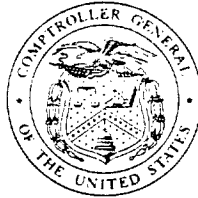


P2-11

DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

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FILE: B-194273

DATE: April 23, 1979

MATTER OF: Cecile Industries, Inc.

DLG00087

[Protest Alleging that Awardee's Bid Was Nonresponsive]

DIGEST:

1. Where protester's initial submission indicates protest is without legal merit, GAO will render decision without obtaining report from agency.
2. Failure of bidder to submit with bid a laboratory report expressly required for determining bidder capability, i.e., responsibility, does not render bid nonresponsive. Laboratory report may be submitted after bid opening and up to time of award.

CNG00630 Cecile Industries, Inc. (Cecile), protests any forthcoming award to the low bidder, Gibraltar Industries, Inc. under invitation for bids (IFB) AG-C00378 No. DLA100-79-B-0041, issued by the Defense Logistics Agency (DLA) for the procurement of wet weather ponchos.

This case falls within the ambit of our decisions which hold that where it is clear from a protester's initial submission that the protest is without legal merit, we will decide the matter on the basis of the protester's initial submission without requesting a report from the procuring activity pursuant to our Bid Protest Procedures, 4 C.F.R. part 20 (1978). Hot Lake Development, Inc.; Vale Geothermal, Inc., B-192512, August 18, 1978, 78-2 CPD 135; Chambers Consultants and Planners, B-192465, August 18, 1978, 78-2 CPD 134.

The solicitation specifications included a requirement that:

"the bidder shall submit a certified copy of a recent laboratory report containing test data which demonstrate that the sealant,

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method of applying, and the finished sealed seam area of the poncho has been tested and found to comply with the requirements of this specification."

Cecile contends that since Gibraltar failed to submit a laboratory report with its bid, the bid should be rejected as nonresponsive.

Regarding the required laboratory report, the solicitation explains:

"The purpose of the above requirement is to assist the Government to determine the capability of bidders to supply ponchos meeting all requirements of this specification. The submission of an acceptable report under this requirement shall not be construed as relieving a supplier from subsequently meeting all requirements of this specification on all deliveries."


The required information expressly relates to the prospective contractor's ability to perform in accordance with the contract terms, i.e., bidder responsibility. Cubic Western Data, Inc., 57 Comp. Gen. 17 (1977), 77-2 CPD 279. The failure of Gibraltar to submit a laboratory report with its bid is not fatal to consideration of the bid, inasmuch as the bidder's ability or responsibility may be determined on the basis of information submitted after the opening of bids and up to the time of award. 52 Comp. Gen. 389, 391, 392 (1972); Thermal Control Inc., B-190906, March 30, 1978, 78-1 CPD 252. This is so even if the solicitation contains language requiring the submission of the information with the bid. Thermal Control Inc., supra.

In certain cases involving the purchase of a product our Office has recognized that an agency may require technical data necessary for determining whether the specifications would be satisfied by the item offered, and failure to include the information with the bid requires rejection of the bid. See 52 Comp. Gen., supra at 392; Cubic Western Data, Inc., supra. However, when such is the case,

Defense Acquisition Regulation (DAR) § 2-202.5(d)(1) (1976) provides that the IFB must clearly state the purpose for which the technical data is required, the extent to which it will be considered in the evaluation of the bids, and the rules which will apply if a bidder fails to furnish the data before bid opening. The solicitation also must contain a clause warning bidders of the consequences of not furnishing the data with their bids. DAR § 2-202.5(d)(2)(1976). Moreover, we have consistently held that where, as here, there are detailed specifications setting forth the agency's requirements, it is inappropriate to impose the technical data requirements of DAR § 2-202.5 and, under such circumstances, it is improper to reject as nonresponsive a bid which does not comply with the solicitation data requirements. Cf. Cubic Western Data, Inc., supra (involving the similar provision of the Federal Procurement Regulations).

The solicitation in this case did not require the laboratory report as descriptive data pursuant to DAR § 2-202.5, but for the express purpose of determining bidder capability, i.e., responsibility. Therefore, the low bidder may submit the laboratory report after bid opening. In fact, DLA has advised us that the low bidder has already done so.

The protest is summarily denied.

  
Deputy Comptroller General  
of the United States