

DECISION



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

FILE: B-183986

DATE: ⁵³60944 June 3, 1976

MATTER OF: Ex-Cell-0 Corporation

98869

DIGEST:

1. Protest alleging that specifications were restrictive of competition and were drafted so as to favor awardee is untimely under section 20.2(a) of GAO Interim Bid Protest Procedures and Standards, in effect at time of solicitation, which provided that protest based upon alleged improprieties in solicitation which are apparent prior to bid opening must be filed prior to bid opening date. 4 C.F.R. § 20.2(a)(1975).
2. Untimely protest shall not be considered under "good cause" exception to general rule that protest based upon alleged improprieties in solicitation which are apparent prior to bid opening must be filed prior to bid opening date where protester did not show compelling reason beyond protester's control which prevented filing in a timely manner.
3. Untimely protests against allegedly restrictive specifications shall not be considered under "issues significant to procurement practices or procedures" exception to general rule that protest based upon alleged improprieties in solicitation which are apparent prior to bid opening date must be filed prior to bid opening date where protest does not raise a principle of widespread procurement interest.
4. Upon acceptance of responsive low bid, that firm became obligated to deliver equipment meeting the specifications. Protester's suggestion that Government will receive non-conforming equipment does not affect the validity of the award but is to be considered by the procuring agency in its administration of the contract.
5. Protester's post-bid opening contention that award to it would be most advantageous to the Government because its techniques save material, labor, and energy is

untimely, because it was or should have been clear from the solicitation that evaluation of bids was limited to the price for the equipment specified.

6. Agency's making of award was not in derogation of section 20.4 of GAO's Interim Bid Protest Procedures and Standards because no protest to GAO had been filed at that time.

On December 5, 1974, invitation for bids (IFB) No. DAAA09-75-B-6436 was issued by the Army Armament Command, Rock Island, Illinois, to procure seven honing machines for use at the Letterkenny Army Depot, Chambersburg, Pennsylvania. By Amendment No. 0001, issued January 31, 1975, the quantity of honing machines required was increased, and by amendment No. 0002, issued January 29, 1975, the bid opening date was extended to February 28, 1975, at 2:30 p.m. On the date of bid opening, bids had been received from Barnes Drill Company (Barnes) and Ex-Cell-O Corporation (XLO Micromatic). The bids received were evaluated and both were found to be responsive.

On May 8, 1975, the contracting officer received a telegram from XLO Micromatic requesting that a "hold" be placed on award of the contract pending review of Military Specification MIL-H-80216 which was "contested in part to not be current with recent technical developments." On May 12, 1975, representatives from XLO Micromatic met with the contracting officer and the specifications utilized in the solicitation were discussed in detail. At that meeting, XLO Micromatic complained that the specifications used in this procurement restricted competition and were not up to date with current developments in the honing industry, that the Barnes products would not meet the contract specifications, and that award to Barnes would not represent the most favorable "terms", because XLO Micromatic's "finished part costs" allegedly were less than Barnes'. On May 13, 1975, the contracting officer awarded the contract to Barnes, the lowest responsive and responsible bidder, and on that date he also received a telegraphic protest from XLO Micromatic.

XLO Micromatic, in its telegraphic protest to our Office, dated May 22, 1975, protested award of items 001,002,004, and 005 to Barnes upon the same grounds which had been discussed with the procuring activity. The protester has elaborated upon the bases for its protest in subsequent letters to the contracting officer, and to our Office.

First, the protester alleges that the IFB specifications were restrictive of competition because Military Specification MIL-H-80003A was modified by the procuring activity so as to

unnecessarily describe the machinery produced by Barnes, thereby favoring XLO Micromatic's competitor. Moreover, XLO Micromatic contends that the specifications were not up to date with current honing industry advancements. XLO Micromatic claims that by using technology currently available the rough and finish hone operations could be combined resulting in significant savings to the Government.

Pursuant to section 20.2(a) of our Interim Bid Protest Procedures and Standards, in effect at the time the protest was filed, protests based upon alleged improprieties in a solicitation which were apparent prior to bid opening should have been filed prior to the bid opening date. 4 C.F.R. § 20.2(a) (1975). The record indicates that no protest was filed prior to the bid opening date of February 28, 1975. Since both of these grounds of protest concerning the drafting of the specifications were not asserted until after the bid opening date, they are untimely and will not be considered. See Chu Associates, Inc., B-183347, July 3, 1975, 75-2 CPD 11.

The protester points out that under our Interim Bid Protest Procedures and Standards the Comptroller General, for good cause shown, or where he determines that a protest raises issues significant to procurement practices or procedures, may consider any protest which is not filed timely. 4 C.F.R. § 20.2(b) (1975). Protester contends that "good cause is shown and a significant procurement issue is raised, where, as in this case, mandatory military specifications are altered so that in essence a particular bidder's equipment is singled out over another bidder."

"Good cause" varies with the circumstances of each protest, although it generally refers to some compelling reason, beyond the protester's control, which has prevented it from filing a timely protest. 52 Comp. Gen. 20 (1972). In the instant case, the record reveals no supervening circumstance which delayed the filing of XLO Micromatic's protest before this Office. "Issues significant to procurement practices or procedures" refers to the presence of a principle of widespread procurement interest. See 52 Comp. Gen. 20 (1972). In our opinion XLO Micromatic's protest does not contain the requisite level of widespread procurement interest nor is it significant to procurement practices or procedures since it appears from the submissions that it deals only with modifications of a particular military specification on a one-time basis so as to meet the minimum requirements for satisfactory operation at a particular military installation.

The third contention offered by XLO Micromatic in support of its protest is that the equipment to be furnished by Barnes will

not conform to the specifications. More specifically, protester alleges that Barnes honing machine Model 3010 is not capable of meeting the minimum metal removal rates required by paragraph 4.5.2.4 of Military Specification MIL-H-80003A on a sustained basis.

The procuring agency reports that the contract awarded to Barnes did not specify that a specific model machine be delivered by Barnes, and that XLO Micromatic's protest was based upon the assumption that Model 3010 would be furnished. In our view, the acceptance of Barnes' responsive bid obligated that firm to supply equipment meeting the specification requirements. The question of whether the equipment to be offered by Barnes will so comply does not bear upon the propriety of the award to that firm but upon administration of the contract. Matters of contract administration are not for resolution under our bid protest procedures which are reserved for considering whether an award, or proposed award, of a contract complies with statutory, regulatory and other legal requirements.

Protester also contends that acceptance of Barnes' bid is not the most advantageous to the Government since protester claims that it could accomplish the task for which the eight honing machines are being procured in a more efficient and economical manner. XLO Micromatic asserts that it has the technology to combine the rough and finish hone operations, thereby eliminating the need for three of the machines, while using a motor half the size of that required by the specifications. Thus, XLO Micromatic claims that the use of its equipment could greatly decrease the total cost of the capital equipment required and the energy utilized.

The IFB provided for award to be made on the basis of the lowest price offered for the equipment specified. The savings in material, labor and energy costs which the protester attributes to the use of its equipment were not identified in the solicitation as evaluation factors for award. The absence of these evaluation factors was, or should have been, apparent to the protester prior to bid opening and its post-bid opening protest in this regard is untimely. 4 C.F.R. § 20.2(a) (1975).

Lastly, XLO Micromatic contends that the Army should have withheld award to Barnes in accordance with section 20.4 of our Interim Bid Protest Procedures and Standards, 4 C.F.R. § 20.4 (1975), since Army officials had notice of the protester's intention to protest because of XLO Micromatic's May 8, 1975 telegraphic request to withhold award and the firm's subsequent meeting with Army officials.

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Protester contends that these actions constituted a preaward protest, and therefore, award should have been withheld pending a ruling by our Office. Even if the communications of May 8 and 12 are construed as protests, both were directed solely to the procuring activity. In the absence of notice to the agency "that a protest has been filed with the General Accounting Office", section 20.4 of our interim bid protest procedures was inapplicable. Since XLO Micromatic's protest to our Office was not filed until 10 days after the award to Barnes, the agency's actions were not in derogation of our procedures.

In view of the foregoing, the protest is denied.


Deputy Comptroller General
of the United States