

Protest of) Date: January 21, 1988
SENSORY ELECTRONICS, INC.)
Solicitation No. 104230-87-A-0130) P.S. Protest No. 87-124

DECISION

Sensory Electronics, Inc. (SEI), timely protests the award of a contract to Castleton, Inc. (Castleton), the low bidder in response to Solicitation No. 104230-87-A-0130. SEI contends that the product offered by Castleton does not meet the requirements of the solicitation.

Invitation for Bids (IFB) No. 104230-87-A-0130 was issued by the Office of Procurement, Headquarters, on June 26, 1987, with an offer due date of November 6, as extended by Amendment A04. The IFB sought bids for electronic backup warning devices to be installed on 1- to 2 1/2-ton parcel delivery vans (Line Item 1, total quantity 3,751) and 5- to 7-ton cargo vans (Line Item 2, total quantity 1,102).^{1/} Eleven bids were received in response to the solicitation. Castleton's bid was low at \$616,331; SEI submitted the second low bid at \$679,420. SEI filed its protest with the contracting officer on November 20, who referred it to this office for resolution under Postal Contracting Manual (PCM) 2-407.8 e.

SEI, through counsel, contends that Castleton's bid is "nonresponsive" since the ultrasonic sensory device it offers is ineffective in adverse weather conditions^{1/} and

^{1/}The mandatory requirements for the backup device are set forth in USPS Specification W-1093 (ESC) (March 23, 1987) attached to the IFB. The IFB does not provide for the submission of bid samples. It does require first article approval and, in Section 4.1.1 of the specifications, provides that the contractor may submit a certificate of compliance for the operating environment requirements (Sections 3.3, 3.4.2, and 3.4.5) in lieu of actual tests by the Postal Service.

^{2/}In support of this argument, SEI refers to Information Circular 9079, published by the Bureau of Mines, United States Department of the Interior, which discusses backup alarm technology for mobile mining equipment. Three types of backup warning systems are compared: infrared systems, ultrasonic sensing systems, and Doppler radar systems. The report concludes: "Doppler radar proved to be the best compromise because of its immunity to various weather conditions." The report does not state that the ultrasonic system failed the test, or that it was affected by bad weather. The publication bears the notation "U.S. Government Printing Office 1986" but is otherwise undated.

cannot comply with Section 3.4.1.1 of USPS Specification W-1093, which reads in pertinent part as follows:

3.4.1.1 Operating Features - The system design shall preclude false signals (e.g., alarm signal for objects outside of the rectangular area described in figure 1, or environmental conditions such as rain, snow or fog.). [sic]

The protester states that in any formally advertised federal procurement, strict conformance with the specifications is a prerequisite to eligibility for award, citing Postal Vehicle Supply Service, P.S. Protest No. 81-24, July 15, 1981, and Scandura, Inc., P.S. Protest No. 80-49, January 6, 1981, reconsideration denied, January 28, 1981. It contends that its product, a Doppler system, fully meets the IFB requirements and therefore award should be made to SEI as the lowest responsive, responsible bidder.

In his report to this office, the contracting officer states that SEI misuses the term nonresponsive when referring to Castleton's bid. He states that responsiveness concerns whether the bidder has offered to perform the exact thing called for in the solicitation; responsibility concerns the bidder's ability to perform. The contracting officer states that Castleton has offered to provide exactly what was required in the solicitation. Its bid is therefore responsive. Based on a pre-award survey, he has also determined that Castleton is a responsible contractor and, as the low bidder, is eligible for the award of the contract.¹⁷ SEI's protest is an objection to an affirmative finding of responsibility which can only be overturned in the presence of fraud, bad faith, or failure to apply definitive responsibility criteria. EDI Corporation, P.S. Protest No. 83-51, January 26, 1984. He asserts that since none of these conditions has been shown to exist here, SEI's protest should be denied.

Three firms, Castleton, Intec Video Systems, Inc. (Intec), and Safety Technology, Inc. (Safety Technology), submitted comments in response to SEI's protest. Castleton states that its unit does comply fully with the requirements of the specifications, and that it has proven this fact by its own in-house testing. It asserts that its product's compliance with the requirements can be determined only by the first-article tests defined in the specification. Castleton objects to the use of or reference to the Bureau of Mines report on the grounds that (1) its unit was not tested in the investigation, (2) the two ultrasonic units tested were prototypes, not commercially available products, and (3) one of the two ultrasonic units employed was poorly designed and the other employed a sensor which was not waterproof. Castleton also notes that a Doppler radar device failed first article testing in a prior Postal Service solicitation for similar backup warning devices.

^{3/}The contracting officer subsequently advised that award was made to Castleton on January 14, 1988, notwithstanding the protest, under PCM 2-407.8 g. (1).

Intec contends that only its video system can meet the needs of the Postal Service, although its unit is not competitive from a price standpoint, because users of video systems have found that paying more for something that works is better than paying less for something that doesn't.

Safety Technology, like Castleton, states that ultrasonic technology has been in use since World War II with "unparalleled" success. It states that Doppler radar systems are not superior to ultrasonic units, and that the Bureau of Mines report is not valid since the ultrasonic units tested were not commercial units and were poorly designed. Safety Technology notes further that the three authors of the Bureau of Mines report issued a follow-up article on July 28, 1987, which states that ultrasonic technology is reliable. Safety Technology joins the contracting officer in suggesting that the issue is one of responsibility.

In a submission filed in response to the contracting officer's report, SEI urges that responsiveness relates to whether the product offered complies with the solicitation. Since the contracting officer does not dispute that Castleton is offering an ultrasonic system, nor the findings of the Bureau of Mines report, SEI concludes that Castleton's bid must be nonresponsive. The protester urges that it would be unreasonable for the contracting officer to ignore the technical limitations of the systems offered by the bidders, because this would permit acceptance of a bid where compliance obviously could not be achieved. SEI also contends that the specifications do not provide for testing the device in adverse weather conditions such as rain or snow. Thus, conformance with the requirements of Section 3.4.1.1 will not be established and the terms of the IFB are "fatally" ambiguous.^{4/}

In a subsequent submission, SEI states that commercial literature for a product sold by Castleton under the trademark "Rear Guard" confirms the protester's contentions with respect to the effectiveness of ultrasonic systems in inclement weather. Specifically, the literature states (under the caption "Caution") that the sensor "will not operate in extremely hot or extremely cold weather" and that it may "become clogged as a result of dirt, mud or oil." SEI asserts further that the description in the literature reflects that the frequency range of warning alarm is outside that permitted under the IFB (Section 3.4.1.1 of the specifications).

Discussion

The record reflects some confusion between the terms responsiveness and responsibility. As is well settled, for a bid to be responsive it must conform in all

^{4/}The protester's contention that the specifications are ambiguous by failing to include a test for the Section 3.4.1.1 requirements is a protest against the terms of the solicitation and is untimely, since it was not raised before the time set for the receipt of offers. PCM 2-407.8 d (1). See Bula Forge, Inc., P.S. Protest No. 86-14, April 23, 1986. The timeliness requirement is jurisdictional; we have no authority to waive or disregard issues of timeliness, and cannot proceed to a discussion of the merits of an issue which has been untimely raised. See POVECO, Inc., et al., P.S. Protest No. 85-43, October 30, 1985, and cases cited therein.

material respects with the IFB. PCM 2-301. As our prior decisions state:

[T]he test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation and upon acceptance will bind the contractor to perform in accordance with all the terms and conditions thereof. Unless something on the face of the bid, or specifically made a part thereof, either limits or modifies the obligation of the prospective contractor to perform in accordance with the terms of the invitation, it is responsive.

Data Switch Corporation, et al., P.S. Protest Nos. 85-4, 85-5, April 29, 1985; L.P. Fleming, Jr. Hauling, Inc., P.S. Protest No. 83-64, December 19, 1983. Responsibility, on the other hand, relates to the ability of a bidder to perform any resultant contract. Whether a bidder is to be considered responsible is for determination after bid opening. See L.P. Fleming, Jr. Hauling, Inc., *supra*, citing Bow Industries, Incorporated, Comp. Gen. Dec. B-181828, December 12, 1974, 74-2 CPD &330.

Castleton's bid is an unqualified promise to perform in accordance with the terms of the solicitation; it is responsive. The protester's argument that the contracting officer cannot ignore the obvious technical limitations of ultrasonic systems as reflected by the Bureau of Mines report is not persuasive. The protester apparently would have us conclude that no ultrasonic system could meet the requirements of the specification; this we are unable to do. The report itself does not support SEI's contentions. Nothing in it suggests that the units tested met the present specification's requirements, nor does the report state specifically that the ultrasonic sensors tested gave false signals or were otherwise affected by adverse weather conditions. The report notes only that the Doppler radar unit proved to be the best compromise, since it was immune to weather conditions. Both the pre-award survey report and various materials provided by the interested parties in the course of this protest reflect no difficulties due to rain, snow, or mud from the use of ultrasonic devices.

Concerning Castleton's descriptive literature, there is no evidence before us that the product described in that literature is the same as that to be provided by Castleton under its contract with the Postal Service. Castleton may intend to modify its commercial product to be more effective under adverse weather conditions or to meet the frequency range requirements of the IFB. The cautionary statements in the literature are in the nature of a disclaimer to the limited warranty set forth in the same brochure. In its bid, Castleton has agreed to the warranty provision set forth in Section 6.6 of the specifications, and has thus waived any disclaimer.

Under the terms of the IFB, conformance with the specifications will be established by first article testing. The protest decisions SEI cites in support of its contentions are distinguishable here. In each, conformance with a specification requirement at issue was to be determined from a source identified in the solicitation. Scandura, Inc., *supra*, involved a bid sample. Nonconformity of a bid sample may not be waived or cured after bid opening; in the present case, a bid sample was not required. Postal Vehicle Supply Service, *supra*, required vehicles offered for lease to meet a specified combined city/highway mileage rating, as published by the Environmental Protection Agency (EPA).

The low bid was found to be nonresponsive since the vehicles offered did not achieve the required mileage according to the EPA computations. The instant case does not involve a recognized source identified in the IFB from which conformity with the specification could be established.

SEI's contentions involve Castleton's ability or capacity to perform. As our prior decisions reflect, we do not consider protests against affirmative determinations of responsibility unless there are allegations of fraud, bad faith, or a failure to apply definitive responsibility criteria set forth in the solicitation. Southern California Copico, Inc., P.S. Protest No. 84-39, August 15, 1984; E. Trailer Maintenance, Ltd., P.S. Protest No. 84-33, April 17, 1984; G.F. Business Equipment, Inc., P.S. Protest No. 77-12, May 27, 1979. Here, there are no allegations of fraud or bad faith, and there is nothing in the record which suggests a basis for reversing the contracting officer's determination in this case. Accordingly, the protest must be denied.

The protest is denied.

William J. Jones
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Office of Contracts and Property Law

[checked against original JLS 3/22/93]