

Washington, D.C. 20548

Decision

Matter of: Innovative Refrigeration Concepts

File: B-258655

Date: February 10, 1995

Richard D. Lieberman, Esq., Sullivan & Worcester, for the protester.

Gregory H. Petkoff, Esq., and Russell K. Pippin, Esq., Department of the Air Force, Office of the General Counsel, for the agency.

Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester was not required to protest prior to bid opening on an unambiguous "brand name or equal" invitation for bids for a chiller, which was set aside for small businesses offering small business products and which specified a large business product as the brand name, where the protester asserts that it was entitled to the award as the low bidder offering an equal product manufactured by a small business.

2. Under a small business set-aside, an agency improperly awarded a contract for a brand name or equal product to the low bidder offering an equal product of a large business; only a bid offering the equal product of a small business is responsive.

DECISION

Innovative Refrigeration Concepts (IRC) protests the award of a contract for a chiller to R&K International Co. under invitation for bids (IFB) F28609-94-B-0030, issued by the Department of the Air Force, McGuire Air Force Base, New Jersey. IRC contends that R&K's bid was nonresponsive because it proposed to furnish the product of a large business in violation of the small business set-aside provisions of the IFB.

We sustain the protest.

The IFB, a total small business set-aside, solicited bids on a brand name or equal basis for one Trane Model CGWC-D12 chiller or equal. The IFB listed salient characteristics for the chiller, and required the submission of all descriptive literature necessary for the agency to determine whether the product offered met those salient characteristics. The IFB also incorporated by reference Federal Acquisition Regulation (FAR) § 52.219-6, "Notice of Total Small Business Set-Aside," which requires a small business manufacturer or regular dealer submitting an offer in its own name to furnish only end items manufactured or produced by domestic small businesses. In addition, bidders were required to certify their size status and to certify that the end item to be furnished would be manufactured or produced by a domestic small business.

The Air Force received six bids by the July 29, 1994, bid opening date. R&K was the low bidder, and represented in its bid that it is a small business and that the end item it would furnish would be manufactured or produced by a small business. However, R&K proposed to furnish equal equipment manufactured by McQuay Commercial Products Group/Snyder General Corp., which is not a small business concern under the applicable size standard. In its bid, IRC represented that it is a small business concern and that the end item it will furnish will be manufactured or produced by a domestic small business. In a letter accompanying its bid, IRC explained that it had bid its own domestically manufactured "equal" product, but that it anticipated that other small business bids might offer items manufactured by large businesses, which should be rejected under FAR § 52.219-6.

By letter dated August 2, IRC, the second low bidder, advised the agency that R&K's bid offering a large business product was required to be rejected as nonresponsive. On September 21, IRC was apprised that the agency had not intended the IFB to be set aside only for those small businesses offering small business products, notwithstanding that the IFB stated otherwise, and that award had been made on September 14 to R&K. On September 29, IRC protested to our Office.¹

¹The Air Force asserts that IRC's August 2 letter was not an agency-level protest because IRC did not identify its filing as a protest and the Air Force did not regard it as such. However, IRC's letter clearly conveys "an expression of dissatisfaction and a request for corrective action," and the agency formally responded to the letter after it made award to R&K. See Mackay Communications--Reconsideration,
(continued...)

The Air Force argues that IRC's protest to our Office was untimely because the IFB contained what the agency now considers a patent ambiguity by requiring small business products while requesting bids on a brand name or equal basis and specifying a large business product as the brand name. Protests based on ambiguities in the specifications that are apparent prior to bid opening must be filed before bid opening. 4 C.F.R. § 21.2(a)(1) (1994); see DynCorp, 70 Comp. Gen. 38 (1990), 90-2 CPD ¶ 310; 841 Assocs., L.P.; Curtis Center Ltd. Partnership, B-257863; B-257863.2, Nov. 17, 1994, 94-2 CPD ¶ 193.

The allegation that a solicitation is ambiguous does not make it so. Pulse Elecs., Inc., B-243769, Aug. 2, 1991, 91-2 CPD ¶ 122. A solicitation is not ambiguous unless it is susceptible to two or more reasonable interpretations. Id. When a dispute exists as to the actual meaning of a solicitation requirement, our Office will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. Science Pump Corp., B-255803, Apr. 4, 1994, 94-1 CPD 227.

The fact that the IFB identifies a large business product as the brand name but requires the supply of a product manufactured by a small business does not mean that the IFB is ambiguous. By its terms, the "Brand Name or Equal" clause is intended to be descriptive, not restrictive, and is used to portray the characteristics and level or quality that will satisfy the government's needs. Defense Federal Acquisition Supplement § 252.210-7000; see FAR § 10.004(b)(3).

When this IFB is read as a whole, there is no ambiguity--the IFB provided for award to a small business bidder offering the products of a small business that complied with the designated salient characteristics. While it is true that the product of large business, e.g., the designated brand name, could satisfy the designated salient characteristics, a bid offering such a product would not satisfy the small

¹(...continued)

B-238926.2, Apr. 25, 1990, 90-1 CPD ¶ 426. In any case, contrary to agency's assertion that the responsiveness of R&K's bid must be protested within 10 days of bid opening, IRC was not required to protest the agency's acceptance of this bid until it had been apprised that the agency considered that bid to be responsive. See Abbott GmbH Diagnostika, 70 Comp. Gen. 242 (1991), 91-1 CPD ¶ 139.

business manufacturer requirement.² In contrast, an "equal" product manufactured by a small business which meets the salient characteristics of the brand name clearly satisfies the terms of the IFB as well as the small business manufacturer requirement.³ Since the solicitation is not ambiguous,⁴ IRC's protest that the low bid is nonresponsive is timely. See Abbott GmbH Diagnostika, supra; Lanier Bus. Prods., Inc., supra.

Turning to the merits of this protest, notwithstanding that R&K's bid certified that it would furnish only an end item manufactured or produced by a small business, its bid was in fact predicated on furnishing a large business product.⁵ Under the circumstances, the contracting officer was required to reject R&K's bid, inasmuch as it indicated that R&K would not comply with the set-aside requirement to

²The fact that a brand name is designated does not necessarily mean that a bid offering that item is responsive; the salient characteristics must still be met. See, e.g., General Hydraulics Corp., B-181537, Aug. 30, 1974, 74-2 CPD ¶ 133 (bid offering brand name product is nonresponsive where the brand name does not meet the required salient characteristics); see also Abbott GmbH Diagnostika, supra and Lanier Bus. Prods., Inc., B-220610, Jan. 30, 1986, 86-1 CPD ¶ 110 (a protest that a bid offering a brand name product is nonresponsive for that reason is timely where filed within 10 days of when the protester was apprised that the agency considered such a bid to be responsive).

³To illustrate, the protester lists several previous contracts it was awarded in which agencies specified a brand name or equal product but also required that the end item be manufactured by a small business, and for which IRC supplied a product equal to those manufactured by the specified large business. Here, two bidders offered "equal" products manufactured by small businesses.

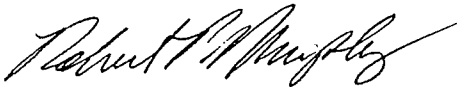
⁴The Air Force argues that the application of the IFB's "Order of Precedence" clause results in the brand name or equal provision taking precedence over what it perceives as the inconsistent small business set-aside provision. However, since the IFB does not contain an inconsistency, the order of precedence clause has no applicability. See Aztec Dev. Co., B-256905, July 28, 1994, 94-2 CPD § 48; Erincraft, Inc., B-235829, Oct. 10, 1989, 89-2 CPD ¶ 332.

⁵IRC asserts that McQuay (the chiller manufacturer of the product offered by R&K) is a well-known large business manufacturer and the agency concedes McQuay is a large business.

supply a product manufactured or produced by a domestic small business.⁶ See Bulloch Int'l, Inc., B-237369, Feb. 5, 1990, 90-1 CPD ¶ 153, recon. denied, B-237369.2, Apr. 10, 1990, 90-1 CPD ¶ 377; see also Cagle Welding & Equip., Inc., B-247199, Apr. 10, 1992, 92-1 CPD ¶ 359.⁷

Because R&K's bid should have been rejected as nonresponsive, IRC should have received award.⁸ However, since the protest was not filed within 10 calendar days of award, the Air Force did not suspend performance by R&K, see 4 C.F.R. § 21.4(b), and the chiller has been delivered. Thus, we cannot recommend that the award be disturbed. However, the protester is awarded its bid preparation costs and its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) and (2). IRC should submit its certified claim directly to the agency within 60 working days of receipt of the decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.


 for Comptroller General
 of the United States

⁶Although end item certifications can usually be accepted at face value, an agency may not rely on them when they are known to be incorrect. See Wire Rope Corp. of Am., Inc., B-225672, Mar. 13, 1987, 87-1 CPD ¶ 286; see also Towmotor Corp., 65 Comp. Gen. 373 (1986), 86-1 CPD ¶ 219 (domestic origin certifications). Here, the agency does not claim that it was unaware that McQuay was a large business prior to making award--indeed, IRC brought this matter to the agency's attention prior to award. Id.

⁷We note that to have purchased the chiller from a small business distributor without requiring that it be produced by a small business, as was the agency's stated intention, the agency would had to have obtained a waiver from the Small Business Administration. FAR §§ 19.102(f)(5), 19.502-2(b), 19.508(c), 52.219-6, Alternate I. Because IRC itself manufactures an acceptable chiller, any such waiver would have been improperly requested. See Adrian Supply Co., B-257261, Sept. 15, 1994, 95-1 CPD ¶ ____.

⁸The agency does not assert that IRC's product is not equal, or that IRC is not responsive or responsible.