

BROSNAN  
P.L.II

DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20348

FILE: B-190316

DATE: January 11, 1978

MATTER OF: Joyce Teletronics Corporation

DIGEST:

1. Protest challenging agency interpretation of solicitation provision rather than propriety of that provision is timely when filed within 10 days of agency's finalization of that interpretation by contract award.
2. In order to submit technically acceptable offer under solicitation containing "Approved Item" clause parts proposed to be furnished must not just have been previously supplied to end item contractor but must have performed in technically acceptable manner. Offer was properly rejected where parts proposed were identical to parts which malfunctioned in end units previously supplied.

Joyce Teletronics Corporation (Joyce) protests the award of contract No. DSA900-77-C-4949 on September 12, 1977 by the Defense Electronics Supply Center (DESC) to Calvert Electronics Incorporated for 1441 microphone/receivers (microphone) for use in the AN/PRC-90 Survival radio (radio) pursuant to RFP DSA900-77-R-2039. Joyce submitted the low offer at \$14.85 per unit for the award quantity while the contract was awarded at \$26.50 per unit.

The protest centers on whether Joyce's offer was properly rejected as technically unacceptable. The RFP calls for incremental quantities of the items described as follows:

"5965-00-421-9007  
Microphone, Receiver  
Knowles P/N XL8030  
GTE Sylvania (04655) 12-483632"

The RFP further provides:

04731

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"APPROVED ITEM: The Government has determined that offers on the solicited item must be limited to sources whose product has current approval as a result of (1) previously supplying the subject item(s) of the solicitation to the Government, (2) furnishing subject items to the original equipment manufacturer, or (3) specifying that subject item will be supplied by firms identified in (1) and/or (2) above. Offerors qualifying to the above requirements shall complete the following:

ITEM    MEGR.    CON'R. NR. & DATE    PURCHASER"

Joyce offered its part number JTMRD-457-1 which that firm indicated had been furnished to three manufacturers who had previously supplied radios under Government prime contracts. Calvert will supply the designated Knowles unit. Joyce's proposal was rejected because DESC determined that the Joyce part was "not acceptable for use in the AN/PRC-90 Survival Radio." Joyce protested this rejection to DESC. This protest was denied by DESC on November 1, 1977. Joyce then filed the subject protest with this Office.

The rejection of Joyce's proposal is related to problems encountered by the Air Force with the radio which is included in survival kits carried on Army, Air Force and Navy aircraft and used for purposes of rescue. The microphone, which is the subject of this procurement, is an important part of the radio as it is the component responsible for the transmission and reception of verbal communications. Although DESC is responsible for the procurement of spare parts for the radio the San Antonio Air Force Logistics Center/MMIRC (Air Force) is the engineering support activity for the radio and its components and as such controls the technical requirements for the microphone.

It is reported that the original equipment manufacturer of the radio is not one of the manufacturers which Joyce supplied but Sylvania Electronics Products, Incorporated (Sylvania). We are informed that as a result of an effort by the Air Force to obtain competition on radio procurements the three contracts listed by Joyce were awarded to firms other than Sylvania. However, DESC states that the radios procured under each of these three contracts malfunctioned and the failures were directly attributable

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to Joyce's microphone. It seems that the Joyce microphone was severely affected by slight changes in pressure caused by altitude changes to the extent that it was nearly inoperable at altitudes over 2500 feet above sea level.

Although the controlling Sylvania specification drawing does not contain any pressure equalization requirement the microphones supplied by Knowles and incorporated in the original radios manufactured by Sylvania were not subject to the air pressurization problems encountered by the Joyce unit.

Because of the problems with the Joyce microphone, which had been manufactured in accordance with the Sylvania drawing, it was determined that the drawing was inadequate for competitive procurement. Accordingly, a "Determination and Findings, Authority to Negotiate an Individual Contract" was executed citing 10 U.S.C. § 2304(a)(10), which permits the use of negotiation where competition is impractical, as the authority to negotiate a contract for the Knowles unit.

Although Joyce categorizes the findings of the Air Force in connection with the microphone's performance as conclusionary it does not deny that its unit is subject to the malfunction described by that agency. It is Joyce's position that its low offer must be accepted notwithstanding the technical problems because it is an "approved source" in accordance with the "Approved Item" clause in the solicitation. Joyce concludes that it is an approved source because it provided the microphone according to Sylvania's drawing to three prior suppliers of the radio.

DESC argues that since Joyce is essentially protesting against the sole-source nature of the solicitation and since its protest was filed after the date for receipt of proposals its protest is untimely under Section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. Part 20 (1977). Section 20.2(b)(1), supra, provides that protests against alleged improprieties in a solicitation must be filed prior to the closing date for receipt of initial proposals.

We believe that the protest is timely. Joyce is not complaining about the provisions contained in the solicitation but contends that the agency's interpretation of one of those provisions ("Approved Item" clause) is erroneous. Since Joyce submitted its protest to the agency in a timely manner after the agency finalized its

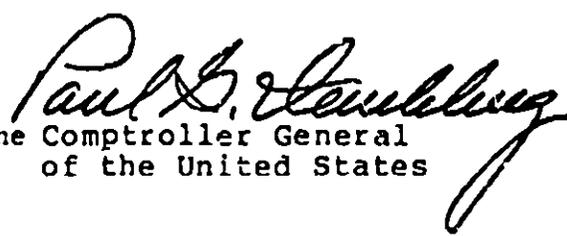
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interpretation of the disputed clause by awarding the contract to Calvert and since Joyce challenged DESC's denial of its initial protest by filing a protest with this Office within the requisite 10 days (Joyce protested to this Office prior to the resolution of its DESC protest, however, its protest to this Office did not become operative until the DESC protest was resolved) the protest is timely and will be considered. Section 20.2(a), supra.

We do not agree with Joyce's position that because it may meet the literal requirements of the "Approved Item" clause its low offer must be accepted. It is fundamental to negotiated procurements that the Government is not necessarily required to accept the lowest-price offer. Technical merits of offers as well as other factors are also for consideration in determining the award.

It is our view that an offeror does not submit a technically acceptable offer under the subject solicitation merely by offering to provide parts previously supplied to prime contractors for the end item. Those parts must have not only met the manufacturer's specification drawing but must also have performed in a technically acceptable manner. Here the record shows that the items Joyce proposed to furnish would be the same as those items which the Air Force has found to have malfunctioned in the past because of pressure changes. It was the failure of the original specification drawing to deal with this pressure characteristic which led to the issuance of the subject solicitation. Although Joyce insists that its unit meets the original manufacturer's specification it has not contested the merits of the Air Force's technical determination. Consequently, we see no basis to question the rejection of Joyce's low offer. See generally, Alton Iron Works, B-183955, August 29, 1975, 75-2 CPD 131. In this connection, we have been advised that the Air Force is currently working on a specification change and hopes to be able to competitively procure these items in the near future.

The protest is denied.

  
For The Comptroller General  
of the United States