DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

e1407

FILE: B-186319 DATE: September 1, 1976

MATTER OF: AUL Instruments, Inc.

98095

DIGEST:

1. Solicitation requirement that item to be furnished be modified commercial off-the-shelf equipment is not satisfied by offeror proposing to furnish newly assembled item comprised of various components some of which were not previously designed.

2. Where protester is requested during course of initial discussions with procuring activity to identify which of its existing equipment will be used to satisfy RFP's requirement for commercial off-the-shelf item, contracting officer's elimination from competitive range of protester's proposal on basis that revised offer evidenced a "build from scratch" manufacturing approach was proper since solicitation and nature of discussions clearly indicated that such an approach was unacceptable.

3. Agency's determination that protester's proposed equipment did not meet specification requirement for modified commercial equipment relates to technical acceptability of proposal and not to offeror's responsibility to perform contract.

4. Requirement imposed by agency for modified commercial equipment serves valid purpose and is not unduly restrictive of competition.

AUL Instruments, Inc. (AUL) protests the determination of the United States Marine Corps that AUL's revised proposal, submitted in response to request for proposals (RFP) M00027-76-R-0002, was technically unacceptable. The RFP, issued August 6, 1975, and subsequently amended, solicited proposals for 1,121 function generators and supporting technical data. A function generator is a special type of electronic signal generator used for testing various types of electronic equipment.

Section F of the RFP, entitled "Description/Specifications", requires that the function generators be in accordance with Military Specification MIL-T-28800A ("Test Equipment For Use With Electrical and Electronic Equipment") as amended, and the salient physical and functional characteristics that follow, including the requirement that the generators be of the "Type II" classification as defined in the military specification. Paragraph 1.2.1(b) of the military specification defines "Type II" equipment as follows:

"Type II equipments are commercial off-the-shelf equipments which incorporate one or more military requirements to permit it to more fully meet military needs."

AUL was among those submitting proposals on December 11, 1975. On February 17, 1976, representatives of the Marine Corps and AUL met to discuss the firm's technical proposal. At the conclusion of these discussions, AUL was given a letter in which the contracting officer advised the protester that the proposal was technically unacceptable but was considered reasonably susceptible of being upgraded to be fully acceptable. Enclosure one of the letter contained a list of technical deficiencies. Listed first among the deficiencies was the following:

"1. Paragraph 1-3: Type, Class and Style. Although the proposal discusses some of the aspects of the type II, Class 3, style C specifications, it does not identify the specific requirements for type, class and style, or a conformance with same. It is therefore necessary that offeror provide additional information as follows:

a. What existing equipment, if any, is being used by AUL to meet the type II (commerical off-the-shelf) requirements by manufacturer's type and model number.

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d. If offeror does not propose to use an existing model (i.e. - would "build-from-scratch"), information solicited in above paragraphs b and c must be furnished for the "build-from-scratch" model.

AUL's revised proposal of March 5, 1976 (submitted in the form of an addendum to its technical proposal) was evaluated by cognizant technical personnel and resulted in a determination that AUL's proposal was technically unacceptable. The contracting officer's letter of April 12, 1976, to AUL read in pertinent part:

"* * * the Technical Proposal included with your offer, as amended, has been judged to be clearly unacceptable (i.e. - inadequate

> and incapable of being upgraded to an acceptable proposal without either gross revision or complete reaccomplishment), due to nonconformance with requirements of the detailed specifications. Specifically, the deficiency is that the proposed function generator, and the proposed build-from-scratch manufacturing approach, are such that the instrument, as offered, would not comply with the Type II requirements, paragraph 1.2.1(b) of MIL-T-28800A, * * *"

Thereafter AUL filed a timely protest to this Office and USMC has suspended a request for best and final offers pending resolution of the protest.

AUL contends that its generator is commercial off-the-shelf equipment modified for military usage and therefore meets the specifications. It further contends that its proposal was initially included within the competitive range and then improperly excluded for a reason not listed among the deficiencies noted. Furthermore, AUL disputes its exclusion from the competitive range prior to the submission of its best and final proposal, citing Armed Services Procurement Regulation (ASPR) 3-805.3(d) (1975 ed.).

In a subsequent submission AUL also argues that its proposal was rejected basically because of a "responsibility" type determination, but that USMC purported to reject AUL's proposal on technical grounds, without benefit of the procedures applicable to responsibility determinations, including a pre-award survey and referral to the Small Business Administration of capacity matters. Finally, AUL argues that if the requirement for commercial off-the-shelf equipment pertains to specification requirements it unduly restricts competition since AUL was denied the right to show that its equipment is the equivalent of commercial off-the-shelf equipment. In conclusion, AUL asserts that its proposal should not have been rejected.

AUL's initial contention is that the equipment offered in its proposal conforms to the specification requirement for commercial equipment modified for military usage (Type II equipment). In support of this position AUL argues that its approach contemplates that an existing amplifier and generators could be recombined and inserted in a case, a method of design which it states can hardly be termed "building from scratch." AUL

explains that its plan was to construct the generator by assembling the output amplifier, pulse and square wave generator, sine wave shaper and triangle generator, installing them in the chassis and inserting the completed assembly in a case. The amplifier and each of the generators was to be a minor modification of AUL's standard products which are sold to the public and the Government alike. Only the frame on which the components were to be mounted and the environmentally protected case in which they where to be housed were to be specially manufactured by AUL for this procurement.

In addition, AUL argues that, in any event, the specification does not prohibit a "build from scratch" approach where a commercially available product results by the time of delivery. In this connection, it points to a statement made by a Marine Corps representative at the pre-proposal conference held in August 1975, to the effect that commercial equipment was desired but not required. AUL also notes that first article testing for this equipment is not required for 290 days, and asserts that obviously a design and development effort was expected in view of the generous amount of time allowed for first article testing. Finally, AUL reads the February 17th contracting officer's letter as indicating that building from scratch was acceptable if the required information was furnished.

The Marine Corps, on the other hand, states that the instrument which AUL proposed to furnish would not be type II commercial equipment as required, but would be virtually a new instrument contrary to the specification requirement. It states that the intent of the requirement is to minimize design and engineering risk. It reports that at the time the RFP was issued, there were a number of function generators available in the market that met or exceeded Marine Corps' functional requirements, and therefore the Corps had no desire to accept the risk of new equipment.

Regarding the proposal conference, Marine Corps states that one of its representatives at that conference (but not the individual cited by the protester who, according to the Marine Corps made no comments) said that "our intent is a commercially available instrument modified to whatever extent necessary to more fully meet military requirements." It does not view this statement as indicating that a new instrument would be acceptable. As to the time allowed for first article testing, Marine Corps states that a 290-day period of time is considered to be standard procedure whenever procurements go beyond

straight commercial off-the-shelf equipment, in order to allow time to modify existing equipment, prepare test procedures, and complete first article testing requirements.

The February 17, 1976, deficiency letter, according to the Marine Corps, was its attempt to maximize competition and to ascertain whether AUL was offering commercially available or "build from scratch" equipment. It believes a fair reading of the letter does not suggest, as AUL contends, that a "build from scratch" approach would have been acceptable.

The Marine Corps states that if AUL in its revised proposal had proposed, for example, to build from scratch "a case to provide suitable environmental protection for an existing function generator, this would have been acceptable." However, according to the Marine Corps, none of the proposed assemblies are components or assemblies of any function generator available from AUL or any other manufacturer. More specifically, the Marine Corps states the following with respect to AUL's proposed components:

> "(d) The AN/USM-205A Output Amplifier is not one of the protestors' standard products and the complete instrument was never sold to the general public by Aul Instruments. The original Signal Generator, AN/USM-205 was built by Hewlett-Packard as their model HP-650A and was on the commercial market up until 1964. Aul Instruments built more of these instruments for the U. S. Army under contract DAAB05-75-C-4930 of 18 June 1973. The later model was updated to a solid state version, designated AN/USM-205A, and was tailored to a U. S. Army conformance specification. Although the hardware delivery was successful and on time, there are still delivery problems on software to the Army, i.e. manuals, test data, etc. Additionally the unit will not meet specification requirements without a significant amount of engineering and redesign to increase power output from 3.16 volts into a 50 or 60 ohm load to 10 volts into a 50 or 600 ohm load and add 5 volts offset capability.
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> "(e) The Pulse and Square Wave Generator from the Signal Generator, SG-1056/U is not a standard product of the protestor and was never

available to the general public. The SG-1056/U was built by Aul Instruments for the U. S. Navy under contract N00039-73-C-0123 of 24 January 1973, The Pulse and Square Wave Generator will require a major redesign effort to meet specification requirements for frequency range, rise/fall time and variable symmetry control.

"(f) Sine Wave Shaper and Triangle Generator from the S.H.I. Signal Generator, AN/USM-390 is not a standard product of Aul Instruments and has never been available to the general public. It is, in fact, still an unproven product for the military. A contract, number F41608-72-D-6646-0001, was awarded to Aul Instruments by the U. S. Air Force in February 1972 but there is not, to date, a first article, even though the Air Force contract called for the first instrument to be delivered for testing 195 days from contract award. Additionally the particular circuit will require major redesign to meet specification requirements for frequency range and variable symmetry control."

We note that AUL, in its rebuttal comments to the Marine Corps report, points out that its proposed output amplifier and pulse and square wave generator have been "satisfactorily delivered" under military contract, but concedes that the "sine wave shaper and triangle generator have not yet been delivered." It also contends that the extent of redesign of the proposed units would not be great. Nevertheless, it is clear from the record that the AUL proposed equipment is not based on any existing, commercially available model.

Nor do we accept AUL's argument that a build from scratch approach is permitted by the specifications so long as a commercially available product results by time of delivery. The purpose of the requirement for modified commercial equipment (Type II equipment) is to avoid the risks associated with new equipment. As the Marine Corps states with regard to AUL's proposed equipment, the engineering efforts required to interface the various assemblies are unknown and could prove to be a problem. Thus, the "build from scratch" approach is exactly what the Marine Corps wanted to prevent by requiring that the equipment offered be commercially available. New equipment which would only become commercially available as a result of the instant procurement clearly would not satisfy the specification requirement. Moreover,

we do not believe that an offeror reasonably could believe that new equipment would be acceptable because 290 days were allowed for first article testing or because of the statement at the pre-proposal conference that commercial equipment could be modified "to whatever extent necessary to more fully meet military requirements."

In fact, it appears to us that AUL fully understood that the Marine Corps wanted a proven design. In response to the February 17 letter from the contracting officer, AUL stated in its revised proposal that its instrument would "consist of various modules from other instruments previously designed for and supplied to the Government." While the Marine Corps evaluators disagreed with AUL's assessment of its equipment, the fact remains that AUL was attempting to offer an instrument "previously designed" in its revised proposal.

AUL also argues that once it was included in the competitive range by being asked to submit a revised proposal, it could not be excluded without being afforded the opportunity to submit a best and final offer. It cites 10 U.S.C. 2304(g) (1970) and ASPR 3-805.3 as supporting this position, in that the statute requires that discussions be held with all offerors determined to be within the competitive range and the regulation requires that such discussions be terminated with a call for best and final offers. However, the protester has misinterpreted the statute and implementing regulation. In order to maximize competition, the regulation provides that if doubt exists whether a proposal is within the competitive range, such doubt should be resolved by including it within the range. ASPR 3-805.2(a). AUL's initial proposal was treated in accordance with this regulation, which goes on to provide:

> "The initial number of proposals considered as being within the competitive range may be reduced when, as a result of the written or oral discussions, any such proposal has been determined to no longer have a reasonable chance of being selected for award."

Thus, once it becomes clear that a proposal either should not have been included in the competitive range or no longer belongs in the range, the proposal may be removed from the competitive range discussions at that point. Operations Research, Inc. (Reconsideration), 53 Comp. Gen. 860 (1974), 74-1 CPD 252; 52 Comp. Gen. 198 (1972). The provisions of ASPR 3-805.3(d)

concerning best and final offers apply to those offerors remaining in the competitive range at the conclusion of the discussions. Clearly, AUL was not of those offerors. Hence, we see no irregularities with the manner in which the Marine Corps excluded AUL's proposal from the competitive range.

AUL's final arguments turn on whether its proposal was rejected because of reasons related to its responsibility or because of technical inadequacies in its proposal. AUL argues that the Marine Corps did not find technical inadequacies in the AUL proposal but actually rejected the proposal because of its unwillingness to accept the risk of AUL's design. Citing a number of our decisions, AUL argues that a requirement for a commercial product has nothing to do with the nature of the equipment itself but rather solely with the responsibility of the firm offering it. As such, an offeror's ability to meet this requirement should be judged as of the date of delivery, and the test is whether the offeror is capable of performing the contract. Thus, argues AUL, whether or not the offeror is proposing a commercial product prior to award, the relevant consideration is whether the offeror is capable of furnishing a commercial product at time of delivery. In making this type of determination, AUL maintains that the agency should use the procedures associated with responsibility determinations, including pre-award survey and Certificate of Competency referral, as necessary. AUL points out that Marine Corps did not use these procedures and therefore its determination was improper. Alternatively, it contends that if the requirement for commercial equipment goes to responsiveness, it unduly restricts competition because AUL is capable of meeting the agency's needs notwithstanding its compliance with the requirement.

It is true, as AUL points out, that in a number of cases dealing with advertised procurements we have treated a bidder's compliance with a specification requirement for a commercial off-the-shelf item as being a prerequisite to an affirmative determination of the bidder's responsibility. In Data Test Corporation, 54 Comp. Gen. 499 (1974), 74-2 CPD 365, and Kepner Plastics Fabricators, Inc., et al., B-184451, B-184394, June 1, 1976, 76-1 CPD 351, cited by the protester, we took this position on the basis that neither bidder took exception to, or otherwise manifested an intention in their respective bids, not to be bound by the solicitation requirement that the proposed item be the manufacturer's standard commercial product. However, information developed after bid opening indicated that a standard commercial product in fact would not be furnished, and

the issue presented in those cases was whether the requirement could be waived by the agency as a matter of responsibility. As these cases hold, it is our view that such a requirement may not be waived, since to do so would be unfair to the other bidders and potential bidders.

In this case, AUL's proposal was rejected by the Marine Corps not because of a determination that AUL was incapable of meeting the specification requirements. Rather, the rejection was based on a determination that the equipment offered by AUL was not modified commercial equipment. In our view this is a technical determination, and not a determination of AUL's responsibility to perform the contract.

Furthermore, we find no merit to AUL's argument that the requirement for commercial equipment was unduly restrictive of competition. In D. Moody & Co., Inc.; Astronautics Corporation of America, 55 Comp. Gen. 1 (1975), 75-2 CPD 1 and in Arctic Marine, Inc., B-182321, May 14, 1975, 75-1 CPD 311, both cited by the protester, we held as unduly restrictive of competition, respectively, an agency determination which would have excluded surplus dealers from competing for a QPL item and a solicitation provision which would have required bidders to have their products rated by a particular non-Government professional group. In both cases we found no adequate justification for the restriction since in the former case a satisfactory QPL item could be offered by a surplus dealer and in the other case equivalent ratings could be obtained from competent professional groups other than the one specified. Here, however, the agency has not unreasonably restricted competition to particular classes of businesses or insisted that the equipment offered must be rated by a particular professional society. The Marine Corps simply wanted to purchase equipment which was based on a commercially available design in order to avoid the risks of purchasing an unproven design. In our opinion the design and engineering risks which the Marine Corps sought to minimize are not insignificant. Accordingly, the competition was restricted to offerors proposing modified commercial off-the-shelf equipment, and AUL's proposal was rejected because the equipment it offered did not meet this requirement. We think that the Marine Corps requirement was valid and find no reason to question the rejection of AUL's proposal. Data Test Corporation, supra; Data Test Corporation, 54 Comp. Gen. 715 (1975), 75-1 CPD 138.

R. F. Keller

Acting Comptroller General
of the United States