

DISTRICT OF COLUMBIA CONTRACT APPEALS BOARD

PROTEST OF:

GRANTURK EQUIPMENT)	
COMPANY, INC.)	CAB No. P-0884
)	
Solicitation No. DCKT-2011-B-0034)	
)	

OPINION DENYING THE PROTEST OF GRAN TURK

Filing ID 44639736

In this matter, third-ranked bidder GranTurk Equipment Co., Inc. (protester or GranTurk) protests the Department of Public Works' (District) award of a contract for the acquisition of two refuse trucks to low bidder Waste Equipment Sales and Service, Inc. (Waste or Intervenor). The protester also challenges the responsiveness of the second ranked bidder, Maryland Industrial Trucks (M.I.T.). M.I.T. has neither protested the award to Waste, nor intervened in this matter.

After carefully reviewing the entire record herein, we dismiss GranTurk's protest because it has not demonstrated that it would be next in line for award were the protest to be sustained. The second ranked bid submitted by M.I.T. would be next in line for award if the protest were sustained. Gran Turk's contention that M.I.T.'s bid is non-responsive because its *descriptive literature* fails to conform to two bid specifications is without merit. Under Section L.20.2 of the solicitation herein, the contracting officer had discretion to *accept* bids whose descriptive literature failed to conform to solicitation specifications. Accordingly, even if the descriptive literature submitted with M.I.T.'s bid failed to conform to solicitation specifications, M.I.T.'s bid was properly determined responsive. Under these circumstances, the protester is not next in line for award, and lacks standing to protest the award to Waste.

BACKGROUND

On January 6, 2011, the District issued IFB No. DCKT-2011-B-0034 (IFB) for the acquisition of seven refuse trucks.¹ The protest herein centers solely on the District's award to Waste of a single component of the IFB: CLIN#1 for two 16 cubic-yard high compaction rear loader refuse trucks. (AR, Ex. 2.)

With respect to CLIN#1 and the issues material to the instant protest, the IFB included three specifications (at Section C) and two instructions (at Section L) of singular import:

C.2.2.25.3 Compaction force: minimum 89,000 pounds. Must be high compaction.

¹ The District procured a total of two 16 cubic-yard high compaction rear loader refuse trucks, one 6 cubic-yard rear loader refuse packer, and four 8 cubic-yard rear loader packers. (AR, Ex. 2.) The IFB provided each vehicle type with its own Contract Line Item Number (CLIN), and also stated the District's intention to award a firm fixed-price contract to a single contractor for each CLIN.

(State compaction force to be provided): _____

C.2.2.25.5 Body sides shall be minimum 11 gauge to 1/8 inch AR450 high tensile sheet which has tensile strength of over 200,000 PSI. Curved shell design with 1/4" wrap around reinforcement top and bottom. The body floor shall be 1/4" minimum.²

C.2.2.26.4 Hopper: minimum 3/8 inch 100,000 PSI steel one-piece (no liners).

L.20.1 Descriptive literature must be furnished as a part of a bid and must be received before the time set for opening bids. The literature furnished must be identified to show the items in the bid to which it pertains. The descriptive literature is required to establish, for the purpose of bid evaluation and award, details of the products the bidder proposes to furnish as to design, material, quality, construction, and performance characteristics.

L.20.2 Failure of descriptive literature to show that the product offered conforms to the specifications and other requirements of this invitation for bids *may* require rejection of the bid. Failure to furnish the descriptive literature by the time and date set for receipt of bids *will* require rejection of the bid, except that if the materials are transmitted by mail and received late, it may be considered under the provision for considering late bids, as set forth elsewhere in this invitation for bids. The Contracting Officer may waive the requirement for furnishing descriptive literature if either of the following occurs:

- A. Bidder states in the bid that the product being offered is the same as a product previously or currently being furnished to the District; or
- B. The CO, on advice of technical personnel determines that the product offered by the bidder complies with the specification requirements of the current invitation for bids. (emphasis added.)

(AR, Ex. 2a.) On February 3, 2011, the District received six timely bids in response to CLIN#1 (including two no-bids). (Protest at 5; AR, Ex. 1.) The bids were ranked as follows per the bid tabulation sheet:

Bidder	Bid Amount
1. Mid-Atlantic Waste Systems	\$376,666.00
2. Waste Equipment Sales and Service	\$378,060.00
3. Maryland Industrial Trucks	\$381,340.00
4. GranTurk Equipment Co., Inc.	\$393,232.00

² Section C.2.2.25.5 was amended by the District on January 26, 2011, to accept a minimum of 80,000 psi. (AR, Ex. 3, Amendments to the Solicitation.) The amendment does not impact the Board's analysis or conclusions.

The contracting officer's technical representative concluded its bid review on February 8, 2011; noting that Mid-Atlantic Waste Systems' bid was non-responsive³, but concluding that the bids of Waste, M.I.T. and Gran Turk were responsive. (AR, Ex. 10.) Each of the three responsive bidders submitted descriptive literature with their bids as required by Sections L.20.1 and L.20.2 of the IFB.

On April 5, 2011, approximately five weeks *after* bid opening, the District's contract specialist (at the behest of the contracting officer) sent emails to Mid-Atlantic, Waste, M.I.T. and Gran Turk, asking each to clarify whether their particular refuse truck met the IFB's requirement for 89,000 lbs. minimum compaction force.⁴ (AR, Exs. 9, 11.) The four bidders replied to the referenced emails by April 6-7, 2011; with the result being that the bid rankings and responsiveness memorandum of February 8, 2011, remained unchanged⁵. (AR, Ex. 9.)

On April 27, 2011, the District awarded the contract for the two rear loader refuse trucks to Waste. (AR, Ex. 7.) Third low bidder GranTurk filed the instant protest timely on May 11, 2011. The awardee Waste intervened on June 14, 2011.⁶ Second low bidder M.I.T. has neither protested nor intervened in the instant protest. The Board conducted a hearing on July 26-27, 2011.⁷ The parties and Waste filed post-hearing briefs on August 30, 2011. Miscellaneous pleadings were filed by the parties after the filing of post-hearing briefs through December 2011.

In its protest, Gran Turk challenges both the awardee⁸ and the next in line bidder, M.I.T. (Protest at 9, 11, 12-14, 18-19.) With respect to the protester's challenge to M.I.T., Gran Turk contends generally that the District erred in determining M.I.T.'s bid responsive to two specifications of the IFB. Very specifically, Gran Turk contends that M.I.T.'s descriptive literature for the curved shell design specification (C.2.2.25.5) does not "demonstrate that

³ Mid-Atlantic's bid offering of "69,000 lbs psi" compaction force was found unacceptable as to specification C.2.2.25.3, and its "minimum 4 to 4.5 inches of bore packing carrier or slide cylinder" was found unacceptable as to specification C.2.27.13. (AR, Ex. 10.)

⁴ The District's emails also sought clarification as to whether each bidder's equipment met minimum requirements for cubic yard space (C.2.2.25.2), refuse capacity (C.2.2.25.4), body thickness (C.2.2.25.5), and hydraulic system operating pressure (C.2.2.27.3). (AR, Ex. 9.)

⁵ Mid Atlantic's earlier non-responsiveness determination did not change, and the bids of Waste, M.I.T., and GranTurk continued to be viewed as responsive by the contracting officer. (AR, Ex. 9, Greg Harrelson Email.)

⁶ Waste intervened pursuant to D.C. Mun. Reg. tit. 27, §100.2(l) (2002).

⁷ This case was originally assigned to former Administrative Judge Warren Nash, who presided over the hearing but retired before a decision was issued. Thereafter, the case was reassigned to Chief Judge Loud.

⁸ With respect to the awardee, the protester contends that (1) Waste's "descriptive literature" noted that its equipment produced "79,500 pounds of compaction force, not the 89,000 pounds of compaction force required by" the specifications, (2) Waste's bid "did not state that its" equipment could meet the curved body shell design specification and the descriptive literature submitted therewith also failed to demonstrate such compliance, and (3) Waste's bid did not meet the specification requirement for a 3/8 inch hopper floor based on "descriptive literature" that described Waste's rear loader as providing "3/8 inch AR200" instead of the required "3/8 inch 100,000 PSI steel". (Gran Turk Protest at 12-14.) Subsequent to filing its protest, Gran Turk asserted an additional ground for challenging the award to Waste, namely that the District violated procurement law by requesting and considering additional information from bidders subsequent to bid opening. (Gran Turk Comments To AR at 13-17; Gran Turk Post Hr'g Br. 13-19.) The additional allegation focuses almost exclusively, however, on the District's request for and consideration of additional information from Waste. *Id.*

M.I.T.'s offering will comply with this specification". (Gran Turk Post-Hr'g Br. 5, 46.) Gran Turk also contends that M.I.T.'s descriptive literature differed from specification C.2.2.26.4 by stating that "the tailgate hopper floor [would] be ¼ inch" rather than the specification's required 3/8 inch thickness. (Gran Turk Post-Hr'g Br. 5-6; GranTurk Comments To AR, Ex. A, Decl. of Edward A. Antoniewicz.)

Finally, Gran Turk contends as to both specifications (C.2.2.25.5 and C.2.2.26.4) that M.I.T.'s failure to "state that [it] would comply with [the specifications] rendered its bid non-responsive in light of the fact that "M.I.T. stated 'yes' ... it would comply with many of the other specifications in Section C of the IFB".⁹ (Gran Turk Post Hr'g Br. 5, 50-51.)

DISCUSSION

We exercise jurisdiction pursuant to D.C. Code §2-360.03(a)(1).

The threshold question presented is whether the protester has standing to challenge the award to Waste. As noted herein, Gran Turk is not next in line for award. (AR, Ex. 1). Gran Turk had the highest priced of three responsive bids. Gran Turk contends, however, that it has standing because its pleadings challenge both the awardee *and* the next in line (M.I.T.). (Gran Turk Post Hr'g Br. 10-11.)

A protester has standing for purposes of jurisdiction if it has some direct economic interest in the procurement. *Micro Computer Co., Inc.*, CAB No. P-226, 40 D.C. Reg. 4388 (May 12, 1992). However, where there is "an intermediate party who has a greater interest in the procurement than the protester, the protester's interest will be, and is, considered too remote to qualify as an aggrieved or interested party". *Protest of MTI-RECYC*, CAB No. P-287, 40 D.C. Reg. 4554 (Oct. 1, 1992). The Board will not consider protests by offerors who are not next in line for award if the protest is sustained. *St. John's Community Services*, CAB No. P-555, 46 D.C. Reg. 7695 (Mar. 23, 1999); *C.P.F. Corporation*, CAB No. P-521, 45 D.C. Reg. 8697 (Jan. 12, 1998).

We conclude that the protester has failed to demonstrate that it is next in line for award if the protest were to be sustained. M.I.T. is a clear intermediary bidder in this matter whose bid ranked second overall to the awardee Waste. The bid tabulation sheet ranks M.I.T. as the second low responsive bidder (AR, Ex. 2), the contracting officer determined M.I.T. as the second low responsive bid (AR, Exs. 6, 10), and the contracting officer testified that M.I.T. would be next in line for award if the protest against Waste were to be sustained (Hr'g Tr. vol. 2, 147:5-20, July 27, 2011.)

⁹ Initially, Gran Turk also contended that M.I.T.'s descriptive literature failed to conform to specification C.2.2.25.3 regarding compaction force. (Protest at 18-19.) Gran Turk has not included the latter protest grounds in its post-hearing brief materials. The Board therefore treats the latter argument as abandoned by Gran Turk. It is immaterial to the Board's analysis and conclusions, however, whether Gran Turk challenges M.I.T.'s descriptive literature as to Section C.2.2.25.3 (compaction force).

To determine whether Gran Turk is next in line for award, this board must first address whether Gran Turk's challenge to the second low bidder herein (M.I.T.) has merit. Gran Turk contends that M.I.T.'s bid was non-responsive because its *descriptive literature* failed to conform to sections C.2.2.25.5 and C.2.2.26.4. It is important to note that Gran Turk's basis for challenging M.I.T.'s second place ranking is the (purported) failure of its *descriptive literature* to comply with certain IFB specifications¹⁰. (Gran Turk Post Hr'g Br. 20-27.) Gran Turk's protest rests entirely on its *interpretation* that section L.20 of the IFB requires descriptive literature to conform to IFB specifications. (Gran Turk Post Hr'g Br. 22, 50-51.)

Our review of section L.20 of the IFB does not support Gran Turk's contention. In pertinent part, Section L provides:

L.20.1 Descriptive literature must be furnished as a part of a bid and must be received before the time set for opening bids. The literature furnished must be identified to show the items in the bid to which it pertains. The descriptive literature is required to establish, for the purpose of bid evaluation and award, details of the products the bidder proposes to furnish as to design, material, quality, construction, and performance characteristics.

L.20.2 Failure of descriptive literature to show that the product offered conforms to the specifications and other requirements of this invitation for bids *may* require rejection of the bid. Failure to furnish the descriptive literature by the time and date set for receipt of bids *will* require rejection of the bid, except that if the materials are transmitted by mail and received late, it may be considered under the provision for considering late bids, as set forth elsewhere in this invitation for bids. The Contracting Officer may waive the requirement for furnishing descriptive literature if either of the following occurs:

- A. Bidder states in the bid that the product being offered is the same as a product previously or currently being furnished to the District; or
- B. The CO, on advice of technical personnel determines that the product offered by the bidder complies with the specification requirements of the current invitation for bids. (emphasis added.)

(AR, Ex. 2a.)

The general rule is that where a contract is not ambiguous, the wording of the contract controls its meaning and resort cannot be had to extraneous circumstances or subjective interpretations to determine such meaning. *Appeal of Heller Elec. Co., Inc.*, CAB No. D-939, 41 D.C. Reg. 3717, 3723 (Nov. 17, 1993)(citations omitted). The same maxim applies to interpretation of a solicitation. *Allied Technology Group, Inc. v. U.S.*, 39 Fed. Cl. 125, 144 (Cl. Ct. 1997); *Blake Constr. Co. v. U.S.*, 202 Ct. Cl. 794, 798 (1973).

In our view, the plain language of Section L.20.2 makes it very clear that a bid whose descriptive literature does not conform to IFB specifications "may" be accepted. The relevant section L.20.2 expressly states that "[f]ailure of descriptive literature to show that the product

¹⁰ Protester states that "the only way to give meaning to Section L.20 of the IFB ... is that the bid and the descriptive literature ... must be read together to determine" bid responsiveness. (Gran Turk Post Hr'g Br. 22.)

offered conforms to the specifications and other requirements of this invitation for bids *may* require rejection of the bid”. (Emphasis added.) In this case, it was lawful for the contracting officer to accept M.I.T.’s bid as responsive, notwithstanding the alleged failure of its descriptive literature to conform to specifications C.2.2.25.5 and C.2.2.26.4. Under these circumstances, M.I.T. is next in line for award and the only bidder with standing to challenge the award to Waste herein.

A review of our previous decisions addressing descriptive literature finds nothing inconsistent with our conclusion that Section L.20.2 herein grants the contracting officer discretion to *accept* bids with non-conforming descriptive literature. In *Protest of Advanced Medical Systems Inc.*, CAB No. P-202, 39 D.C. Reg. 4516 (April 1, 1992), the Board ruled that the protester’s bid was properly rejected as non-responsive because its descriptive literature failed to establish that its fetal monitor met the specification requirement for an autocorrelation feature. In *Protest of Lewis Systems*, CAB No. P-252, 38 D.C. Reg. 3242 (April 11, 1991), the Board ruled that the protester’s bid was properly rejected as non-responsive because its descriptive literature failed to establish that its curbside recycling containers met the specification requirement for a minimum drainage capacity of 10 ounces.

In each of the above mentioned cases, however, the District’s contracting officer was *required* by the terms of the solicitation to reject bids whose descriptive literature failed to conform to contract specifications. The descriptive literature clauses in *Advanced Medical Systems*, *supra*, and *Lewis Systems*, *supra*, are identical and read as follows: “[f]ailure of descriptive literature to show that the product offered conforms to the specifications and other requirements of this invitation for bids *will* require rejection of the bid” (emphasis added). (AR, IFB No. 081-9-65-CW, ¶27, §B, *Advanced Medical Systems*, *supra*; AR, Ex. C Special Conditions, ¶ 9, §B, *Lewis Systems*, *supra*.) Therefore, the Board’s previous cases are distinguished from the instant matter in that Section L.20.2 herein expressly gives the contracting officer discretion to accept a bid with non-conforming descriptive literature.¹¹

Further, we have reviewed the federal government contract cases cited by the protester regarding descriptive literature clauses. *FFR-Bauelement-Bausanierung GmbH*, Comp. Gen. Dec. B-274828, 97-1 CPD ¶7; *Thermal Reduction Co.*, Comp. Gen. Dec. B-211405, 83-2 CPD ¶180; *RMTC Sys., Inc. v. Dep’t of the Army*, GSCBA 12637-P, 94-2 BCA ¶26,614; *Nu-Lite Electrical Wholesalers, Inc.*, Comp. Gen. Dec. B-248383, 92-2 CPD ¶104; *AMSCO Scientific*, Comp. Gen. Dec. B-255313, 94-1 CPD ¶112.

These cases are inapposite to the issues presented by the present protest because Section L.20.2 herein grants the contracting officer discretion to accept bids with non-conforming descriptive literature. The federal cases cited by protester either involve descriptive literature clauses that specifically require rejection of bids with non-conforming descriptive literature,

¹¹ The descriptive literature clause in *Advanced Medical Systems*, *supra*, and *Lewis Systems*, *supra*, also appears in *Protest of Chesapeake Bus & Equipment*, CAB No. P-611, 48 D.C. Reg. 1537 (May 10, 2000). It is possible, therefore, that the District inserted the instant Section L.20.2 language into solicitations to clarify contracting officer’s discretion to accept bids with non-conforming descriptive literature, and that the current clause is the successor to the District’s earlier descriptive literature clause. The record is silent, however, as to the basis for the change in language from the compulsive “will” to the permissive “may” as regards the District’s descriptive literature clause.

Thermal Reduction Co., Comp. Gen. Dec. B-211405, 83-2 CPD; *AMSCO Scientific*, Comp. Gen. Dec. B-255313, 94-1 CPD ¶112; or involve “brand name or equal” solicitations where the contracting officer is only authorized to accept bids whose descriptive literature “meets the salient physical, functional, and other characteristics” specified in the solicitation, *FFR-Bauelement-Bausanierung GmbH*, Comp. Gen. Dec. B-274828, 97-1 CPD; *RMTC Sys., Inc. v. Dep’t of the Army*, GSBCA 12637-P, 94-2 BCA ¶26,614; or invoke rules regarding treatment of unsolicited descriptive literature, *Nu-Lite Electrical Wholesalers, Inc.*, Comp. Gen. Dec. B-248383, 92-2 CPD ¶104.

We have considered the protester’s other arguments challenging the award to Waste and find them equally devoid of merit. The protester’s contention that the contracting officer testified that descriptive literature must be read to make a proper responsiveness determination is legally irrelevant. (Gran Turk Post Hr’g Br. 25-26). It is legally irrelevant because Section L.20.2 is manifestly clear that bids with non-conforming descriptive literature can be accepted by the contracting officer. And as we noted in *Heller, supra*, where contract language is unambiguous, resort to extraneous circumstances or subjective interpretations is not permissible for purposes of contract interpretation. *Heller at 3723*.

Additionally, there is nothing in D.C. Mun. Regs. tit. 27, §1507.2 (2002) that prevents a contracting officer from accepting a bid whose descriptive literature fails to conform to IFB specifications. (Gran Turk Post Hr’g Br. 23.) The regulation cited by the protester merely delimits the two circumstances under which a contracting officer can require the submission of descriptive literature with bids. Neither circumstance, however, limits the contracting officer’s discretion to *accept* bids with non-conforming descriptive literature.¹² In this case, the IFB specifically conferred that authority on the contracting officer at Section L.20.2.

Further, we disagree with the protester’s labeling of the instant descriptive literature clause as meaningless. (Gran Turk Post Hr’g Br. 22.) To the contrary, the contracting officer herein testified that she uses the bid as “controlling” and that the descriptive literature “is just supplemental”. (Hr’g Tr., Gena Johnson, vol. 2, 94:19-22, July 27, 2011.) The contracting officer’s use of descriptive literature in said manner is consistent with Section L.20.1 of the solicitation, which notes that descriptive literature is required to provide details about the product being offered (i.e., its design, material, quality, construction, and performance characteristics).

Additionally, protester’s contention that M.I.T.’s bid was rendered ambiguous because it failed to “state that [it] will comply” with specifications C.2.2.25.5 and C.2.2.26.4 “although [M.I.T.] stated “yes” that it would comply with many of the other specifications” is without merit. The protester has not cited any authority for the proposition that a bidder has a duty to write the word “comply” next to each specification in its bid to demonstrate responsiveness. Moreover, item No. 12 of M.I.T.’s signed bid states that “in compliance with the above [including Section C], the undersigned agrees...to furnish any or all items upon which prices are offered.” (AR, Ex. 5, M.I.T. Bid.) The bidder’s signed execution of the bid at item No. 12

¹² The regulation provides that descriptive literature can be required if the contracting officer needs it to determine before award that products offered meet bid specifications. D.C. Mun. Regs. tit. 27, §1507.2 (2002). *Alternatively*, the regulation provides that a contracting officer can require submission of descriptive literature if he/she needs it to establish exactly what the bidder proposes to furnish. *Id.*

denotes acceptance of IFB terms, excluding those that the bidder has taken exception to. Cf. *Matter of: Image Contracting*, B-253038, 1993 WL 316192 (bidder's signed execution of the bid documents represents its agreement to be bound by all sections in the Table of Contents).

Finally, it is not altogether clear from the record whether the protester asserts standing on the grounds that the integrity of the evaluation process was compromised by the District's requesting email clarifications from bidders on equipment characteristics five weeks after bid opening. See *CUP Temp., Inc.*, CAB No. P-474, 44 D.C. Reg. 6841 (July 3, 1997). The initial protest herein includes specific challenges to M.I.T. as next in line, but only on the ground that descriptive literature made its bid non-responsive to IFB "specifications and essential requirements". (Gran Turk's Protest 1,6,11,18-19, 21.) Similarly, Gran Turk's post-hearing brief states conclusorily that it has standing because "[it] has challenged the first and second ranked bidders (Waste and M.I.T. respectively)". (Gran Turk Post Hr'g Br. 10-11.)

Nonetheless, we noted in *CUP, supra*, that a protester ranking third among offerors had standing to challenge the award because it challenged the integrity of the evaluation process. Assuming arguendo, that the protester contends that standing is conferred under the principle articulated in *CUP, supra*, we disagree. In *In Re Thomas*, CAB No. P579, 46 D.C. Reg. 4618 (May 11, 1999), we noted that a protester challenging "the integrity of the manner in which the agency officials scored all the offerors" must show how the higher-ranked offerors were improperly evaluated "such that the protester would be in line for award if his protest grounds were sustained". *Id.*

Accordingly, we find nothing in the record that shows that the District's belated email request for clarification of certain equipment characteristics resulted in improper scoring that would render Gran Turk next in line for award. The record shows that prior to the request for email clarification, Waste, M.I.T., and Gran Turk were found responsive and ranked one, two, and three respectively on the basis of price. (AR, Ex. 10.) After the series of email exchanges between April 5-7, 2011, Waste, M.I.T. and Gran Turk were still found responsive by the District, and still ranked one, two, and three respectively. Though admittedly unusual, the District's request for email clarifications herein had no impact on M.I.T.'s ranking as second low bidder and Gran Turk's ranking as third. Gran Turk has not establish a nexus between the District's request for email clarifications and how M.I.T.'s bid was improperly evaluated "such that [Gran Turk] would be in line for award if [its] protest grounds were sustained".

Accordingly, Gran Turk's protest is dismissed with prejudice. Gran Turk would not be next in line for award if the protest against Waste were sustained and therefore lacks standing.

SO ORDERED.

Date: June 5, 2012

/s/ Marc D. Loud, Sr.
Chief Administrative Judge

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/s/Monica C. Parchment
Administrative Judge

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