

DECISION



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

FILE: B-206803

DATE: June 7, 1983

MATTER OF: Brady Mechanical, Inc.

DIGEST:

Compliance with a solicitation's descriptive literature provision that requires the literature to be submitted after bid opening is a matter of responsibility and not responsiveness. Therefore, a procuring agency may not reject as nonresponsive the bid of a bidder which indicates in its bid that it will furnish the product of a specific manufacturer but after bid opening submits descriptive literature of another manufacturer. Rather, the question of whether the bidder's intention is consistent with the specifications is one of the bidder's responsibility.

Brady Mechanical, Inc. protests the award of a contract to Pyramid Construction Co. to supply and install both heating-ventilation and energy management control systems under solicitation No. DACA 45-81-B-0252 issued by the Department of the Army. Brady contends that the Army improperly rejected its bid as nonresponsive for failure to furnish descriptive literature.

We sustain the protest.

The solicitation contained detailed performance specifications describing the energy monitor control system sought. Amendment 0002 of the solicitation required bidders to submit with their bids descriptive literature for certain listed components of that system and stated that failure to either furnish the literature or submit literature demonstrating the system's conformance to the specifications would result in rejection of the bid. Thereafter, the Army received complaints concerning this requirement from prospective bidders, apparently because manufacturers of energy management control systems were unwilling to give descriptive literature packages to each bidder. Consequently, the Army revised the literature requirement in

amendment 0006 to state that after bid opening the apparent three lowest bidders would be required to furnish literature for the listed components within 5 days after notification from the Government. Amendment 0006 also inserted a requirement that each bidder name in its bid the manufacturer of the system to be supplied. The bid rejection provisions as set forth in amendment 0002 generally remained the same.

At bid opening, Brady was the second low bidder. Thereafter, the contracting officer allowed the low bidder to withdraw from the competition due to a bidding error and requested descriptive literature only from Brady and Pyramid. Before submitting any literature, Brady informed the contracting officer that the firm was unable to obtain MCC Powers' (the manufacturer named in its bid) literature within 5 days. On the date the submission was due, Brady furnished literature from Hewlett-Packard. The contracting officer determined that Brady's bid was nonresponsive since Brady failed to submit MCC Powers' literature within the 5-day period and subsequently awarded the contract to Pyramid.

Brady challenges the contracting officer's determination that its bid was nonresponsive. In this regard, Brady first contends that compliance with the descriptive literature provision was not a matter of responsiveness since the solicitation did not advise bidders that the literature submitted would be considered a part of each bid. Even had the solicitation so advised, Brady continues, regulations require that literature to be used for bid evaluation purposes be submitted before bid opening. Brady therefore asserts that it was improper for the contracting officer to use the descriptive literature provision to determine bid responsiveness.

The Army, on the other hand, characterizes compliance with the descriptive provision as a matter of responsiveness and relies on the language of the solicitation stating that a bid would be rejected where the literature failed to show that the energy_monitor_control_system_conformed to the specifications. That language, the Army asserts, clearly implied the responsiveness nature of the provision. We disagree.

A contracting agency in appropriate circumstances may request bidders to submit descriptive literature so that it can determine exactly what the bidder proposes to furnish, and a bid that does not include that literature will be rejected as nonresponsive. See Storage Technology Corporation--Reconsideration, 57 Comp. Gen. 235 (1978), 78-1 CPD 257. Where compliance with a descriptive literature requirement is to be a matter of bid responsiveness, however, the solicitation must clearly indicate that the literature will be considered a part of a bid, that it must be submitted with the bid, and that the failure to submit either the literature on time or literature demonstrating product conformance to the specifications will result in rejection of the bid. 36 Comp. Gen. 376 (1956); Defense Acquisition Regulation (DAR) §§ 2-202.5(d)(1) and (2) (1976 ed.). In this case, the descriptive literature provision as originally set forth in amendment 0002 complied precisely with applicable regulations that would have allowed the Army to treat the submission as a matter of responsiveness. The provision as revised in amendment 0006, however, deleted the requirement that the literature be submitted before bid opening. Since the responsiveness of a bid must be based on the bid itself and what is submitted with it, the deletion of the requirement for submission of literature with the bid meant that neither the content of the literature furnished nor the failure to furnish the literature upon request could involve a matter of responsiveness. See Yardney Electric Corp., 54 Comp. Gen. 509 (1974), 74-2 CPD 376. Therefore, the Army's rejection of Brady's bid as nonresponsive was improper.

The Army argues that Brady was nonresponsive because after bid opening it proposed to use a manufacturer other than the one designated in its bid. However, we see no reason why the proposed change in manufacturers would result in a nonresponsive bid that on its face was responsive. Since the change was proposed after bid opening, what the Army should have done is to view Brady's proposed change as a matter of that firm's responsibility, that is, its capability to perform the contract.

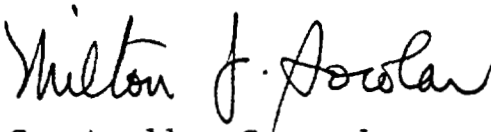
The Army reports that even though Brady submitted literature for Hewlett-Packard equipment, which is acceptable to the Army and is being supplied by the awardee, "there was no indication that Brady * * * did in fact intend to use any supplier other than MCC Powers." What

Brady intended to furnish, of course, and whether that intention was consistent with what the specifications called for, was one of the matters that should have been considered in connection with a responsibility determination. See, e.g., World Wide Diesel, Inc., B-205599, May 6, 1982, 82-1 CPD 433. The Army, however, did not request a preaward survey or otherwise evaluate Brady's responsibility. Instead, it mechanistically rejected Brady's bid when Brady submitted Hewlett-Packard literature instead of MCC Powers' literature.

Therefore, on this record, we must sustain the protest on the grounds that the Army improperly rejected Brady's bid as nonresponsive and did not adequately consider whether Brady was a responsible prospective contractor. Corrective action in this case is not feasible, however, since the contract has been substantially completed.

As we see it, the real problem here stems from the Army's use of a defective solicitation requirement. Although we appreciate the reason the Army permitted submission of the literature after bid opening, it could not properly do so and still attempt to treat the requirement as one involving responsiveness. By separate letter, we are so advising the Secretary of the Army.

The protest is sustained.

for 
Comptroller General
of the United States