

Westfall - McGrail 149025



Comptroller General  
of the United States  
Washington, D.C. 20548

341154

# Decision

**Matter of:** National Window, Inc.

**File:** B-251959

**Date:** April 16, 1993

Charles A. Poekel, Jr., Esq., for the protester.  
Carl Howe, Esq., and Phillipa Anderson, Esq., Department of  
Veterans Affairs, for the agency.  
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Esq., Office of the General Counsel, GAO, participated in  
the preparation of the decision.

## DIGEST

1. Where invitation for bids required the submission of descriptive literature to establish bidders' conformance to the specifications, and descriptive literature submitted by the protester showed that its product did not comply with several of the specifications, the agency properly rejected the bid as nonresponsive.
2. Where invitation for bids required the submission of test data with bids and advised that the data would be used in evaluating bid responsiveness, agency properly refused to permit the protester to furnish such data after bid opening.

## DECISION

National Window, Inc. protests the rejection of its bid under invitation for bids (IFB) No. 630-81-92, issued by the Department of Veterans Affairs (VA) for the replacement of windows and installation of air conditioning units at the New York VA Medical Center. National Window objects to the determination by the agency that the windows of its supplier, Miami Wall Systems, Inc., failed to comply with the solicitation's requirements.

We deny the protest.

The IFB included detailed specifications describing the replacement windows to be furnished and advised bidders to submit descriptive literature identifying the manufacturer and type of window that they proposed to install. The IFB

further advised that the descriptive literature should include manufacturer's drawings and/or catalog cuts indicating dimensions, material types, specifications, and evidence that the proposed windows met the performance requirements of the specifications. The solicitation explained that the descriptive literature was required to ensure that bidders understood and would comply with the IFB's requirements. Bidders were cautioned that if the descriptive literature failed to demonstrate compliance with the specifications, or if no descriptive literature were submitted, the bid would be rejected as nonresponsive.<sup>1</sup>

National Window's bid of \$1,269,000 was the lowest of the five received at bid opening on August 20, 1992. After reviewing the descriptive literature that National Window had submitted with its bid, the contracting officer notified the protester that its bid was being rejected as nonresponsive because the windows offered did not comply with the solicitation's requirements concerning weatherstripping, glazing, weep system, and hardware. National Window objected to the rejection of its bid and requested a meeting with VA personnel to discuss the matter. VA representatives, along with an independent window consultant whom the agency had retained to assist in this procurement, met with representatives of National Window and Miami Wall Systems on November 2. Upon conclusion of the meeting, the contracting officer reaffirmed his decision to reject the bid as nonresponsive, noting that in addition to the previously cited areas of noncompliance, National Window had failed to comply with the requirement for current test data.<sup>2</sup> National Window responded by filing an agency-level protest. On December 21, the contracting officer denied the protest, and on January 11, National Window protested to our Office, asserting that its low bid should have been accepted since its product was in substantial compliance with the IFB's requirements.

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<sup>1</sup>The IFB also included the standard descriptive literature clause set forth at Federal Acquisition Regulation (FAR) § 52.214-21.

<sup>2</sup>In his original letter of rejection, the contracting officer advised National Window that in addition to not meeting requirements concerning weatherstripping, glazing, weep system, and hardware, its windows failed to comply with technical requirements concerning window sight lines, exterior glazing, and a performance guarantee. In reaffirming his decision to reject National's bid after the November 2 meeting, the contracting officer made no mention of these areas of alleged noncompliance, however; thus, we will not address them in our decision.

Where descriptive literature is required by a solicitation to establish the bidder's conformance to the specifications, and bidders are so cautioned, a bid must be rejected if the literature submitted fails to show that the offered equipment conforms to the specifications in the areas for which the literature was requested or shows that the offered equipment otherwise does not comply with the specifications. TIMCO Elec. Power & Controls, Inc., B-248308, Aug. 6, 1992, 92-2 CPD ¶ 84. Here, the agency asserts, the descriptive literature that National Window furnished with its bid showed that the Miami Wall Systems windows failed to comply with a number of the solicitation's specifications.

The contracting officer determined that the Miami Wall Systems windows failed to comply with the solicitation requirement for two rows of weatherstripping located along the perimeter of the exterior sash.<sup>3</sup> Instead, the Miami Wall Systems design provided for weatherstripping in the frame. According to the contracting officer, the difference in location is significant since weatherstripping located on the sash provides an offset in the sash that protects the material, while weatherstripping in the frame comes into direct contact with the elements, which causes it to deteriorate more rapidly.

The protester contends that it was not clear from the solicitation where the weatherstripping was to be located and that rejection of the windows of its supplier because they do not contain weatherstripping along the perimeter of the sash was therefore improper. The protester insists that some of the IFB drawings showed the weatherstripping located in the frame.

To the extent the protester asserts that the IFB is ambiguous, the protest is untimely. A protest alleging inconsistency between a solicitation's written provisions and its drawings concerns a solicitation defect that is apparent on its face; to be timely, such a protest must be filed prior to bid opening. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1993); Microwave Solutions, Inc., B-245963, Feb. 10, 1992, 92-1 CPD ¶ 169. The protester thus was required to resolve any concern it had about the weatherstripping specification before bid opening rather than making its own assumptions about its meaning. Superior Healthcare Group, B-239238, Aug. 6, 1990, 90-2 CPD ¶ 111. In any event, the specification clearly required "continuous weatherstripping around [the] entire perimeter of the exterior sash"; we do not see, and the protester has not shown,

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<sup>3</sup>Specifically, section 08524, part 2.5 of the IFB called for "[t]wo (2) rows continuous weatherstripping around entire perimeter of the exterior sash."

in what way the drawings are inconsistent with the plain language of the specification. Since the protester does not dispute that its window provides for weatherstripping in the frame rather than along the perimeter of the exterior sash as explicitly called for by the specification, the agency properly concluded that its bid was nonresponsive to this requirement.

The contracting officer further determined that the Miami Wall Systems windows failed to comply with the requirements of the specification concerning the weep system, including the requirement that the design not incorporate round weep holes.<sup>4</sup> According to VA, round weep holes are not acceptable since they will not fully drain. The protester argues that the shape of the weep hole is not significant and that any drainage problem associated with the use of round weep holes is minor.

Where the defect in a bid is immaterial, *i.e.*, where its significance as to quality, quantity, delivery, or price is trivial when compared with the total cost or scope of supplies or work to be furnished, the defect must be waived or the bidder must be given an opportunity to cure it. See FAR § 14.405; Yale Materials Handling Corp., B-250208, Nov. 20, 1992, 92-2 CPD ¶ 360. Here, based on the record before us, we cannot find that the use of round weep holes would have only a trivial impact on the quality of the Miami Wall Systems windows.

The contracting officer noted that round weep holes were not acceptable because they do not fully drain, lack of drainage clearly could adversely affect the structural integrity of the window. The protester concedes that round weep holes will not fully drain, but argues that the amount of trapped water is insignificant. The protester's mere disagreement with the contracting officer's technical judgment is not sufficient to show it is unreasonable. DBA Sys., Inc., B-241048, Jan. 15, 1991, 91-1 CPD ¶ 36. Furthermore, given the explicit language of the specification (*i.e.*, "round weep holes will not be acceptable"), bidders were clearly on notice that the agency viewed the shape of the holes as material. Thus, if National Window had wished to challenge the prohibition against the use of round holes, it should have protested the terms of the specification prior to bid opening. 4 C.F.R. § 21.2(a)(1).

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<sup>4</sup>The IFB required a "baffled slotted weep system and internal water passages to conduct infiltrating water to the exterior sash." It further provided that "round weep holes will not be acceptable."

The contracting officer further determined that National Window's bid was nonresponsive because the protester failed to submit with its bid test reports for the current Miami Wall Systems window design. National Window concedes that at least one test report--the acoustical test report--that it submitted with its bid was not current, but contends that it should have been permitted to submit an updated report after award.

A requirement for test data in a sealed bid procurement can relate either to bid responsiveness or bidder responsibility depending on the intention of the agency as expressed in the solicitation. Acoustic Sys., B-248373; B-248374, Aug. 24, 1992, 92-2 CPD ¶ 123. Generally, a pre-award testing requirement merely serves to verify the bidder's ability to provide the required items in conformance with the specifications such that the test data usually can be furnished after bid opening, as is the case with any responsibility-related matter. On the other hand, if the data is needed to determine whether the offered items themselves conform to the solicitation's specifications, a bidder's failure to include the data requires rejecting the bid as nonresponsive. Camar Corp., B-248485, Aug. 31, 1992, 92-2 CPD ¶ 140.

In determining whether a requirement for literature or data relates to responsiveness as opposed to responsibility, we look to whether the solicitation otherwise complies with the requirements governing the use of descriptive literature needed for determining exactly what the bidder proposes to furnish and whether it meets the specifications. These requirements include clearly stating in the solicitation the purpose for which the technical data is required, the extent to which it will be considered in the evaluation of the bids, and the rules that will apply if a bidder fails to furnish the literature before bid opening or if the literature fails to comply with the requirements of the solicitation. See FAR § 14.202-5(d); Acoustic Sys., supra.

The solicitation at issue here clearly stated that descriptive literature to be submitted with bids should include evidence that the windows proposed met the performance requirements of the specifications, one of which was that the windows have passed an acoustical test. The IFB further stated that the purpose of the requirement was to ensure that bidders understood and were responsive to the solicitation's demands; it also cautioned bidders that if their literature did not demonstrate conformance to the specifications or if no literature were submitted, the bid would be declared nonresponsive. Given these circumstances, we think that the agency properly regarded the submission of a current acoustical test report as a matter of bid responsiveness, Camar Corp., supra, and correctly declined to permit National Window to satisfy the requirement after award.

Western Waterproofing Co., Inc., B-183155, May 20, 1975,  
75-1 CPD ¶ 306.

Because we find that the agency properly rejected National Window's bid as nonresponsive for failure to demonstrate compliance with the solicitation requirements concerning weatherstripping, weep system, and performance test results, we need not consider whether the bid was also nonresponsive for failure to comply with requirements governing glazing and hardware.

The protest is denied.



*ja* James F. Hinchman  
General Counsel