

DECISION



11273
 PL-1
 THE COMPTROLLER GENERAL
 OF THE UNITED STATES
 WASHINGTON, D.C. 20548

FILE: B-194649

DLG 00333

DATE: August 30, 1979

Radionics, Incorporated

MATTER OF:

[Protest of Navy Contract Award]

DIGEST:

1. Protest that amendment expanding field of competition permitted offeror to offer proprietary item, thus restricting small business competition, is timely even though filed after next closing date for receipt of proposals, since protest was not based on anything apparent from amendment but rather on proprietary nature of offered item, and protest was filed within 10 days of knowledge of that information.
2. Protest that award of unrestricted portion of partial small business set-aside was improper where proprietary item is involved is untimely, as it was filed more than 10 days after protester became aware of that information.
3. Competition is not unduly restricted where large business low offer on unrestricted portion of partial small business set-aside involves "proprietary" version of item, because several other functionally interchangeable versions were acceptable and were in fact offered by other offerors.
4. Agency offered set-aside quantity of partial small business set-aside at price at which unrestricted portion was awarded as required by regulation. Small business accepted

Small business set-aside

Competition bid
Proprietary data

Technical proposal
Procurement procedures
protest procedures

006398

contingent on receiving certain data. Agency notified small business that data was proprietary and not available, and that failure to accept offer by due date for response would be construed as declination of offer. Small business' same contingent acceptance on due date was reasonably construed as declination, since contingent condition could not be met and offeror knew that.

5. Dissolution of partial small business set-aside where eligible small business will not accept award at price offered on unrestricted portion, as required by regulation, does not violate statutory requirement that "fair share" of Government contracts be awarded to small business, since there is no requirement that any particular procurement be awarded to small business.

Radionics, Incorporated (Radionics), has protested the award of a contract to Stewart-Warner Corporation (Stewart-Warner) for the non-set-aside portion of a 50-percent small business set-aside, and the proposed dissolution of the partial set-aside and award to Stewart-Warner of that quantity. The contracts are for translator synthesizers used on the AN/WRC-1 Radio Communication Set, and are being awarded under request for proposals (RFP) N00104-78-R-4311, issued by the Navy Ships Parts Control Center, Mechanicsburg, Pennsylvania. DLG 02661

Background

The RFP was issued on September 15, 1978, to five technically approved sources who had previously supplied translator synthesizers in various approved configurations. These various configurations are functionally

DLG 01773

equivalent and are interchangeable. However, the RFP as issued required that all offerors submit items conforming to a Bendix Corporation (Bendix) technical data package owned by the Government.

Amendment 0004, issued January 8, 1979, permitted offers to be submitted on an "or equal part number" basis, provided the part number had been previously approved by the Department of the Navy (Navy). The following priced proposals without first article testing waiver for the non-set-aside quantity were received:

<u>Company</u>	<u>Qty.</u>	<u>U/P</u>	<u>Amount</u>
Stewart-Warner (A)	835 ea.	\$1,477.00	\$1,233,295
Radionics Inc. (J)	835 ea.	1,779.00	1,485,465
Target Corp. (J)	835 ea.	2,634.63	2,199,916
Bendix Corp. (A)	835 ea.	4,021.00	3,357,535

(A) Large Business
(J) Small Business

All offerors' proposals were based on their own previously approved part numbers. Only Bendix elected to offer to the Bendix specifications required initially. A contract for the non-set-aside quantity was awarded to Stewart-Warner on February 28, 1979, at the above unit price and amount.

On February 15, 1979, the Navy initiated telephone negotiations with Radionics for award of the set-aside portion of 835 units, as Radionics was first in order of priority for award under Defense Acquisition Regulation (DAR) § 7-2003.3(a) (1976 ed.). This action was taken pursuant to DAR § 1-706.6(d)(1), which provides in part that:

"(d)(1) After the award price for the non-set-aside portion has been determined, negotiations may be conducted for the set-aside portion. Procurement on the set-aside portion shall

in all instances be effected by negotiation. Negotiations shall be conducted only with those offerors who have submitted responsive offers on the non-set-aside portion. Negotiations shall be conducted with small business concerns in the order of priority as indicated in the foregoing clause [DAR § 7-2003.3(a)] * * *."

The Navy offered to contract with Radionics at a unit price of \$1477, the highest price at which the non-set-aside portion was awarded, as required by DAR § 7-2003.3 (3)(A), which provides that:

"(3) Determining the Set-Aside Award Price.

"(A) General Rule.

Subject to the exceptions listed in (B) and (C) below, awards under the set-aside shall be made at the highest unit price for each item awarded on the non-set-aside, adjusted to reflect transportation, rent free use of Government property and other cost factors considered in evaluating offers on the non-set-aside portion. The set-aside award price shall be subject to the same discount terms used in the evaluation of the highest non-set-aside award price."

On February 16, 1979, Radionics offered to accept the Navy's offer, but stated that:

"In order to do so [accept the Navy's terms] it will be necessary for us to supply the same configuration of the Trans/Synth that Stewart Warner is offering at that U/P.

"In order for us to do this and provide you with a formal acceptance it will be necessary for us to see the Stewart-Warner unit and any available documentation, ie: tech manual, etc."

On February 21, 1979, the Navy granted Radionics until February 28 to accept the contract on the Navy's terms. The Navy further stated:

"Please be advised that limited rights restrictions imposed by Stewart-Warner preclude the Navy from making available to Radionics the data requested."

The communication provided that a lack of response by the specified date would be considered a declination of the Navy's offer.

On February 23, Radionics protested to the Navy, arguing that amendment 0004 created "a situation * * * unduly restrictive to small business," because it permitted Stewart-Warner, a large business, to offer a proprietary version of the translator synthesizer which is cheaper to build than other versions, thus inhibiting small business competition. Radionics also contended that the requirement for prior approval prevented other offerors from supplying equipment similar to the Stewart-Warner equipment, which might be price competitive. Radionics requested that the Navy award the unrestricted portion to Stewart-Warner, and then remove the set-aside portion and resolicit it as a total small business set-aside.

On February 28, Radionics requested an extension of the due date for acceptance of the Navy's offer. The Navy granted Radionics an extension to March 9.

On March 9, Radionics responded with essentially a restatement of its offer of February 16. Radionics stated that it would accept the offer if it was authorized to provide the Stewart-Warner configuration and that in order to do that "* * * it will be necessary for us to see the Stewart-Warner unit and all available documentation, ie: tech manuals, drawings, etc." Radionics stated that as an alternate it would provide the units in its configuration at the unit price it offered.

The communication went on to restate Radionics' protest of February 23. Radionics added the allegation that the award of the non-set-aside quantity to Stewart-Warner was illegal, since the item was proprietary.

By letter dated April 13, the Navy stated that:

"Radionics' acceptance of our offer was contingent upon the Government supplying Stewart-Warner's data which the Government is unable to supply due to Stewart-Warner's allegations of proprietary rights. Therefore, your contingent acceptance is determined by the Contracting Officer to be a declination of the Government's offer."

The Navy further stated that the alternates proposed by Radionics could not be accepted due to the requirements of DAR §§ 1-706.6 and 7-2003.3. The Navy proposes to dissolve the partial set-aside pursuant to DAR § 1-706.8, and award that quantity to Stewart-Warner.

Radionics protested these actions to our Office on April 19, 1979.

Grounds of Radionics' Protest

Radionics asserts that amendment 0004 permitted Stewart-Warner to offer proprietary equipment lower in price than other acceptable configurations, and that the proprietary restrictions and the prior approval

requirement prevented others from offering price competitive equipment. According to Radionics, this action was "discriminatory, unduly restrictive to Small Business and in fact illegal." Radionics also alleges that Stewart-Warner's unit was not approved at the time that the RFP was issued, as required.

Radionics further contends that its contingent acceptance of the Navy's offer was not a declination of the offer. Radionics argues that it only asked to "see" the Stewart-Warner unit, and be provided "available" hardware.

Radionics also argues that award of the unrestricted portion of the procurement to Stewart-Warner was illegal, since a proprietary item was involved. Therefore, Radionics contends, the requirements of DAR §§ 1-706.6 and 7-2003.3 need not be complied with.

Radionics further contends that the Navy's actions violate "* * * Section 15 of the Small Business Act, as amended, and Section 701 of the Defense Production Act."

Timeliness

Stewart-Warner argues that Radionics' protest should be dismissed as untimely. Stewart-Warner characterizes Radionics' protest as being against the substance of amendment 0004. Therefore, Stewart-Warner contends, to be timely Radionics' protest must have been filed prior to the next closing date for receipt of proposals, as required by § 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1979).

It is our opinion, however, that Radionics' protest is based on the proprietary nature of Stewart-Warner's offer. The earliest date indicated in the record that Radionics was aware of that fact is February 21, 1979, when the Navy notified Radionics that Stewart-Warner's data was restricted. Radionics protested to the Navy on February 23, well within the 10 working days permitted by 4 C.F.R. § 20.2(a) and (b)(2). Therefore, all issues raised in Radionics' protest of February 23 were timely filed with the Navy, and for consideration by our Office if the subsequent protest to GAO was filed within 10 days of "initial

adverse agency action." 4 C.F.R. § 20.2(a). The Navy's letter of April 13, 1979, was the initial adverse agency action. Therefore, Radionics' protest filed with GAO on April 19 was timely as to all issues raised in its protest to the Navy of February 23.

However, the contentions concerning award of the non-set-aside portion of the solicitation to Stewart-Warner because its offer was proprietary are untimely and will not be considered. Radionics knew, no later than February 21, 1979, that Stewart-Warner was to be awarded a contract for that portion of the solicitation and that Stewart-Warner's item was proprietary. Any protest based on that information was required to be filed within 10 working days of that date. Yet, Radionics did not raise the issue until its telex sent to the Navy on March '9, 12 working days after February 21.

Merits

For the following reasons Radionics' protest is denied.

The heart of Radionics' protest is the allegation that permitting Stewart-Warner to offer its configuration restricted competition because the unit is proprietary and cheaper to build. Since the Stewart-Warner unit is proprietary and prior approval was required, other offerors then could not offer the same or similar configuration.

It is our opinion that this argument is without merit. While Stewart-Warner's unit was proprietary and prior approval was required, this did not unduly restrict competition. Stewart-Warner's unit is only one of several functionally interchangeable configurations of the required translator synthesizer, all of which have been approved by the Navy and all of which were technically acceptable. So, the proprietary nature of Stewart-Warner's unit and the prior approval requirement did not prevent other offerors from competing equally on the basis of their own or other configurations. It only prevented them from offering the Stewart-Warner configuration or a nonapproved copy of it. Permitting offers to be submitted on an "or equal" approved part number basis actually expanded and

enhanced competition because it allowed a greater number of offerors to offer a wider range of acceptable items. This is the essence of competition. In a similar case, we rejected a small business' argument that a partial small business set-aside had been circumvented because it could not meet the allegedly below-cost low bid of a large business on the unrestricted portion. Fiber Materials, Inc., B-192908, April 12, 1979, 79-1 CPD 258.


Radionics alleged that Stewart-Warner's unit was not approved at the time that the solicitation was issued. According to the Navy, this unit was approved nine months prior to the date of issuance of the solicitation. Where the only evidence with respect to a disputed question of fact consists of contradictory assertions by the protester and the agency, as is the case here, the protester has failed to carry the burden of affirmatively proving its allegation. Aero-Dri Corporation, B-192274, October 26, 1978, 78-2 CPD 304.

Concerning Radionics' contention that its contingent acceptance of the Navy's offer was not a declination of that offer, we think that the sequence of events make it clear that Radionics had declined the offer on the Navy's terms. Radionics' letter to the Navy of February 16 stated clearly that Radionics would not supply the required items at the price quoted by the Navy unless it could " * * * see the Stewart-Warner unit and any available documentation, ie: tech manual, etc." (Emphasis added.)

The Navy response of February 21 stated unequivocally that the requested data could not be provided. This letter warned that a failure to accept the offer by the due date would be construed as a declination. Yet, on the due date Radionics again stated that it could not accept the Navy's offer unless it could see the Stewart-Warner unit and available documentation. Since the Navy had already stated that there was no available data for Radionics to see, and that failure to accept its offer would be considered a declination, we think that the Navy's interpretation of Radionics' continued contingent acceptance as a declination of the offer on the Navy's terms was reasonable.

Finally, Radionics has argued that the Navy's actions violate section 15 of the Small Business Act and section 701 of the Defense Production Act. These statutory provisions are general provisions requiring that a fair share of Government contracts be awarded to small business concerns. We have held that dissolution of a partial small business set-aside and award of that quantity to the low bidder on the unrestricted portion when the eligible small business will not accept award at the price offered on the unrestricted portion does not violate that requirement, since there is no requirement that any particular procurement be awarded to small business. Fiber Materials, Inc., supra. That is precisely the situation in the instant case.

Accordingly, the protest is denied.



Deputy Comptroller General
of the United States



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

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discard

IN REPLY
REFER TO: B-194649

August 30, 1979

The Honorable Frank Horton
House of Representatives

Dear Frank:

We refer to your letter to our Office dated May 3, 1979, in regard to the protest of Radionics, Incorporated, concerning the award of a contract under solicitation No. N00104-78-R-4311, issued by the Navy Ships Parts Control Center, Mechanicsburg, Pennsylvania.

By decision of today, copy enclosed, we have denied the protest.

Sincerely yours,

V. R. K. 11m.
Deputy Comptroller General
of the United States

Enclosure