



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Canon U.S.A., Inc.

File: B-249521

Date: December 2, 1992

Andrew Mohr, Esq., and Jeanne A. Anderson, Esq., Cohen & White, for the protester.
Michael R. Ricci for Anacomp Inc., an interested party.
Michelle Harrell, Esq., General Services Administration, for the agency.
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DIGEST

Agency properly rejected low bid under invitation for bids (IFB) containing bid sample requirement, where the bid, asserting reliance upon the IFB's waiver provision, failed to include a bid sample and the agency was unable to determine that the previously accepted product met the IFB requirements.

DECISION

Canon U.S.A., Inc. protests the rejection of its bid as nonresponsive on various line items under invitation for bids (IFB) No. FCGE-B1-92-0107-S, issued by the General Services Administration (GSA), for the purchase of microfiche readers and microfiche reader-printers under Federal Supply Classification (FSC) Group 67, Part IV, Section C single award schedule. Canon argues that its offered microfiche reader-printer complied with the IFB specifications and that GSA was required to waive the bid sample requirement as to this reader-printer.

We deny the protest.

The IFB was a solicitation for a mandatory Federal Supply Schedule contract for a 1-year period beginning July 1, 1992, through June 30, 1993, and contemplated award on an item-by-item basis to the low-priced offeror meeting all the solicitation requirements. The IFB included 66 line items, entailing 9 different types of microfiche readers and 57 different types of microfiche reader/printers, distinguished by the combination of features sought. The specifications for a number of microfiche reader/printers

required units that could rotate an image 360 degrees, to be accomplished in one of two ways, "by carrier" or "by lens." Image rotation by carrier involves rotating the fiche/platen assembly (the carrier), while the lens remains fixed. Image rotation by lens involves rotating a prism located above the lens, while the carrier remains fixed. The IFB specified whether a given reader/printer must accomplish the 360 degree image rotation (1) by lens only or (2) by carrier or lens.

The IFB required bidders to include bid samples with their bids and warned that failure to include a bid sample meeting the IFB's salient characteristics would require the bid's rejection, but provided:

"At the discretion of the contracting officer, the requirement for furnishing bid samples has been waived for a bidder if (1) the bid states that the offered product is the same as a product offered by the bidder to the previous Solicitation No. FCGE-B8-90-0012-N and (2) the Contracting Officer determines that the previously offered product was accepted or tested and found to comply with specifications and other requirements for technical acceptability conforming in every material respect with those in the above referenced solicitation."

Prior to the March 24, 1992, bid opening, a Canon representative contacted the contract specialist to inform her that Canon did not intend to submit a bid sample of its PC-70 microfiche reader-printer, on the basis that GSA had waived the bid sample requirement as to this product on the previous two solicitations covering microfiche reader-printers.¹ The contract specialist stated that Canon need not submit a bid sample of the PC-70, if this model had previously passed testing. Accordingly, the cover letter to Canon's bid noted that:

"The Canon Model PC-70 is the same equipment offered by Canon on previous Solicitation Nos. FCGE-B8-90-0012-N and FCGE-BA-91-0063-S. This model was accepted and found to comply with specifications and other requirements for technical acceptability conforming in every material respect with those in Solicitation Nos. FCGE-B8-90-0012-N and FCGE-BA-91-0063-S; therefore, as specified in the solicitation, a bid sample has not been submitted."

¹Canon apparently removed its PC-70 bid sample from GSA's storage facilities in 1990, after it received a waiver from the bid sample requirement.

Canon bid the PC-70 on line item Nos. 13 through 26 and 43 through 53. Of these, line item Nos. 13 through 14, 19 through 26, and 46 through 53 required either 360 degree image rotation by lens only or 360 degree image rotation by carrier or by lens. As indicated, Canon's bid did not include a bid sample, but did provide technical literature describing the PC-70. This literature did not specify that the PC-70 had a 360 degree image rotation capability, either by lens or by carrier. Rather, the technical literature described the PC-70 as containing a 90 degree rotatable fiche carrier and made no statement regarding lens rotation capability.

After bid opening, two of Canon's competitors, Anacom, Inc. and Eye Communication Systems, Inc., wrote the contract specialist to express concern that Canon's PC-70 did not provide 360 degree image rotation as required by the aforementioned IFB line items. On July 1, 1992, the contracting officer convened a meeting to investigate the allegations raised by Canon's competitors. In view of the concerns expressed, Canon's PC-70 technical literature that evidenced only a 90 degree image rotation and Canon's failure to submit a sample of the PC-70 with its bid, the contracting officer sought to verify compliance with the IFB by examining (1) any prior Sample Evaluation Reports or other documentation regarding testing of the PC-70, (2) all available literature on the PC-70, and (3) any PC-70's ordered under prior contracts.

The contracting officer reviewed GSA's master procurement file for this supply schedule under which Canon had received contract awards for the PC-70 since at least 1988. However, none of the Sample Evaluation Reports documenting the PC-70's testing were available for any of the successive contract periods. The 1988 procurement file did contain Canon's technical literature on the PC-70, which provided both 90 degree carrier rotation and 360 degree lens rotation, which the contracting officer considered the probable basis for that product's compliance with the 360 degree image rotation requirement at that time.

After 1990, technical literature on the PC-70 suggested that Canon had maintained only the 90 degree carrier rotation feature and eliminated the 360 degree lens rotation feature from its standard model; commercial literature available on the 1990 model of Canon's PC-70 indicated that the 360 degree lens rotation feature was now optional.² This suggested to the contracting officer that Canon's PC-70

²The literature also identified a Canon model PC-70R, which had 360 degree carrier rotation; this model was not bid on this present IFB.

after 1990 might not comply with the IFB specifications, absent modification, such as adding the optional lens rotation feature or by allowing for full 360 degree carrier rotation. Supporting this view, the cover letter to Canon's 1990 bid stated that "[a]ny deviation or apparent deviation from the Commercial Item Description as expressed in Canon's descriptive literature will be modified by Canon to meet the requirement."

The master procurement file did not evidence that GSA tested Canon's 1990 model of the PC-70; it appeared that GSA granted Canon a waiver of the bid sample requirement based upon the testing and acceptance of Canon's 1989 model of the PC-70. Because the 1989 procurement file did not contain any technical literature or sample testing documentation on that year's PC-70, it was impossible for the contracting officer to compare the rotation features of the 1989 and 1990 models. Thus, the contracting officer remained concerned that Canon had modified its PC-70 in 1990 to remove the 360 degree lens rotation feature and to offer only the 90 degree carrier rotation feature.

The 1991 procurement file did not resolve the contracting officer's doubts, since GSA again accepted Canon's request for waiver of the bid sample requirement based upon its acceptance of the PC-70 the previous year, not upon any product testing. Also, the technical literature accompanying Canon's 1991 bid only stated that the PC-70 provided a "90 degree rotatable fiche carrier," and stated nothing with regard to lens rotation features. In addition to reviewing the master procurement file, the contracting officer physically inspected three Canon PC-70's ordered under prior contracts; each of the three machines rotated only 90 degrees by carrier.

Based on the inspection of the three PC-70's, the master procurement file, and all available technical literature, the contracting officer was unable to determine that the Canon PC-70 met the 360 degree image rotation requirement, either by carrier or by lens. GSA notified Canon on July 16, 1992, that its bid had been found nonresponsive for each line item where it offered the PC-70, because the bid neither demonstrated the PC-70's ability to rotate an image 360 degrees, nor included a bid sample by which to test this capacity.

Thus, Canon was awarded none of the line items where it bid the PC-70, although its bid was low on line item Nos. 15

through 18, 20 through 26, and 43 through 53.³ Anacomp was the next low, responsive bidder on each of these line items, but only received awards as to line item Nos. 43 through 44 and 49 through 52, because GSA deemed its prices unreasonable as to the rest of the items in question.⁴ GSA canceled these remaining line items, Nos. 15 through 18, 20 through 26, 45 through 48, and 53, and converted them to negotiated procedures, with a July 22, 1992, proposal receipt date.

On July 23, 1992, Canon protested GSA's determination that its bid of the PC-70 was nonresponsive as to line item Nos. 20 through 26 and 46 through 53 for failing to demonstrate the product's compliance with the 360 degree image rotation requirement.⁵ Canon argues that its PC-70 meets the 360 degree image rotation specification and that it was entitled to a waiver of the bid sample requirement because GSA had previously tested and accepted this product.

With regard to the PC-70's image rotation features, Canon concedes that "[i]n its standard commercial model, the carrier rotates 90 degrees." However, Canon states that a

³Canon's bid of the PC-70 on line item Nos. 13, 14, and 19, was not low. Thus, Canon is not an interested party under our Bid Protest Regulations eligible to maintain a protest of the line item awards. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7. We dismissed Canon's protest of these line items on September 4, 1992.

In addition, line item Nos. 15 through 18 and 43 through 45 do not require 360 degree image rotation. After Canon protested the rejection of the PC-70 under these line items, GSA conceded that the PC-70 is responsive to those line items which do not specify 360 degree image rotation and has accordingly taken corrective action with respect to these line items Nos. 15 through 18 and 43 through 45. Thus, these protests are academic and will not be considered. Steel Circle Bldg. Co., B-233055; B-233056, Feb. 10, 1989, 89-1 CPD ¶ 139.

⁴Anacomp has protested the determination that its prices were unreasonable, which will be the subject of a future decision (B-249806).

⁵Canon timely protested within 10 days of the July 16 notice disclosing that GSA had rejected its bid of the PC-70 as nonresponsive. 4 C.F.R. § 21.2(a)(2). Contrary to GSA's assertion, Canon's protest does not involve a solicitation defect and need not have been filed prior to the July 22 proposal receipt date for the line items to be recompeteted under negotiated procedures.

minor adjustment to the PC-70 will permit the carrier to rotate the full 360 degrees, if one simply removes a tab positioned at the back of the carrier. In this regard, subsequent to the filing of this protest, Canon supplied GSA with a PC-70 bid sample in connection with its proposal on the line items being recompetited under negotiated procedures. GSA conducted a sample test of this model's image rotation capability, and agrees that the carrier will rotate 360 degrees if one breaks off a molded plastic tab at the back of the carrier. Canon argues that this modification of the PC-70 is insignificant and should not render its product nonresponsive to the IFB requirements or preclude a waiver of the bid sample requirement. Canon does not argue that its standard PC-70 offers a lens meeting the 360 degree image rotation requirement.⁶

To be responsive, a bid must show on its face, at the time of bid opening, that it is an unqualified offer to comply with the IFB's material terms. U.S. Design, B-237422, Oct. 30, 1989, 89-2 CPD ¶ 398; Surgical Instrument Co. of Am., B-213591, 84-1 CPD ¶ 433. In general, the failure to submit a required bid sample with a bid is a material deviation that renders the bid nonresponsive. Id.; Interface Flooring Sys., Inc., B-206399; B-207258, Apr. 22, 1983, 83-1 CPD ¶ 432. While a solicitation may provide for the waiver of the bid sample requirement for a product that the agency has previously tested or accepted, a bid submitted on the basis of such a waiver is responsive only if the contracting officer can determine that the offered product complies in every material respect with the IFB requirements. See Surgical Instrument Co. of Am., supra; Custom Training Aids, Inc., B-236755, Jan. 5, 1990, 90-1 CPD ¶ 20.

At the time of bid opening, Canon's bid was unaccompanied by a bid sample and included technical literature that suggested a material discrepancy between the PC-70's stated rotation capability and the IFB requirements. Therefore, although the agency had previously accepted the PC-70, the contracting officer sought to determine whether the PC-70 complied with the IFB's 360 degree rotation requirements by examining the master procurement file, Canon's own commercial literature, and three PC-70's ordered under prior

⁶Canon's arguments focus on the ability of the PC-70 to meet a 360 degree carrier rotation requirement and do not address the PC-70's compliance with those IFB line items that can only be satisfied by 360 degree lens rotation. Canon does not state that it would modify its PC-70 where the image rotation requirement must be satisfied by "lens only."

contracts.⁷ None of these sources provided adequate evidence that the offered Canon PC-70 would meet the IFB's 360 degree image rotation requirement. Canon's commercial literature in fact suggested that, while the PC-70 once satisfied the 360 degree rotation requirement with its lens, the standard PC-70 no longer offered this feature and maintained only a 90 degree carrier rotation capability. While Canon claims that GSA should have maintained better records, which assertedly would have demonstrated the PC-70's compliance with the 360 degree rotation requirement, the fact remains that based upon the evidence available at the time of bid opening, including Canon's own commercial literature and an examination of PC-70's ordered under prior contracts, the contracting officer had a legitimate basis to doubt the PC-70's compliance.⁸

Because this was a sealed bid procurement, GSA did not question Canon regarding the PC-70's compliance with the specifications, nor consider Canon's explanation, offered after bid opening, that the carrier of the PC-70 will rotate the full 360 degrees by removing a tab at the back of the assembly. AZTEK, Inc., B-229897, Mar. 25, 1988, 88-1 CPD ¶ 308. Likewise, the contracting officer could not consider Canon's apparently acceptable PC-70 bid sample, furnished during the recompetition of these line items under negotiated procedures, to determine the responsiveness of the original bid. Aldan Rubber Co., B-212673, Dec. 5, 1983, 83-2 CPD ¶ 645.

Canon claims that, even if the contracting officer discovered a discrepancy between the PC-70's stated features and the IFB requirements, she was nonetheless required to waive Canon's failure to submit a bid sample because GSA had accepted the PC-70 under prior contracts. Canon argues that the contracting officer therefore improperly revoked the waiver granted by the contract specialist, who advised that a bid sample was not necessary for previously tested and accepted products.

⁷Contrary to Canon's assertions, an agency may refer to documentation outside of the bid to determine whether it can waive the bid sample requirement. See Surgical Instrument Co. of Am., supra; Custom Training Aids, Inc., supra.


⁸In preparing the agency report in response to this protest, the contracting officer discovered that the three PC-70's she examined were not required to have 360 degree image rotation. Upon realizing this error, the contracting officer states that she inspected two PC-70's that were required to have 360 degree image rotation, but that these, too, only rotated 90 degrees.

We think that Canon has misconstrued the bid sample clause. That clause does not envision a predetermination by the contracting officer that a bidder is not required to submit a bid sample on the IFB. Instead, as in all matters concerning bid responsiveness, the contracting officer is to determine, as of the time of bid opening, whether or not waiver of the bid sample requirement was justified. See LM&E Co., Inc., B-205116, June 18, 1982, 82-1 CPD ¶ 603 (decision to waive first article testing made as of the time of bid opening, and an agency is not precluded from refusing to grant waiver by virtue of a waiver on a prior procurement).

Contrary to Canon's assertions, the fact that the government has previously accepted an offered product is not in itself sufficient to qualify the bidder for a waiver of the bid sample requirement. Under the waiver provision, the product must have also conformed in every material respect with the specifications and other requirements of technical acceptability; therefore, by withholding the bid sample a bidder assumes the risk that the bid will be nonresponsive if the contracting officer cannot determine that the previously supplied product conformed with these requirements. See Surgical Instrument Co. of Am., supra; Custom Training Aids, Inc., supra. Canon could not have reasonably believed that previously accepted products were necessarily entitled to a waiver of the bid sample requirement since the IFB bid sample clause clearly requires the contracting officer to determine, before granting the waiver, that the previously accepted product complied "with specifications and other requirements for technical acceptability." Here, while the record shows that GSA previously accepted the PC-70 under the prior schedule contract, GSA made no express determination that the PC-70 complied with the specifications and other requirements for technical acceptability, but simply granted Canon's request for a waiver to the bid sample requirement.

In conclusion, on this record we find no basis to question the contracting officer's determination that Canon's PC-70 did not qualify for a waiver as to the line items requiring 360 degree rotation and that the bid with respect to those items was nonresponsive.

The protest is denied.


for James F. Hinchman
General Counsel