



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Propper Manufacturing Co., Inc.

File: B-245366

Date: December 30, 1991

Gilbert J. Ginsburg, Esq., and Catherine A. English, Esq., Epstein, Becker & Green, P.C., for the protester. James P. DeCarlo for A.J. Buck & Son Inc., an interested party.

David Denton, Uniformed Services University of the Health Sciences, for the agency.

Paula A. Williams, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that bid was improperly rejected as nonresponsive because the protester failed to bid on a contract line item under a brand name or equal solicitation is denied where the protester's explanation that it inserted "N/A" under this line item to indicate that it was offering the brand name at best suggests an ambiguity, and is inconsistent with its pattern of bidding when it elsewhere offered brand name items.

2. While agency waived a specified salient feature for the brand name bidder where the solicitation contained an incorrect, overly stringent requirement due to a typographical error, protester was not prejudiced since the accepted product satisfies the agency's actual needs and the protester's product was otherwise properly rejected as nonresponsive.

DECISION

Propper Manufacturing Co., Inc. protests the rejection of its bid and the award of a contract to A.J. Buck & Son, Inc. under invitation for bids (IFB) No. MDA905-91-B-0007, issued by the Uniformed Services University of the Health Sciences (USUHS) for completely assembled medical kits. Propper's bid was rejected as nonresponsive because the firm failed to bid on one contract line item (CLIN) and failed to provide adequate descriptive literature for two other CLINs. Propper contends that its bid should have been considered

CLIN. The second evaluation results indicated that for the questioned items A.J. Buck had proposed to furnish the brand name and was therefore technically acceptable. Propper's bid was determined to be nonresponsive for failing to bid on CLIN 0001AL; Propper's proposed items under CLINs 0001AD and 0001AF were also considered technically unacceptable because the descriptive literature submitted by Propper was inadequate to establish the equality of the items listed to the brand name items.

When Propper learned that the contracting officer considered its bid nonresponsive, it indicated during a telephone conversation with the contracting officer that it had made a typographical error in CLIN 0001AL. In a subsequent letter to the contracting officer, Propper explained that the error occurred because its typist read "WA" (the brand name--Welch Allyn) as "N/A" (not applicable). According to Propper's letter, it "did not intend to submit a 'not applicable' line item"; Propper requested that in any event its bid be considered for award because the item is a "minor accessory" of relatively low importance and value.

The contracting officer denied Propper's request on the ground that the error was not a correctable clerical error. The contracting officer also pointed out that Propper's bid was technically unacceptable because the agency could not determine from its descriptive literature if the "equal" product proposed for CLIN 0001AD, the otoscope, was made of brass covered chrome, a listed salient characteristic, or if the blood pressure kit offered by Propper under CLIN 0001AF could meet the required accuracy of "+/- 1%." Award was made to A.J. Buck, the next low responsive bidder.²

Following an unsuccessful protest to the agency, Propper filed this protest with our Office. Propper contends that the rejection of its bid and subsequent award were improper because: (1) its bid contained a correctable clerical error and it had, in fact, furnished adequate descriptive data to establish that its offered product met the salient characteristics for CLINs 0001AD and 0001AF; and (2) the awardee's bid is nonresponsive because that firm's product does not meet the salient characteristics set forth in CLIN 0001AF.

Propper asserts that its bid was responsive to the solicitation because its price for CLIN 0001 includes all listed CLINS and it took no specific exception to any CLIN. The protester argues that it was unreasonable for the agency

²The agency made a determination to proceed with performance of the contract due to an urgent need for the items, notwithstanding the protest filed with our Office.

to assume that Propper would intentionally submit a nonresponsive bid by deleting a required CLIN. Propper now contends that the only "rational" explanation for the entry "N/A" on its bid is that the name of another manufacturer was not applicable where the brand name item was being offered. Since Propper believes that this typographical error does not affect the substance of its bid to furnish completely assembled medical kits, Propper contends that the contracting officer should have allowed the firm to correct its bid under Federal Acquisition Regulation (FAR) § 14.406-2, or should have waived the mistaken entry as a minor irregularity.

FAR § 14.406-2 provides that apparent clerical mistakes, such as the obvious misplacement of a decimal point or obviously incorrectly stated discounts, may be corrected by the contracting officer before award. The FAR also provides for correction of other mistakes disclosed before award; however, correction is limited to bids that are responsive to the solicitation as submitted at bid opening and may not be used to make nonresponsive bids responsive after bid opening. FAR § 14.406-3.

The agency argues that "N/A" was not simply a correctable clerical error because the ordinary meaning of the acronym "N/A" is either "not applicable" or "not available." Since bidders were required to provide and identify every CLIN which comprises CLIN 0001, the agency views Propper's insertion of "N/A" as taking exception to the IFB requirements, thereby rendering the bid nonresponsive, rather than as an indication that the firm was offering the brand name.

Generally, the responsiveness of a bid must be determined from its face at bid opening and it may not be changed or corrected on the basis of explanations offered by the bidder after bid opening. Schlumberger Indus., B-232608, Dec. 27, 1988, 88-2 CPD 626. A bid which does not include an item required by an IFB is nonresponsive because the bidder is not obligated to provide that item. Automated Mktg. Sys., Inc., B-230014, Mar. 18, 1988, 88-1 CPD ¶ 289.

We think the contracting officer correctly rejected Propper's bid as nonresponsive. The term "N/A," as the agency argues, typically means not applicable and therefore a bidder's use of that notation creates doubt as to whether the bidder intends to furnish the item in question; this renders the bid nonresponsive. See Bayshore Sys. Corp., 56 Comp. Gen 83 (1976), 76-2 CPD ¶ 395. Propper's argument that it could not reasonably have intended to submit a nonresponsive bid is without merit; what controls is that Propper entered "N/A" for CLIN 0001AL and this entry cannot reasonably be viewed as evidencing an intent to provide the

brand name item. At best, as indicated, the "N/A" entry is ambiguous.

Further, Propper's pattern of bidding on the other CLINs makes it clear that Propper did not intend the "N/A" entry to somehow indicate its intent to supply the brand name item. In the two instances where Propper proposed the brand name items, it entered all of the required information. For example, for CLIN 0001AH, Propper entered the following:

"0001AH Ralles Alloy Tuning Fork,
256CPS, Sklar #67-7256

Bidding on:
Manufacturer's Name SKLAR
Brand SKLAR
No. 67-7256"

Thus, Propper's argument concerning the intended meaning of "N/A" is simply inconsistent with its other comparable CLIN entries.

Accordingly, since the contracting officer properly concluded that Propper's bid was nonresponsive, the agency correctly determined that the insertion of "N/A" in Propper's bid was not correctable or waivable as a clerical mistake or a minor irregularity since a nonresponsive bid cannot be made responsive after bid opening through such correction or waiver. See Basil Equip. Corp., B-237335, Feb. 13, 1990, 90-1 CPD ¶ 187.

Propper also objects to the agency's determination that its descriptive literature did not establish the equivalency of its offered product to the brand name specified in CLINs 0001AD and 0001AF. We need not consider this aspect of the protest since, as explained above, Propper's bid was properly rejected as nonresponsive for other reasons.

However, we note that for CLIN 0001AF, a blood pressure kit, the IFB solicited bids for Tycos, model number 5098-03, or equal, for which one of the salient characteristics listed was that the kit be calibrated to 300 millimeters (mm) Hg with +/- 1 mm Hg accuracy. Propper offered its own brand as an equal item, and the agency found that the descriptive literature furnished was inadequate since it did not state any accuracy of calibration. Propper contends that A.J. Buck's bid should have been rejected as nonresponsive in this regard because although A.J. Buck offered the brand name Tycos product, that product does not conform to the accuracy requirement of +/-1 mm Hg set forth in the solicitation.

The agency explains that the salient feature listed in the IFB reflects a typographical error, and should have read "+/- 1%", an accuracy level which the Tycos product does satisfy. Although the agency appears to have waived the mistakenly listed, more stringent requirement for A.J. Buck, we find that the waiver did not adversely affect Propper. The brand name offered by A.J. Buck satisfies the agency's actual needs and, as explained above, Propper's bid was properly rejected as otherwise noncompliant for failure to offer the product required under CLIN 0001AL. Even where a technical deficiency in the procurement process may have arguably occurred, since prejudice is an essential element of a viable protest, our Office will not disturb an award where, as here, it is clear from the record that the protester was not prejudiced as a result. Merrick Eng'g Inc., B-238706.3, Aug. 16, 1990, 90-2 CPD ¶ 130.

The protest is denied.


for James F. Hinchman
General Counsel