

DECISION



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

[Protests Against Rejection of Bids as Nonresponsive]

FILE: B-196914, B-196914.2 DATE: August 20, 1980
B-197414 DLG03377 DLG02531

MATTER OF: Lapteff Associates, Martel Laboratories,
Inc., Kappe Associates, Inc. DLG05117

DIGEST:

1. While information as to how bidders propose to comply with quality control requirements for services may be required under IFB to determine bidder's responsibility, it could not be required for purpose of making responsiveness determination regardless of solicitation language to that effect.
2. Information bearing on bidder responsibility could have been furnished after bid opening up to time of award notwithstanding admonition in IFB that failure to provide information with bid may be grounds for determination of nonresponsiveness.

Lapteff Associates (Lapteff), Martel Laboratories, Inc. (Martel), and Kappe Associates, Inc. (Kappe), the first three low bidders, respectively, under invitation for bids (IFB) No. 0060-AA-66-1-0-BM for on-site laboratory services for wastewater treatment for the District of Columbia (DC) protest the rejection of their bids. *WG00052*

Each of the three low bidders was determined to be nonresponsive for failing to adequately respond to clause 28 of the IFB. Award was made to the fourth low bidder, Biospherics, Incorporated (Biospherics). *DLG05118*

Clause 28, in pertinent part, stated:

"DATA WITH BID: Bidder must submit with his bid, a detailed outline and narrative covering the following areas to indicate how he proposes to comply with the required quality control and quality assurance requirements.

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B-196914
B-196914.2
B-197414

2

Lack of coverage or explanation of any of the following areas may be grounds for a determination of non-responsiveness of the bid * * *.

* * * * *

"DOCUMENTATION: The laboratory must prepare a comprehensive written description of its proposed quality assurance program. * * *"

There followed seven pages of quality assurance requirements for chemistry and microbiology.

Specifically, DC found that the lowest bidder, Lapteff, did not address microbiology at all, and in the area for chemistry addressed tests which were not required under the specifications while it skipped some of the required tests; that the next low bidder, Martel, also skipped addressing microbiology; and that the third low bidder, Kappe, submitted no quality assurance program whatsoever, stating that it would do so in the event of an award.

The two low bidders dispute DC's conclusion regarding the adequacy of their submissions, while Kappe maintains that its approach to clause 28 was proper. However, we need not resolve these disputes for the reasons stated below.

DC states that it wanted bidders to furnish in a narrative how they proposed to comply with the requirements of the quality control and quality assurance areas as well as state the specific methodology/variation to be used. DC explains that a laboratory must prepare basic "protocols" for all tests to be performed; that these protocols spell out the methodology and variant, the steps to be used in performing the particular test and the order of the test procedure, supported by the means of determining accuracy and reproducibility of the data;

B-196914
B-196914.2
B-197414

3

i.e., quality control and assurance; and that this would have to be done for each test required in the specifications in order to arrive at a bid price for the on-site laboratory. In DC's view, this is comparable to a bidder specifying the model number and manufacture of a product upon which a bid is made. Thus, as DC sees it, this type of information is separate from responsibility in which the agency would determine the capability of the bidder to perform the tests, financial soundness, etc.; rather, the information pertains to what the bidder intends to furnish, and thus must be furnished with the bid.

Biospherics supports DC's position. It states that "while the solicitation stipulated at some length the quality control and quality assurance requirements of the contract, it did not specify precisely how these requirements were to be met." As an example, Biospherics states that the solicitation requested a detailed explanation of how the bidder proposed to conduct calibration, maintenance and quality control checks on laboratory instruments, but the solicitation did not set standards for instrument calibration or maintenance; rather the bidder was requested to supply the standards which it proposed to use to satisfy the requirement. According to Biospherics, failure to submit the required information with the bid "which the contracting officer reasonably could construe as adequate, required rejection of the protesters' bids as nonresponsive."

Biospherics cites a number of our decisions dealing with descriptive data requirements in solicitations. It points to these decisions as holding that where a bidder's descriptive data are insufficient to permit evaluation, the bid may be rejected as non-responsive. In Biospherics' view, each of the three low bidders failed to submit sufficient descriptive data to permit an evaluation of its bid and therefore each of these bids was properly rejected as nonresponsive.

B-196914
B-196914.2
B-197414

4

We note that under the DC procurement procedures the term descriptive literature is defined to mean information, such as drawings and brochures, which shows the characteristics or construction of a product or explain its operation, furnished by a bidder as a part of its bid to describe the products offered in its bid. See also Federal Procurement Regulations (FPR) § 1-2.202-5(a) (1964). Thus, descriptive literature refers to information which describes products and explains their operations. Here, of course, we are not concerned with a product or with its operations. We are dealing with a requirement for bidders to describe how they propose to comply with the quality control and quality assurance requirements of a contract for laboratory services. Clearly this type of information is not descriptive literature within the meaning of the DC procurement procedures.

Indeed we have examined the cases cited by Biospherics and find no indication that the term descriptive literature or descriptive data has been applied to information concerning how a bidder proposes to perform services, even of a technical nature such as laboratory services. For example, in A.L. Leftheriotis Ltd., B-190720, March 30, 1978, 78-1 CPD 251; Spectrolab, Inc., B-189947, December 7, 1977, 77-2 CPD 438; and Cummins-Wagner Co., Inc., et al., B-188486, June 29, 1977, 77-1 CPD 462, all cited by Biospherics; the descriptive data requirements applied, respectively, to generator sets, instruments for measuring solar radiation, and air compressors. In Western Waterproofing Company, Inc., B-183155, May 20, 1975; 75-1 CPD 306, also cited by Biospherics, the IFB called for restoration work on a building; however, the data requirement applied to the materials which the bidder proposed to use in the restoration work. As we pointed out in that case, the purpose of the data requirement was to permit the contracting agency to determine what the bidders proposed in the way of restoration materials, and would be bound to furnish, if awarded the contract.

B-196914
B-196914.2
B-197414

5

Simply put, in this case DC was seeking to obtain the bidder's description of how it proposed to perform the required laboratory tests. Although DC argues that this type of information is comparable to a bidder specifying the model number and manufacture of the product it proposes to furnish, we do not agree.

The purpose of requiring a bidder to furnish the model number and manufacturer's name of the product it proposes to furnish, is to give the bidder the opportunity to offer products other than those specifically referenced in the solicitation by brand name. In other words, if a bidder proposes to furnish an "equal" product under a "brand name or equal" purchase description, the bidder will be required to identify the equal product by manufacturer and model number. This enables the contracting agency to evaluate the equal product based on the salient characteristics of the brand name product as listed in the solicitation. FPR 1-1.307-4-6.

In this case DC was not comparing "equal" products to "brand name" products. In fact, in the case of the chemistry quality assurance requirements, it appears that the procedures are general and do not indicate what level of quality is to be achieved. The IFB merely requires written procedures for collecting, transferring, storing, analyzing, or destroying evidence samples; calibrator maintenance and quality control checks on laboratory instruments and equipment; and written instructions for cleaning and storage of glassware. Hence even if the information is furnished, we do not understand how the responsiveness of the bid is to be determined. On the other hand, the IFB states in great detail the procedures for microbiology quality assurance. We are not clear what information was needed from bidders in this area.

Moreover, the bid prices suggest that the bidders were confused generally as to what quality control and assurance steps were expected of them. The bid prices

B-196914
B-196914.2
B-197414

6

ranged from \$334,736 to \$2,561,964, with award being made at \$1,079,150. Although Biospherics argues, for example, that bidders should have supplied instrument calibration or maintenance standards with their bids so that the contracting officer could determine whether the bidder's standards were adequate, in the absence of specified standards we do not understand how the contracting officer could determine responsiveness. At best the contracting officer could determine only whether he was satisfied with the bidder's approach.]

We are not aware of any regulation or decision of this Office which permits a contracting agency to determine bid responsiveness by requiring bidders to furnish with their bids a description of how they propose to perform the contract. Such a description may be required by a contracting agency to determine a bidder's responsibility or to determine the acceptability of a proposal in a negotiated procurement. The test of responsiveness in formal advertising, however, is whether the bidder has offered to do what is required by the solicitation and not whether the bidder's proposed method of performance is satisfactory. This is so regardless of solicitation language requiring inclusion of the information for the bid to be responsive, because a contracting agency cannot make a matter of responsibility into a question of responsiveness by the terms of the solicitation. Science Applications, Inc., B-193479, March 8, 1979, 79-1 CPD 167. In fact, information bearing on bidder responsibility may be furnished after bid opening up to the time performance is due. Fisher Berkely Corporation et al., B-196432; B-196432.2, January 9, 1980, 80-1 CPD 26. Thus, we conclude that the instant solicitation was defective and the three low bids were improperly rejected as nonresponsive.

The protests are sustained.

However, having regard for the fact that the contract was awarded in November 1979 for 1 year and considering the advanced state of the contract, we do not recommend that the award be disturbed, but recommend instead that the options for additional

B-196914
B-196914.2
B-197414

7

years of performance not be exercised and that the procurement be solicited on a proper basis.

Harry R. Van Cleave

For the Comptroller General
of the United States