



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

2121110

Decision

Matter of: Products for Industry
File: B-257463; B-257463.2
Date: October 6, 1994

Peter Scott, Esq., Rutledge, Cary-Hamby & Scott, for the protester.
Joel S. Rubinstein, Esq., Bell, Boyd & Lloyd, for Lista International Corporation, an interested party.
Martin F. McAlwee, Esq., and Gregory H. Petkoff, Esq., Department of the Air Force, 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 non-responsive protester's bid which contained descriptive literature showing that the product offered did not comply with material specifications.
2. Protest that awardee's bid was non-responsive is dismissed as untimely where allegation was first raised after protester's receipt of agency report and the protester made no post-bid opening attempt to examine awardee's bid; protesters who do not act promptly after public bid opening to obtain information on bids received so that, upon learning of agency's award decision, the protester will be aware of any alleged defect in winning bid, do not meet requirement to act diligently to identify bases of protest.

DECISION

Products for Industry (PFI) protests the rejection of its bid as non-responsive and the award of a contract to Lista International Corporation under invitation for bids (IFB) No. F08650-94-B-0019, issued by the Department of the Air Force.

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

The IFB, for storage cabinets and workbenches for the repair of electronic avionics equipment, listed requirements for each of the items. The solicitation also required that descriptive literature be submitted with bids and included

the "Descriptive Literature" clause at Federal Acquisition Regulation (FAR) § 52.214-21, which states:

"(c) The failure of descriptive literature to show that the product offered conforms to the requirements of this solicitation will require rejection of the bid."

The Air Force received six bids by the May 9, 1994, bid opening. The agency rejected PFI's low bid of \$48,630 as non-responsive for failure to comply with the solicitation specifications. For example, the IFB listed "black" as the required color for both the cabinets and the workbenches under the specifications for those items. The agency stated that it included this requirement to maintain color uniformity in the workshop with existing workbenches and cabinets. PFI's descriptive literature did not identify black as an available color, and stated that "[u]nless otherwise listed in the catalog, grizzly equipment [the equipment identified by PFI as what it would furnish] will be painted gray." The agency therefore concluded that, according to PFI's descriptive literature, the proposed workbenches and cabinets did not meet the solicitation color requirement for these items. The agency also rejected the next low bid as non-responsive, and awarded a contract on May 25 to Lista International Corporation--the third-low bidder, at \$67,734.05. This protest followed.

Where an IFB properly requires descriptive literature to establish the bidder's conformance to the specifications, and bidders are so cautioned, a bid is non-responsive if the literature submitted fails to show that the offered equipment conforms to the specifications in the areas for which the literature was requested, or shows that the equipment otherwise does not comply with the specifications. TIMCO Elec. Power & Controls, Inc., B-248308, Aug. 6, 1992, 92-2 CPD ¶ 84.

PFI argues that the IFB did not require descriptive literature for evaluation purposes, that the literature that it did provide with its bid should be considered "unsolicited" literature, and in any event that this literature complied with all of the "significant elements" of the solicitation specifications.

The purpose of a descriptive literature clause is to require information showing the characteristics, construction, or operation of a product that affirmatively establishes conformance with solicitation requirements. The applicable regulation requires that solicitations requiring descriptive literature clearly state "what descriptive literature is to be furnished" and "the purposes for which it is required." FAR § 14.202-5(d)(1). For this reason, the standard


descriptive literature clause, which was included in this IFB, refers to literature "required elsewhere in this solicitation," FAR § 52.214-21. This clause alone, however, does not effectively impose a requirement for descriptive literature. The IFB must set forth the specific descriptive literature requirement "elsewhere" and advise bidders as to what specific literature is required and for what purpose it is required. Futura Sys. Inc., 70 Comp. Gen. 365 (1991), 91-1 CPD ¶ 327. Where the IFB does not do this, there is no enforceable descriptive literature requirement, and any literature that is actually furnished is considered akin to "unsolicited" literature. International Mailing Sys., Inc., B-246214, Feb. 25, 1992, 92-1 CPD ¶ 224. Unsolicited literature, however, can be the basis for rejection of a bid as non-responsive if the contracting officer reasonably concludes that the bidder clearly intended to qualify its bid by including unsolicited information that takes exception to the specifications. FAR §§ 14.202-5(f) and 14.202-4(g); Nu-Lite Elec. Wholesalers, Inc., B-248383, Aug. 13, 1992, 92-2 CPD ¶ 104.

Here, the IFB does not "elsewhere" require descriptive literature, but the literature that PFI submitted with its bid clearly did not meet the specification requirements that the cabinets and the workbenches be black. PFI's descriptive literature did not identify black as an available color, and stated that "[u]nless otherwise listed in the catalog, grizzly equipment will be painted gray." Under these circumstances, the contracting officer reasonably determined that PFI's bid reflected an intention to provide products that did not meet the specifications. Accordingly, the rejection of the bid was proper.

Based upon its review of Lista's bid, PFI also contends that the awardee's bid was non-responsive. We dismiss this allegation as untimely. The record shows that PFI neither attended bid opening nor made any attempt to obtain a copy of Lista's bid through a post-bid opening inquiry or Freedom of Information Act request. PFI first obtained a copy of Lista's bid materials when they were furnished by the Air Force as part of its filings with our Office. Where, as here, bids are opened publicly, protesters are required to make some diligent effort to review the bids shortly after bid opening. Thomas May Constr. Co., B-255683, Mar. 23, 1994, 94-1 CPD ¶ 210. Since PFI made no attempt to review Lista's bid at any time before receiving the agency report,

we find that PFI did not diligently pursue this basis for protest and therefore dismiss its allegations concerning the responsiveness of Lista's bid as untimely.

The protest is denied in part and dismissed in part.


Robert P. Murphy
Acting General Counsel