

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD**

PROTEST OF:

LEWIS SYSTEMS

Under IFB No. OMS-0111-AA-AS

)
)
)

CAB No. P-252

**For the Protester: John R. Wilde, General Manager. For the Government:
Erie F. Sampson, Assistant Corporation Counsel.**

**Opinion by Administrative Judge William L. Davis, with Judge David H. Marlin
concurring.^{1/}**

OPINION

Lewis Systems (Lewis) protests the rejection of its bid as nonresponsive and the award of a contract under Invitation for Bids (IFB) No. OMS-0111-AA-AS, issued by the Government of the District of Columbia, Department of Public Works (District), for heavy duty curbside recycling containers. Lewis contends that it was the lowest responsive bidder.

In response to the IFB, eight bids were received on bid opening day (August 27, 1990) ranging in price from \$657,000 to \$1,797,525. Lewis' bid was the lowest at \$657,000. The second lowest bidder was Rehrig Pacific Company (Rehrig) in the amount of \$749,250. On September 27, 1990, the District awarded the contract to Rehrig, the lowest responsive and responsible bidder. Lewis' bid of \$657,000 was rejected, the District asserts, because it failed to meet all the material terms of the specifications and thus was determined to be nonresponsive. On October 9, 1990, Lewis filed this protest with the Board.

The District maintains that Lewis' bid is nonresponsive because it offered curbside recycling containers that did not meet a material requirement of the specifications. The contract specifications required the recycling containers to have a drainage capacity at the bottom to "accumulate 10-14 ounces of fluid and adequate vent holes to drain any

^{1/}Judge Claudia D. Booker, a member of the panel, did not participate in this decision.

fluid in excess of 14 ounces." (Exh. B to Agency Report.) In addition, the special conditions required the furnishing of descriptive literature with the bid to show that the product being offered conformed to the specifications.^{2/} The descriptive literature submitted by Lewis with its bid contained the following description of the drainage capacity of the containers it proposed to provide:

Specially designed bottom allows pooling of up to 9 oz. of liquid. Eight drain holes (.25") prevent excess accumulation. Also available without drain holes.

In addition the literature contains a specification section with various columns depicting dimensions, nesting ratio, volume, weight, wall thickness, hot stamp area and liquid pooling amount. The liquid pooling amount column contains the figure 9 ounces. (Exh. D to Agency Report.)

In its protest petition Lewis acknowledges that the technical data submitted states "9 ounces" as the actual amount of water which is retained in the channel of the containers it proposed to provide. It maintains, however, that there exists an additional area between the channel and the drain holes which would increase the pooling amount so as to allow the containers to meet the specifications requirement of 10-14 ounces. Moreover, Lewis argues that the District never raised the "pooling issue" during the evaluation of the bids. In addition, Lewis seems to suggest that because its bid was some \$92,250 less than Rehrig, the District should now require that the parties' submissions be tested side-by-side.

Some 27 days after Lewis filed its protest it submitted an addendum, which consists of a report dated October 31, 1990, containing the results of tests made on the pooling capacity of two models of the Lewis containers and two models of the Rehrig containers by Bjorksten Research Laboratories Inc. of Watertown, WI. The test results

^{2/}SPECIAL CONDITIONS

9. REQUIREMENT FOR DESCRIPTIVE LITERATURE:

- A. Descriptive literature must be furnished as a part of the 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.

show that the pooling capacities of the two Lewis models were 11.5 and 11.3 fl. oz. The two Rehrig models had pooling capacities of 22.3 and 15.8 fl. oz.^{3/}

The District of Columbia Procurement Practices Act of 1985 (PPA), D.C. Code §1-1183.3(e) (1987 Repl.) requires that contracts solicited by competitive sealed bidding shall:

[b]e awarded with reasonable promptness by written notice to the responsive and responsible bidder whose bid will be most advantageous to the District, considering price and other factors. (Emphasis supplied.)

A responsive bidder is defined in the PPA as a person who has submitted a bid which conforms in all material respects to the IFB, §1-1181.7(41). A responsive bid must present an unequivocal offer to provide the exact item called for in the solicitation. The District's acceptance of such a bid legally binds the offeror to perform in accordance with all the material terms of the solicitation. We have held that the term "material," as it relates to responsiveness, means that which affects price, quantity, quality or delivery of the item offered. See, Faith Construction Co. (D.C. CAB, March 1990), citing Forrester Constructor, Inc. (D.C. CAB 1987); ZAV Electrical Contractors, Inc. (D.C. CAB 1988); and W.M. Schlosser Co., Inc. (D.C. CAB 1988).

It is clear to this Board that the drainage capacity of the recycling containers is a material term of the specifications, affecting not only price but quality. That being the case, the protester, in order to prevail, must show by a preponderance of the evidence that it offered to provide the exact item called for under the specifications; and that its descriptive literature showed that the product offered conformed to the specifications. The protester has failed to carry this burden. Its general allegation that its product met the specifications is not sufficient to overcome the deficiency created by the descriptive literature it supplied. The literature submitted by Lewis clearly shows that the drainage capacity of the Lewis Systems containers is less than what the specifications called for. We do not believe that the District had an obligation to go behind the descriptive literature to see whether the difference was significant. Since the descriptive literature evidenced nonconformance with the specifications, the determination that the protester's bid was nonresponsive was proper.

The protester's assertion that it should be awarded the contract because its bid was lower by some \$92,250 is without merit. The rejection of Lewis' bid certainly may increase the price of this procurement; however, a nonresponsive bid cannot be accepted

^{3/}It should be pointed out here that the record is silent with respect as to whether the models tested were the same models which the two companies submitted for bids. The District filed its Agency Report after the addendum was filed with this Board and did not comment on the test results in its report.

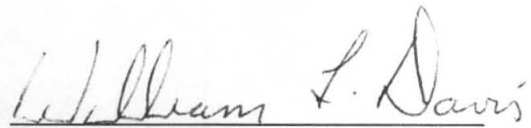
even though it would result in savings to the District because such acceptances would compromise the integrity of the competitive bidding system mandated by the PPA.

The supplementary materials submitted by the protester cannot be considered for the law is well settled that a nonresponsive bid cannot be made responsive after bid opening. Forrest Constructors, Inc. (D.C. CAB 1987).

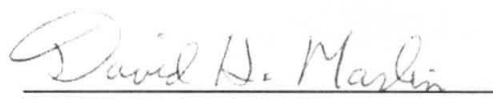
ORDER

The protest is DENIED.

DATE: April 11, 1991


WILLIAM L. DAVIS
Chief Administrative Judge

CONCUR:


DAVID H. MARLIN
Administrative Judge