



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Industrial Acoustics Co., Inc.; Acoustic Systems

File: B-255123.2; B-255123.3; B-255203.2;
B-255203.3

Date: March 29, 1994

Samuel Stern, Defense Contracts Consultants, for Industrial Acoustics Co., Inc.; L. Graeme Bell III, Esq., Laurie S. Elkin, Esq., and Christopher M. Farris, Esq., Crowell & Moring, and David Michalek for Acoustic Systems, the protesters.

Dennis Foley, Esq., and Philip Kaufman, Esq., Department of Veterans Affairs, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where bidder restricted disclosure of required test data submitted to establish responsiveness of the bid, the agency properly rejected the bid as nonresponsive.
2. Protests of previously awarded solicitations are dismissed as untimely where protester did not diligently pursue the information which forms the basis for the protests.

DECISION

Industrial Acoustics Company, Inc. and Acoustic Systems protest the rejection of their bids as nonresponsive under invitation for bids (IFB) Nos. 583(042)-71-93 and 612-46-93, issued by the Richard L. Roudebush Veterans Affairs (VA) Medical Center, Indianapolis, Indiana, and the VA Northern California System of Clinics, Pleasant Hill, California, respectively, for audiometric examination booths used to test patients' hearing.

We deny the protests in part and dismiss them in part.

IFB No. 583(042)-71-93, which was issued on August 17, 1993, sought bids for delivery and installation of five examination booths. IFB No. 612-46-93, issued on August 13, 1993, sought bids for two booths. Both solicitations incorporated a standard VA specification which described

the physical characteristics, acoustical performance requirements, and electromagnetic shielding attenuation requirements of the booths. Both solicitations required that bidders submit descriptive literature, including test reports, with their bids to establish that their booths complied with these requirements.

Acoustic Systems and Industrial Acoustics were the only two bidders to respond to the IFBs. Acoustic Systems submitted the lower bid under both solicitations and was awarded the Indianapolis contract on September 27, and the Pleasant Hill contract on September 30. On September 29 and October 4, respectively, Industrial Acoustics protested the two awards to our Office, contending that Acoustic Systems' bids under both solicitations were nonresponsive because Acoustic Systems failed to submit all of the required electromagnetic shielding attenuation test data. Upon review, the VA determined that both bids were nonresponsive because neither Acoustic Systems nor Industrial Acoustics submitted all of the required test data. The agency thus proposed to terminate the awards to Acoustic Systems, cancel the IFBs, and complete the acquisitions through negotiation.

Both protesters dispute the agency's determination that their bids were nonresponsive. Acoustic Systems also argues that if Industrial Acoustics' bids under these two IFBs were nonresponsive, then its bids under a number of other recent solicitations--all of which resulted in awards to Industrial Acoustics--must also have been nonresponsive.

INDUSTRIAL ACOUSTICS' PROTESTS

As a preliminary matter applicable to both protests, an agency may cancel an IFB after bid opening and complete the acquisition through negotiation where no responsive bid has been received from a responsible bidder. Federal Acquisition Regulation §§ 14.404-1(c)(8) and (e)(i), 15.103; G. Marine Diesel Corp., B-238703; B-238704, May 31, 1990, 90-1 CPD ¶ 515. While Industrial Acoustics argues that the agency improperly concluded that omissions from its test data rendered its bids nonresponsive, we need not consider this issue since the bids were clearly otherwise nonresponsive and were thus properly rejected by the agency. In this regard, Industrial Acoustics labeled each page of the test data that it submitted to establish compliance with the IFB's acoustical performance and electromagnetic shielding attenuation requirements with the following restrictive legend: "Proprietary Data Not to be Divulged Outside of U.S. Government." Because of the restrictive caption, none of Industrial Acoustics' data was publicly disclosed.

Under the Competition in Contracting Act of 1984, bids are to be opened publicly. 41 U.S.C. § 253a. The purpose of public opening is to protect both the public interest and the bidders against any form of fraud, favoritism, or partiality and to leave no room for suspicion. VACAR Battery Mfg. Co., Inc., B-223244.2, June 30, 1986, 86-2 CPD ¶ 21. We have interpreted the requirement for public opening to mean that a restriction upon disclosure of bid information renders the bid nonresponsive if it prohibits the disclosure of sufficient information to permit competing bidders to know the essential nature and type of products offered, or those elements of a bid relating to quantity, price, and delivery terms. Id.; see also Federal Acquisition Regulation § 14.404-4. In other words, a restrictive legend renders a bid nonresponsive if it prohibits the disclosure of information necessary to establish the responsiveness of the bid to the IFB's requirements.

Here, the solicitations required the submission of test data to establish that the booths offered complied with the specification's acoustical performance and electromagnetic shielding attenuation requirements. The IFBs also advised that a failure to submit the required descriptive literature, i.e., test data, would result in rejection of the bid as nonresponsive. Since the test data thus was necessary to establish the responsiveness of the bid to the IFB's requirements--i.e., to reveal the essential nature of the booths offered--Industrial Acoustics' restriction on the data's disclosure rendered its bids nonresponsive. As a result, the agency properly rejected the bids.

ACOUSTIC SYSTEMS' PROTESTS

Likewise, in its original letter of protest, Acoustic Systems asserted that it had submitted test data with its bid which demonstrated that its booths would meet the needs of the VA in all the stipulated frequency bands and that its bids were therefore responsive. VA responded in its report by noting that the shielding effectiveness test reports furnished by the protester clearly indicated that certain required measurements had not been performed. In commenting on the agency report, Acoustic Systems did not attempt to rebut the agency's assessment of the adequacy of its test data. We therefore have no basis to disagree with the agency's view that these bids were nonresponsive. See Atmospheric Research Sys., B-240187, Oct. 26, 1990, 90-2 CPD ¶ 338.

In its comments, Acoustic Systems argued that if Industrial Acoustics' bids under the two instant solicitations were nonresponsive, its bids under six

other recent solicitations,¹ all of which resulted in award to Industrial Acoustics, must also have been nonresponsive. In this regard, Acoustic Systems alleges--and the agency confirms--that all six solicitations were essentially identical to the Indianapolis and Pleasant Hill ones, apart from size and number of booths--i.e., they incorporated the same standard specification and required the submission of descriptive literature, including test reports to demonstrate the bidder's compliance with the requirements. The agency further confirms that Industrial Acoustics submitted the same descriptive literature with the same restrictive caption as it used here in response to all six solicitations.

The protester contends that although it did not protest any of the awards within 10 days after being notified of them, its protests are nonetheless timely since it did not learn the information on which it bases the protests--i.e., that the agency had determined Industrial Acoustics' submissions here were nonresponsive and that Industrial Acoustics had used the same test data for the other procurements--until the agency filed its report on these protests on November 4, 1993. The protester explains that it attempted to gain access to Industrial Acoustics' test data under the first solicitation issued incorporating the standard specification² by filing a Freedom of Information Act (FOIA) request with the agency on June 21, 1993, but that the contracting officer denied the request on the grounds that Industrial Acoustics' submissions were protected from disclosure under exemption (b)(4) of FOIA, 5 U.S.C.

¹The six other solicitations were as follows:

<u>Solicitation no. and issuing medical center</u>	<u>Date issued</u>	<u>Date awarded</u>
Spokane, WA 688-93-4-984-0005	Aug. 19, 1993	Sept. 3, 1993
Columbia, SC 544-041-93	Aug. 13, 1993	Sept. 15, 1993
Huntington, WV 581-24-93	Aug. 23, 1993	Sept. 30, 1993*
Tampa, FL 673-64-93	Aug. 23, 1993	Sept. 28, 1993
Biloxi, MS 520-23-93	Aug. 5, 1993	Sept. 8, 1993
Atlanta, GA 508-133-93	July 16, 1993	Sept. 1, 1993

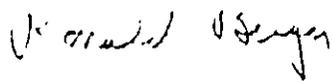
*In response to a separate protest by Acoustic Systems to our Office (B-255406), the VA terminated this award to Industrial Acoustics. Industrial Acoustics has now protested the decision to terminate the award, and our Office is currently considering its protest (B-255406.2).

²Solicitation 621-93-3-091-0138, issued by the VA Medical Center, Mountain Home, TN.

§ 552(b)(4),³ Acoustic Systems argues that since it had been denied access to Industrial Acoustics' test reports and had been assured by the VA that the data complied with the specification's requirements, it reasonably assumed that identical submissions by Industrial Acoustics in response to the subsequent solicitations were also responsive until it received the agency report on November 4.

In our view, the protester can not now file a timely challenge to the award of contracts to Industrial Acoustics under the six earlier solicitations. Where a procurement has been conducted under sealed bidding, bidders must act promptly after bid opening to obtain information on the bids received, either by examining the bids while they are available for public inspection immediately after opening or by filing, without delay, a request for copies of them. Thomas May Constr. Co., B-255683, Mar. 23, 1994, 94-1 CPD ¶ _____. Here, there is no showing that the protester filed a request for Industrial Acoustics' test data under any of the six solicitations which it now protests, and we do not agree that it was reasonable to assume that since the contracting officer for the VA's Mountain Home procurement--an unrelated procurement, not one of the six challenged here--denied its FOIA request, that any other requests for such data would be similarly denied. Given its failure to attempt to gain access to Industrial Acoustics' test data under any of the subsequent solicitations, we do not think that Acoustics Systems can be said to have diligently pursued the information which forms the basis for its protest. See Hartford Constr. Corp., B-235642.2, Aug. 29, 1989, 89-2 CPD ¶ 187.

The protests are denied in part and dismissed in part.


Robert P. Murphy
Acting General Counsel

³This section exempts from disclosure trade secrets and commercial or financial information obtained from a person that is privileged or confidential.