bid is nonresponsive where the submitted literature reasonably creates a question about what the bid is offering. See Brown Boveri Elec., Inc., B-209338, Apr. 1, 1983, 83-1 CPD ¶ 342.

As stated above, we find that the IFB here did not include a valid requirement to submit descriptive literature for bid evaluation. On the other hand, once IMS submitted its descriptive literature, the agency had a duty to assure that the literature did not evidence a clear intent to qualify the bid.

¹As stated above, the FAR clause does not operate independently, it refers to "[d]escriptive literature, required elsewhere in this solicitation."

²When solicitations include separate guidance apart from the standard FAR clause, the two provisions work together to require descriptive literature. For example, in BSC Indus., Inc., B-237299, Feb. 5, 1990, 90-1 CPD ¶ 152, an agency's rejection of a bid as nonresponsive was upheld because the solicitation included the standard FAR descriptive literature clause (52.214-21) and also included a requirement for additional data in section M.4 of the IFB, but the protester's literature did not show compliance with the requirements in section M.4.

Here, there is no indication in the descriptive literature, or elsewhere in its bid, that IMS took exception to any of the solicitation's requirements. In fact, the agency does not assert that IMS's bid took issue with any requirement, but only that the descriptive literature was silent about compliance with certain of the requirements, a fact that IMS acknowledges in two areas.

We addressed this situation in 53 Comp. Gen. 399 (1973) where a bidder provided unsolicited informational material with its bid that was referenced to the solicitation number. The informational material provided in that case listed some of the features of the solicited equipment but did not repeat all the requirements in the IFB's purchase description. In that decision, we stated:

"It is our opinion that the descriptive data was submitted to "highlight" the salient features of the proposed shredder/pulverizer system, not as a means to indicate the limit of what would be supplied. We do not believe that the descriptive data was included with the view of offering something other than what the Government sought to obtain under the specifications. Nor do we believe that [the bidder], if awarded the contract in question, would have any legal right to supply an item that deviates in any manner from the requirements of the specifications."

53 Comp. Gen. at 400.

In our view, the analysis here is the same as in our prior decision. Absent a requirement, not present here, to establish such compliance through descriptive literature, IMS's bid was not rendered unacceptable by the failure of its unsolicited descriptive literature to expressly address each of the specification provisions. Id.

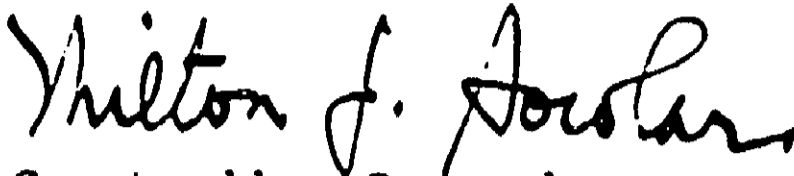
Since we conclude that bidders were not required to provide descriptive literature for bid evaluation, and since the agency does not maintain that IMS took exception in its descriptive literature to any requirements, we find the IMS bid responsive, and we need not consider the remaining contentions by IMS that its descriptive literature established its compliance with the other three requirements. These contentions are now academic.

CONCLUSION AND RECOMMENDATION

For the reasons set forth above, we find the agency improperly rejected IMS's apparent low bid as nonresponsive. As a result, we recommend that the agency terminate its award to Pitney Bowes and award to IMS, if otherwise appropriate. In

addition, we find that IMS is entitled to recover the costs of filing and pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d) (1991). IMS should submit its claim for such costs directly to the agency.

We sustain the protest.

for 
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