

1/Due to an extended illness, Administrative Judge Benjamin B. Turner has not participated in this opinion.

Thereafter, on July 31, 1989, one of protestor's representatives called DCGH and was advised that even though its bid was low, the order was issued to Hewlett-Packard. AMS was also told that the bases for rejection of its bid were that it did not provide autocorrelation and did not specify the leakage current of the monitor.

By letter dated August 1, 1989, AMS protested to DCGH award of the order to anyone other than the low bidder. Protestor stated that it did provide autocorrelation in the form of Ultrasound Signature Recognition (USR), a trademarked version of the autocorrelation technique. AMS admitted, however, that it did not specify the leakage current in its brochure. With regard to the latter, protestor said, "...[O]ur specifications for leakage current are as good as anyone else in the industry. . . ." Protestor went on to say the DCGH could have called if it had had any questions on the leakage current. There is no evidence that DCGH ever responded to protestor's letter.

On August 28, 1989, AMS filed a timely protest with the Contract Appeals Board ("CAB" or "Board").^{2/} Therein, it reiterated its bases for the protest filed with the DCGH on August 1, 1989.

^{2/}D.C. Code §§ 32-201, *et seq.* (1987) established the D.C. General Hospital as an independent agency and the D.C. General Hospital Commission (Commission) as its governing body. Under D.C. Code § 32-220(8), the Commission has the authority to enter into contracts "... to achieve any or all of its purposes. . . ." This is so, provided

that the Commission shall exercise the authority granted by this paragraph only pursuant to procurement rules which the Commission shall promulgate that conform to all District of Columbia and federal laws regarding procurement by the District of Columbia government, . . .

Paragraph (e) of D.C. Code §1-1181.4 (1987) permits an independent agency to agree formally to be bound by the Procurement Practices Act of 1985 and the rules and regulations promulgated thereunder. By agreement dated November 2, 1989, DCGH engaged the Board to hear and decide appeals and protests involving DCGH procurements. Therein, the Board and DCGH agreed that the Board shall be the exclusive hearing tribunal with jurisdiction to hear and decide, *de novo*, "an appeal from the final decision of the Hospital's Contracting Officer. . . on (1) any protest of a solicitation or award of a contract. . . ." The agreement also recognized that DCGH's current procurement regulations were "not in complete harmony" with the agreement. Consequently, the parties agreed that between the time of execution of the agreement and final publication of conforming procurement regulations, DCGH would provide the right to all prospective bidders, offerors and contractors to file a protest initially with DCGH and subsequently with the Board.

In the present matter, the protestor filed its protest initially with DCGH. Yet, not only did DCGH never respond; but also neither the agreement with the Board nor any subsequent procurement regulations provide a time limit on DCGH to respond to a protest or a time limit from which a protestor may file with the CAB after receipt of a DCGH decision on a protest. Consequently, we must deem the protest to have been filed in a timely manner.

Further, DCGH has not published procurement regulations since the date of the 1989 agreement. When it does so, it should be mindful of the requirement for procurement regulations set forth in D.C. Code § 32-220(8), *supra*.

In *Trail Equipment Co.*, B-241004.2 (February 1, 1991), 91-1 CPD ¶ 102, the protestor's bid was rejected as nonresponsive because the descriptive literature submitted with it to establish the acceptability of the "or equal" product either took exception to, or failed to provide information on, various salient characteristics that the solicitation required the alternate product to meet. In denying the protest, the Comptroller General stated:

. . . To be responsive to a brand name or equal solicitation, a bid offering an equal product must conform to the salient characteristics of the brand name product listed in the solicitation. A bidder must submit with its bid sufficient descriptive literature to permit the contracting agency to assess whether the equal product meets all the salient characteristics specified in the solicitation. . . . (citation omitted)

Id. at 3. Moreover, the bid must be rejected if the literature submitted with the bid, and any other information available to the contracting officer, does not demonstrate compliance with the salient characteristics. *Id.* *Accord, Tri-Tool, Inc.*, B-241703.2 (March 11, 1991), 91-1 CPD ¶ 267.

In the instant matter, protestor's bid was rejected because the descriptive literature accompanying the bid did not show that the alternate product met two salient characteristics, *i.e.*, autocorrelation and electrical leak specifications.

Protestor countered by declaring that its Ultrasound Signature Recognition (USR) is its trademarked version of autocorrelation and that its specifications for leakage current were as good as anyone else's in the industry. Protestor also asserted the DCGH could have called to find out more about its product.

While protestor's claims about its USR and leakage current specifications may be true, these post-bid claims are unavailing. Furthermore, the descriptive literature submitted with the bid clearly does not relate USR to autocorrelation or set forth leakage current specifications.

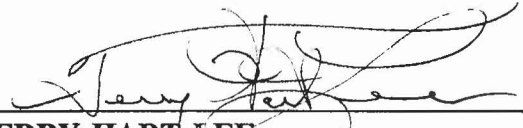
Responsiveness must be determined at the time of bid opening, and, in general, solely from the face of the bid and material submitted with the bid. To allow a bidder to make its nonresponsive bid responsive after bid opening, . . ., is tantamount to allowing the bidder to submit a new bid. (citations omitted)

Trail Equipment Co., supra, at 4.

Thus, because protestor's bid and descriptive literature failed to provide information on two salient characteristics of the brand name product, its bid was properly

rejected. Consequently, this protest is DENIED. *Id.*, *Wright Tool Co.*, B-242800, B-242800.3 (May 30, 1991), 91-1 CPD ¶ 522.

DATE: April 1, 1992


TERRY HART LEE
Administrative Judge

CONCUR:


ZOE BUSH
Chief Administrative Judge