



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Amjay Chemicals

File: B-252502

Date: May 28, 1993

G. V. Kshatriya for the protester.
Susan Shalov for Gourmet Inque Ltd., an interested party.
Linwood I. Rogers, Esq., Defense Logistics Agency, for the agency.
Katherine I. Riback, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly rejected as nonresponsive a bid which contained unsolicited descriptive literature concerning the product offered, which established that the product did not comply with a material solicitation requirement.
2. Allegation that the awardee has not previously supplied item to agency concerns the agency's affirmative determination of the awardee's responsibility which our Office will not review absent a showing of possible fraud, bad faith, or misapplication of a definitive responsibility criterion.

DECISION

Amjay Chemicals protests the award of a contract to Gourmet Inque Ltd., under invitation for bids (IFB) No. DLA450-93-B-0786, issued by the Defense General Supply Center, Defense Logistics Agency, for Malathion 57 percent insecticide. Amjay contends that its apparent low bid was improperly rejected as nonresponsive and that the awardee has not previously supplied the insecticide to the agency.

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

The IFB, issued on December 21, 1992, was a total small business set-aside. The IFB solicited bids for Malathion 57 percent insecticide, and required that the insecticide have a minimum flashpoint of 140 degrees Fahrenheit TCC. On the January 20, 1993, bid opening date, it was determined that Amjay had submitted the apparent low bid. In a cover letter submitted with its bid, Amjay stated, "we agree to

all terms and conditions of this solicitation. Enclosed are copies of MSDS [material safety data sheets] and specimen Label." The MSDS for the Malathion 57 percent insecticide that Amjay included with its bid states that the insecticide is manufactured by Southern Mill Creek Products Company, Inc.,¹ and that it has a flashpoint of 102 degrees Fahrenheit TCC. The agency rejected Amjay's bid as nonresponsive for failure to satisfy the minimum flashpoint requirement. Four other bids were similarly rejected as nonresponsive and one bid was rejected for failure to include any prices. Award was made on February 16 to Gourmet Inque Ltd.

The protester contends that its bid was improperly rejected as nonresponsive because the agency should not have considered the MSDS that Amjay submitted since the solicitation did not require that the MSDS be submitted with bids,² and the MSDS which it submitted did not refer to the solicitation number.³ The protester also argues that its bid cover letter in which Amjay agreed to all terms and conditions of the solicitation should control.

Consideration of unsolicited literature in a bid is governed by Federal Acquisition Regulation (FAR) §§ 14.202-5(f) and 14.202-4(g), which provides that unsolicited descriptive literature generally should be disregarded. However, the FAR also provides that where it is clear from the bid or accompanying papers that the bidder's intention was to qualify the bid, the literature may not be disregarded. See David Grimaldi Co., B-244572, Oct. 28, 1991, 91-2 CPD ¶ 381. Where, as here, the unsolicited literature describes the exact product being offered by the same manufacturer and is explicitly represented by the bidder to be descriptive of the product being offered, the relationship between the bid

¹Southern Mill Creek Products Company, Inc., is also listed on Amjay's bid as the manufacturer of the Malathion 57 percent insecticide that it proposes under this solicitation.

²The solicitation required that MSDS and hazard warning labels be submitted by the apparently successful offeror prior to contract award. While Amjay argues that it should be allowed to resubmit another MSDS because it is the low bidder, since its bid was determined to be nonresponsive, Amjay is not the apparent successful offeror.

³The solicitation requires that the MSDS submitted cite the solicitation number, the applicable CAGE code of the manufacturer, the part number, and where so identified, the national stock number.

and the literature warrants considering the literature in determining whether the bid is responsive. Benthos, Inc.; Cygnus Eng'g, B-237454; B-237454.2, Feb. 20, 1990, 90-1 CPD ¶ 295.

To be responsive, a bid must be an unequivocal offer to provide the exact thing called for in the solicitation, so that, upon acceptance, the contractor will be bound to perform in accordance with all of the IFB's material terms and conditions. If any substantial doubt exists as to whether a bidder upon award could be required to provide the items as specified in the IFB, the integrity of the competitive bidding system requires rejection of the bid as nonresponsive. David Grimaldi Co., supra. Thus, where unsolicited descriptive literature submitted with a bid reasonably raises questions as to whether the product offered complies with a material requirement of the IFB, the bid should be rejected as nonresponsive. Benthos, Inc.; Cygnus Eng'g, supra.

The MSDS that Amjay submitted with its bid clearly stated that the Malathion 57 percent insecticide manufactured by Southern Mill Creek Products Company had a flashpoint of 102 degrees Fahrenheit TCC. Accordingly, the agency properly determined that Amjay's bid, which proposed Malathion 57 percent insecticide manufactured by Southern Mill Creek Products Company, was nonresponsive for failure to comply with the solicitation requirement that the insecticide have a minimum flashpoint of 140 degree Fahrenheit TCC. Amjay's argument that its cover letter statement, which agrees to all of the solicitation's terms, cures the discrepancy in the MSDS, fails, because a blanket offer in a cover letter to comply with all IFB specifications does not establish responsiveness where enclosed descriptive literature evidences noncompliance. Id.

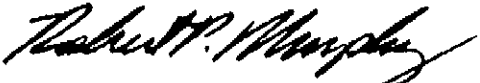
Next, Amjay argues that Gourmet has never supplied this item to the agency.⁴ The solicitation does not require that bidders be previous suppliers; hence, Amjay essentially questions the agency's affirmative determination of

⁴Amjay also complains that Gourmet miscertified in its bid that it is a small disadvantaged business. The Small Business Act, 15 U.S.C. § 637(b)(6) (1988), gives the Small Business Administration, not our Office, the conclusive authority to determine matters of small business size status for federal procurements. 4 C.F.R. § 21.3(m)(2) (1993); American Bristol Indus., Inc., B-249108.2, Oct. 22, 1992, 92-2 CPD ¶ 268. Thus, we will not review a protester's challenge of another company's size status. Id.

Gourmet's responsibility. See DTM, Inc., B-241270.2, Feb. 15, 1991, 91-1 CPD ¶ 178. Our Office will not review an agency's affirmative determination of responsibility, which is largely a business judgment, unless there is either a showing of fraud or bad faith on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have been misapplied. 4 C.F.R. § 21.3(m)(5) (1993). Neither exception is applicable here.

Finally, Amjay argues that the government would save money by accepting its bid. Although rejection of the protester's bid may result in additional cost to the government in this procurement, we have consistently held that a nonresponsive bid may not be accepted even though it would result in savings to the government, since acceptance of such a bid would compromise the integrity of the competitive bidding system. See The Bruce Corp., B-231171, June 24, 1988, 88-1 CPD ¶ 610.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel