

DECISION

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

7535

FILE: B-192107

DATE: September 1, 1978

MATTER OF: The Mosler Safe Company

DIGEST:

1. Forest Service requested and was granted GSA waiver to conduct competitive procurement for safes rather than purchase protester's safes from Federal Supply Schedule (FSS). Protester argues that its security filing cabinets also listed on FSS meet agency's needs, and should have been referenced in waiver request. Protester offers substantial evidence that other procuring activities use cabinets for same functions required by Forest Service. In view thereof, and since similarity of schedule and nonschedule items should be viewed from broad perspective, Forest Service should resubmit request to GSA with reference to cabinets.
2. Despite allegation that part of IFB specification describes nonexistent item, IFB specification when considered in entirety is susceptible of only one reasonable interpretation. Accordingly, specification is appropriate for use by agency in attempting to obtain GSA waiver of purchase from Federal Supply Schedule.
3. GAO will not consider protest that IFB should contain specification to indicate precise degree of protection to be afforded by safes being procured, absent evidence of fraud or intentional misconduct, since such matter is responsibility of procuring agency.
4. Forest Service request for GSA waiver of purchase from Federal Supply Schedule (FSS) described FSS-listed item and compared item with IFB specifications. Protest against waiver granted is denied where waiver reflects those considerations.

Invitation for bids (IFB) No. R6-78-94 was issued on March 24, 1978, by the Forest Service for two types of small safes, specifically, "'C' rated" and "ER-TL-15" safes. The Mosler Safe Company (Mosler), upon learning of the solicitation, advised the Forest Service that certain Mosler items listed on the Federal Supply Schedule (FSS) would meet the Forest Service's needs. The items are Mosler's class 6 security filing cabinets, and class 5 money safes, which are listed on the FSS under contract No. GS-005-41986.

The Forest Service did not consider the class 6 security filing cabinets compatible with its need for small safes. It also determined the class 5 money safes unacceptable with respect to size, weight, price, and configuration. Nevertheless, the Forest Service, as a mandatory user of the FSS, submitted a request to the General Services Administration (GSA) for a waiver to procure the requirements competitively, rather than from the FSS, in accordance with Federal Property Management Regulations (FPMR) § 101-26.401 (1977). FPMR § 101-26.401 (1977) provides in pertinent part:

"* * * prior to initiating procurement directly from commercial sources, agencies shall determine whether the required commodities and services or similar commodities and services serving the required functional end-use purpose are available from a Federal Supply Schedule. * * *"

FPMR § 101-26.401-3(b) (1977) provides:

"When an agency determines that items available from Federal Supply Schedule contracts will not serve the required functional end-use purpose of the item to be procured, and that a similar item is available from another source which will meet

its minimum requirements, a request to waive the requirement to use the Federal Supply Schedule contract shall be submitted to GSA for consideration in accordance with § 101-26.100-2."

Attached to the request for waiver as a complete description of the items to be procured were the IFB specifications for "C" rated and ER-TL-15 safes. Also attached was a description of Mosler's FSS class 5 money safe. The request stated that the price of the class 5 money safe substantially exceeded the anticipated cost that would result from a competitive procurement. The request also detailed the size and weight dimensions required by the Forest Service to show that the size and weight of Mosler's class 5 money safe were unacceptable.

GSA granted a waiver on May 15 for "Two Hundred forty six (246) safes, Underwriter's Laboratories (UL) 'C' rated fire protection and UL ER-TL-15 construction * * *." On May 19, an amendment to the IFB was issued setting bid opening for June 9. On June 7 Mosler filed a protest in our Office against the Forest Service's failure to purchase Mosler's items as listed on the FSS.

Bids under the IFB were opened as scheduled. Mosler submitted a "NO BID." Award is being withheld pending resolution of the protest.

One contention in Mosler's protest is that the Forest Service's request for waiver was deficient in that it failed to show that Mosler's FSS-listed equipment would not meet the Forest Service's functional end-use purpose. The basis therefor is that the waiver request compared the Forest Service's needs only with Mosler's class 5 money safes and did not mention Mosler's class 6 security filing cabinets, which are also listed on the FSS and which Mosler argues fulfill the needs to be met by the "C" rated safes. A second contention is that the request for waiver was deficient because it neither adequately described what was actually required by a "C" rated safe, nor adequately defined the "C" rated safe's

"functional end-use" purpose in accordance with FPMR requirements. The basis for the last point is Mosler's view that the specifications for the "C" rated safes that accompanied the request did not detail the degree of protection the safes should provide. Third, Mosler argues that the class 5 money safes meet the Forest Service needs reflected in the ER-TL-15 safes. Finally, Mosler submits that the GSA waiver to procure safes with "Underwriter's Laboratories (UL) 'C' rated fire protection * * * construction" is invalid because UL does not give "C" ratings to safes.

I. Should the waiver request have referenced Mosler's class 6 security filing cabinets?

The regulations at FPMR § 101-26.401 (1977) are set out above. In addition, FPMR § 101-26.100-2 (1977) directs:

"When items or services provided by * * * Federal Supply Schedule will not serve the required functional end-use purpose, requests to waive the requirement for use of GSA sources shall be submitted to GSA for consideration. Personal preference, subjective evaluations, or lowest cost without other substantive considerations are not acceptable as sufficient justification for waiver. * * *"

These regulations enunciate a general policy that Federal agencies should procure from FSS contracts in lieu of procuring "similar" items from other sources if the FSS items will adequately "serve the required functional end-use purpose." When an agency determines that items available from FSS contracts will not serve the required functional end-use purpose, the agency is to request from GSA a waiver of the requirement.

The "C" rated safes the Forest Service needs are to be used by cashiers whose funds do not exceed \$2,000. Mosler has submitted evidence that a substantial number of Federal agencies as well as Forest Service regions other than the one involved here use Mosler's security filing cabinets to store similar amounts of cash. With one exception, the Forest Service does not dispute Mosler's evidence,

but argues in a report on the protest that a waiver concerning the class 6 security filing cabinets was not necessary because the items exceed the Forest Service's maximum space requirements and are of an unacceptable configuration. In a supplemental report on the protest, the Forest Service adds that the class 6 security filing cabinets do not meet the Treasury Department's minimum standards for the safekeeping of funds. Those standards are set forth in section 4 of the Treasury Department's June 1976 "Manual of Procedures and Instructions for Cashiers," entitled "Safekeeping Facilities." Paragraph 0403 thereof states in pertinent part:

"In line with good administrative practice, it is recommended that safekeeping facilities be commensurate with the amount of the advance. File cabinets with key locks are not considered adequate. At the minimum, a cabinet with a bar and combination lock is recommended.
* * * (Emphasis added.)

Mosler's class 6 security filing cabinet does not have a bar.

In response to the supplemental report, Mosler essentially contends that the Treasury Department standards preclude the use of the standard office-type file cabinet unless it has a combination lock and bar. Mosler argues that its class 6 security filing cabinet is a special item that offers even more protection than a standard filing cabinet with a combination lock and bar, and cites regulations issued by the Department of Transportation and the Internal Revenue Service, implementing the Treasury standards, that appear to recognize that fact.

Mosler further argues that, in any case, the evidence it has presented clearly shows that its FSS-listed class 6 security filing cabinets provide functions similar to those required by the Forest Service from the "C" rated safes. In view thereof, Mosler contends

that the Forest Service at least should have referenced them in its waiver request to GSA, i.e., that Mosler's FSS-listed item clearly provides a similar "functional end-use purpose," and it is therefore up to GSA, not the procuring activity, to determine the propriety of a non-FSS purchase.

In Ampex Corporation, 54 Comp. Gen. 488 (1974), 74-2 CPD 355, we stated:

"We are given no definition of 'similar' as it is used in that provision [101-26.401-3], which is broad in scope and clearly intended to preclude the erosion of the FSS system which would occur if agencies were permitted to procure similar items directly from commercial sources. We therefore believe that the 'similarity' of items should be viewed from a broad rather than a narrow perspective. 'Schedule' and 'non-Schedule' items may bear sufficient similarity to each other that, in the interest of enforcing the FSS system, an agency proposing to use the 'non-Schedule' item should be required to seek a waiver from the requirement to use the 'Schedule' item, and yet still could obtain that waiver upon a showing that the 'Schedule' item did not meet the agency's minimum needs. In short, our view that the similarity between Ampex and 3M products should have prompted the Navy to request a waiver would not preclude GSA from ultimately granting the waiver on the basis that the Ampex product does not adequately serve the required functional end-use purpose."

Clearly, our Office is not in a position to determine whether the Forest Service's needs can be met by Mosler's class 6 security filing cabinets. In fact, it appears that the cabinets do come in certain configurations

that are indeed incompatible with those needs. However, as stated above, there is undisputed evidence in the record before us that Mosler's class 6 security filing cabinets are serving the same functional end-use purpose desired by the Forest Service in connection with the "C" rated safes. In view of FPMR § 101-26.100-2 (1977) and our position as reflected in the above quotation, the Forest Service should have at least included in its waiver request reference to Mosler's FSS-listed class 6 security filing cabinets as well as the class 5 money safes.

Accordingly, we believe that it is incumbent upon the Forest Service to request a waiver from GSA regarding the subject cabinets and the desired "C" rated safes before proceeding with the contract award. The record indicates the low bid of two bids under the IFB will expire on September 8. In view thereof, the Forest Service should implement this recommendation as soon as possible. In this connection, we also point out that a bidder whose bid has expired may still at its option accept an award. Tennessee Valley Service Company, 57 Comp. Gen. 125, 127 (1977), 77-2 CPD 442.

II. The IFB specifications regarding "C" rated safes.

Mosler has also protested the adequacy of the IFB specifications concerning the "C" rated safes. That issue is appropriate for our consideration here because those specifications were used by the Forest Service in the initial waiver request to describe the "C" rated safes, and we therefore assume would be intended for use in implementing our above recommendation. In addition, should GSA grant a waiver at this time, award of a contract based on those specifications would be contemplated.

Mosler argues that the specifications were deficient with regard to what they described and the degree of protection required for the storage of funds.

A. What was described?

Section 220 of the IFB's technical specifications, entitled "'C' Rated Construction," provides that "All 'C' rated rectangular door safes shall be constructed to Underwriters Laboratory (UL) and Broadform specifications." "'C' rated" refers to Broadform specifications, which are issued by the Insurance Service Office for use in determining insurance rates for coverage against burglary, fire, and other hazards. To obtain a Broadform "C" rating, a safe must have steel doors at least one inch thick, and steel walls at least one-half inch thick. UL does not issue "C" ratings.

Mosler argues that the cited specification requires "C" rated safes to be constructed to UL specifications, and since UL does not issue "C" ratings, the specification describes an item that does not exist. Mosler contends that the specification is, therefore, "patently defective."

In its report on the protest, the Forest Service cites section 210 of the technical specifications, entitled "'C' Rated and 'ER-TL-15' Construction," which requires that all doors be equipped with a "Group 2, U.L. listed, key change combination lock." The Forest Service contends that in view of that requirement, the language in section 220 "simply assured that the walls and doors will meet minimum thickness requirements (Broadform) and that the locks will meet certain requirements (Underwriters Laboratory)."

In response, Mosler contends that there was no reason to repeat the lock specification in section 220 after stating it in section 210. In addition, Mosler points out that there is no reference to "UL" in section 230, which concerns "'ER-TL-15' Construction"; that section 210 requires a safe to be "equipped" with a UL listed lock but section 220 uses the term "constructed"; and that GSA in granting a waiver to procure the "C" rated safes apparently considered the UL reference in section 210 as involving UL fire protection ratings, not lock ratings. In regard to this last point, UL does issue a "'C' listing" to insulated safes providing fire protection.

We believe that the Forest Service's interpretation is the only reasonable one under the circumstances, particularly since the alternative suggested by Mosler is a description of a nonexistent item. In connection with the language of the waiver as granted, we believe that it reflects an erroneous reading of the subject specification; however, in view of our recommendation that another waiver be requested by the Forest Service, we consider that issue moot.

Accordingly, the IFB's specifications regarding the desired "C" rated safes are appropriate as a description of the item for purposes of both a waiver request and, should the request be granted, award under the IFB.

B. Degree of Protection

Mosler contends that the IFB specifications are defective because they fail to describe the amount of protection which must be afforded by the "C" rated safes. Mosler argues:

* * * a safe may meet fully the requirements for a 'C' rating but nonetheless be constructed in a manner that raises serious questions as to the degree of security it offers. * * * the type of locking mechanism or gaps between the door and walls are examples of construction details that could spell the difference between adequate and inadequate protection. Yet the IFB specifications are wholly silent with respect to such points. This means that bidders could offer wholly inadequate door and lock designs and still submit responsive bids.

* * * the IFB, as presently written, encourages inexpensive and shoddy design and construction with respect to those elements that are not tightly controlled by the specification. Thus, the likely end result

of IFB -94 will be the procurement of safes with thick walls and doors but with other features vulnerable to attack. To state it simply, the Portland Office [of the Forest Service] probably would be obtaining thick steel plates with even thicker surrounding concrete walls clad in steel but with a door and lock design offering relatively little in the way of protection."

We stated in Miltope Corporation-Reconsideration, B-188342, June 9, 1977, 77-1 CPD 417:

"Although this Office will review a protester's complaint that it is prevented from competing in a procurement because the procuring activity has adopted unduly restrictive specifications, we have done so because use of unjustifiable restrictions conflicts with those statutory and regulatory provisions which require the Government to procure needed supplies and services through free and open competition.

"Quite a different situation is presented where, as here, it is asserted that the Government's interest as user of the product is not adequately protected. Here, the protester's apparent interest conflicts with the objective of our bid protest function, that is, to insure attainment of full and free competition. Assurance that sufficiently rigorous specifications are used is ordinarily of primary concern to procurement personnel and user activities. It is they who must suffer any difficulties resulting by reason of inadequate equipment. We therefore believe it would be inappropriate to resolve such issues pursuant

to our bid protest function, absent evidence of fraud or willful misconduct by procurement or user personnel acting other than in good faith."

Accordingly, we will not consider the merits of the matter.

III. ER-TL-15 safes

Mosler argues that its FSS-listed class 5 money safes provide the same functional end-use as will the ER-TL-15 safes being procured by the Forest Service. Mosler alleges that the class 5 money safes should have been but were not considered by GSA in granting the waiver to purchase the ER-TL-15 safes.

However, the request for waiver submitted to GSA included both a description of Mosler's class 5 money safe and the IFB specifications regarding the ER-TL-15 safes. Mosler does not take issue with the adequacy of those specifications. In the request, the Forest Service compared the safes and indicated the reasons for considering Mosler's FSS-listed safes incompatible with its needs. The GSA letter granting the waiver specifically referred to safes with "'ER-TL-15' construction." Accordingly, Mosler's protest on that issue is denied.


Deputy Comptroller General
of the United States