



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

Decision

Matter of: Nu-Lite Electrical Wholesalers, Inc.

File: B-248383

Date: August 13, 1992

Karl Dix, Jr., Esq., Smith, Currie & Hancock, for the protester.

James L. Ropelewski, Esq., Department of Justice, for the agency.

David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bid was properly rejected where it contained unsolicited literature that either qualified what the bidder was required to provide or reasonably created an ambiguity as to what was being offered in the bid.

DECISION

Nu-Lite Electrical Wholesalers, Inc. protests the rejection of its bid under invitation for bids (IFB) No. 115-4010-1, issued by the Federal Correctional Institution (Federal Bureau of Prisons), El Reno, Oklahoma, for the purchase of brand name or equal light poles with certain attached items, brand name or equal luminaires, and a lowering device tool. The agency rejected Nu-Lite's bid because the descriptive literature Nu-Lite submitted with its bid showed that the head frame assembly (head frame and luminaire ring) and the pole that Nu-Lite was offering as equal products did not comply with the salient characteristics listed in the IFB. Nu-Lite contends that its bid was improperly rejected and that it is entitled to award as the firm which submitted the low, responsive bid.

We deny the protest.

The IFB, issued on October 11, 1991, requested bids on eight light poles, Miller Bernd No. 16-100-MRMH-SSLD or equal, including a head frame assembly, capping unit, gear box and lowering device, and suspension and guide cables; on 64 luminaires, Quality No. 115-30-MH-1000-480 or equal; and on a lowering device tool. Bidders offering equal products were to identify in their bids the products being offered

and submit with them descriptive literature showing that the salient characteristics listed in the IFB for each brand name product were met by the products offered. Bidders were advised that bids offering equal products would be considered for award only if the equal products were shown to comply with the listed salient characteristics. Although not specifically identified as the salient characteristics, the IFB listed detailed specifications for the items solicited--the poles, head frame assembly, capping unit, gear box and lowering device, suspension and guide cables, and luminaries.

Fifteen bids were opened on the November 15 bid opening date. The five lowest bids were rejected because either the poles or the luminaires being offered as equal products did not comply with the detailed specifications. Award was made on April 16, 1992, to the sixth low bidder, Atlas High Mast Lighting Company.

The agency rejected Nu-Lite's bid, which was second low, because the descriptive literature submitted with the bid showed the head frame assembly being offered as an equal was made of hot-dipped galvanized steel rather than Corten steel¹ and the pole being offered as an equal had a minimum yield strength of 50,000 pounds per square inch (psi) after fabrication rather than the required minimum of 55,000 psi.

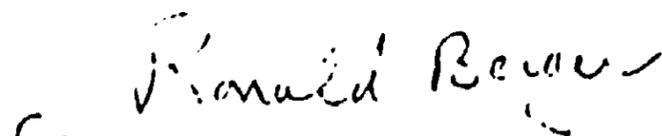
Nu-Lite argues that only the poles and luminaires were described as brand name or equal items. Nu-lite asserts that since the head frame assembly was not designated in the IFB as a brand name or equal product, a bidder was not required to submit literature for the assembly. Nu-Lite argues that the issue of whether it could supply an assembly in accordance with the specifications should have been treated as a question of responsibility rather than responsiveness, and that it therefore should have been given the opportunity after bid opening to establish its ability to comply with the specifications. Further, Nu-Lite argues that its descriptive literature stated a minimum psi yield for the pole, and thus, its bid did not expressly take exception to the specifications. In any event, Nu-Lite contends that Atlas's literature also showed the pole it was

¹Galvanized steel is a standard carbon steel which is coated to resist the elements. Corten steel is a type of weathering steel which is not coated but seals itself. The agency determined, and it is undisputed, that weathering steel was required in the climate these products were to be used because of its outstanding resistance to atmospheric corrosion.

offering had a minimum 50,000 psi value and that the agency, as it apparently did for Atlas, should have waived this discrepancy in Nu-Lite's literature.

We conclude that the agency properly rejected Nu-Lite's bid. Even if Nu-Lite is correct that the IFB did not require descriptive literature for the head frame assembly, Nu-Lite's bid was accompanied by such literature. In situations where the requirement for descriptive literature is not clearly provided for in the IFB, the literature that is actually furnished is considered akin to "unsolicited" literature. Tektronix, Inc.; Hewlett Packard Co., 66 Comp. Gen. 704 (1987), 87-2 CPD ¶ 315. Unsolicited literature can be the basis for rejection of a bid as nonresponsive if the contracting officer concludes that the bidder clearly intended to qualify its bid by including the unsolicited information. Federal Acquisition Regulation (FAR) §§ 14.202-5(f) and 14.202-4(g). In addition, bid rejection is required where the submitted literature reasonably creates a question as to what the bid is offering. Int'l Mailing Sys., Inc., B-246214, Feb. 25, 1992, 92-1 CPD ¶ 224. Thus, where a bidder submits unsolicited descriptive literature with its bid that either clearly takes exception to the specifications or renders the bid ambiguous as to whether or not the item offered will comply with the specifications, the bid must be rejected as nonresponsive. David Grimaldi Co., B-244572, Oct. 28, 1991, 91-2 CPD ¶ 381.

Here, Nu-Lite submitted descriptive literature describing the products it was offering in detail. This literature described the head frame assembly and stated unequivocally that the assembly would be hot-dipped galvanized steel. No alternative steel assembly was listed as available and there was no indication that the description was not applicable to the product intended to be furnished. We think in these circumstances the contracting officer reasonably determined that Nu-Lite's bid reflected an intention to provide a product which did not meet the specifications. At best, the bid was ambiguous as to whether a compliant product would be furnished. Accordingly, rejection of the bid was proper.²


James F. Hinchman
General Counsel

²In light of this conclusion, we need not address the pole yield strength issue.