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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: EEV, Inc.
File: B-253061
Date: July 23, 1993

Stuart L. Hesselson for the protester,
Fred Kopatich, Esq., Jerry A. Walz, Esq., and James K.
White, Esq., Department of the Commerce, for the agency,
John L. Formica, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

1. Post-bid opening protest that the requirement in an invitation for bids (IFB) that bidders offering other than the brand name products submit bid samples should be waived for the protester, which offered other than the brand name product, is dismissed as an untimely complaint of an alleged impropriety apparent on the face of the solicitation, where the bid sample requirement was clearly set forth in the IFB, which provided that the bid sample requirement would only be waived for bidders offering the brand name product.

2. Protester is not an interested party to challenge the agency's cancellation of a solicitation where the protester's bid was properly rejected by the agency as nonresponsive.

DECISION

EEV, Inc. protests the rejection of its bid as nonresponsive and the subsequent cancellation of invitation for bids (IFB) No. 51WCNW306035CH, issued by the National Oceanic and Atmospheric Administration, Department of Commerce, for five types of magnetron tubes to be used in a National Weather Service radar system.

We dismiss the protest.

The IFB, issued on a brand name or equal basis, contemplated the award of firm, fixed-price requirements contract for the magnetron tubes. The IFB solicited bids on five contract line item numbers (CLIN), and specified Raytheon Magnetron

Tubes (model numbers QK 729 through 733) as the brand name products. Although the solicitation provided that the magnetron tubes must satisfy the requirements of a military specification dated July 16, 1954 (which was canceled by notice dated March 6, 1970), and a Department of Commerce specification dated July 6, 1959, it cautioned that because of the age of these specifications and the possibility that manufacturing processes and materials have changed, bidders offering equal products must submit for each CLIN a bid sample which would be tested by the agency. The IFB incorporated the standard "Bid Samples" clause set forth at Federal Acquisition Regulation (FAR) § 52.214-20, which states that bid samples "must be furnished as part of the bid." The clause provides that the samples "will be tested or evaluated to determine compliance with all the characteristics listed for examination in the solicitation," and that if bid samples are not furnished with the bid, or if the samples furnished do not meet the IFB requirements, the bid will be rejected. The IFB also specified that the requirement for furnishing bid samples would only be waived for bidders "offering the brand name product requested."

The agency received only EEV's bid by the March 12, 1993, bid opening date. EEV offered "equal" magnetron tubes of its own manufacture for each of the five line items, but failed to furnish any bid samples with its bid. The agency rejected EEV's bid as nonresponsive because of EEV's failure and canceled the IFB because no responsive bids were received.

EEV protests the agency's rejection of its bid as responsive and the agency's subsequent cancellation of the solicitation. EEV contends that the IFB's bid sample requirement should be waived for it because its magnetron tube 4J35, offered as an equal product to the Raytheon tube specified for CLIN 0005, is "the original tube used in the Raytheon design of the . . . [r]adar," and that a comparison of the specifications for EEV's tube with the military and Commerce specifications provided with the IFB confirms that EEV's 4J35 tube "equals or exceeds [the Raytheon tube] in every respect." The protester adds that its magnetron tube 4J32, offered as an equal product to the Raytheon tube specified in CLIN 0002, is currently being used by the National Weather Service at sites in Tampa and Daytona, Florida. The protester finally complains with regard to the bid sample requirement that it "put an undue burden on an off-shore supplier" such as itself because of the amount of time it takes for such a supplier to receive the tubes from its foreign manufacturing site.

The crux of EEV's protest is that the bid sample requirement should have been waived for its offered "equal" products. Our Bid Protest Regulations contain strict rules requiring

the timely submission of protests. These rules specifically require that protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1993); Manatts, Inc., B-237532, Feb. 16, 1990, 90-1 CPD ¶ 287. These timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Air Inc.--Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129.

The requirement that bidders offering equal products--such as EEV--submit bid samples was clearly set forth in the IFB; to be timely, EEV should have raised its objection to the bid sample requirement prior to the March 12, 1993, bid opening. 4 C.F.R. § 21.2(a)(2); Aydin Computer and Monitor Div., B-245644, Dec. 12, 1991, 91-2 CPD ¶ 538; Barrett Carpet Mills, Inc., B-228507, Jan. 12, 1988, 88-1 CPD ¶ 20. While FAR § 14.202-4(f)(1) provides that the requirement for furnishing bid samples may be waived where the agency anticipates receiving bids offering products "previously or currently being contracted for or tested by the [g]overnment and found to comply with specification requirements conforming in every material respect with those in the current invitation for bids," FAR § 14.201-6(o)(2) provides that where a waiver is contemplated, the agency "shall use" in the IFB one of two alternates to the standard bid samples clause. Both of the alternate clauses specifically provide that the requirement for furnishing bid samples may be waived if the bid states that the offered product is the same as the product offered by the bidder on a previous acquisition, and the agency determines that the previously offered product was accepted and tested, and complies in every material respect with the requirements of the IFB. FAR § 52.214-20 Alternate I and Alternate II. Neither of these alternate clauses was included in the IFB; as indicated above, the standard clause included in the IFB only permits waiver of the bid sample requirement for the brand name product. In sum, to the extent that EEV believes that the IFB should not have required the submission of bid samples at all, or should have provided for waiver, EEV was required to file its protest prior to the bid opening date. Thus, EEV's post-bid opening protest of the IFB's failure to provide for waiver of bid samples other than brand name products is untimely.

Because EEV's bid did not include bid samples as required by the IFB, it was properly rejected as nonresponsive. Canon U.S.A., Inc., B-249521, Dec. 2, 1992, 92-2 CPD ¶ 388, recon. denied, B-249521.2, Mar. 10, 1993, 93-1 CPD ¶ 219. Thus, EEV would not be eligible to receive award even if we were to sustain its protest against the cancellation of the IFB, and it is therefore not an interested party under our Bid

Protest Regulations, 4 C.F.R. § 21.0(a), eligible to maintain a protest of the cancellation. Municipal Leasing Sys., Inc., B-242648.2, May 21, 1991, 91-1 CPD ¶ 495; Titan Roofing, Inc., B-236236.2, Jan. 10, 1990, 90-1 CPD ¶ 39.

The protest is dismissed.



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