

DECISION



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

FILE: B-208308

DATE: January 17, 1983

MATTER OF: Amray, Inc.

DIGEST:

1. Protester's communication of dissatisfaction with solicitation specifications to contracting agency officials and recommendation for corrective action prior to closing date constituted a timely protest against apparent solicitation improprieties. Subsequent protest to GAO is timely since it was filed within 10 working days of actual knowledge of initial adverse agency action.
2. Protester has not met burden of showing agency's specification was in excess of minimum needs or unduly restricted competition.

Amray, Inc., protests request for quotations (RFQ) No. 81-0886, for a scanning electron microscope, issued by Sandia National Laboratories (Sandia), which is operated for the Department of Energy (DOE) by Sandia Corporation under a prime management contract. Amray alleges the specifications were written around design features based on personal preference for a foreign instrument rather than performance specifications and are unduly restrictive of competition.

Sandia and DOE argue that the protest is untimely and is otherwise without merit. We agree with Amray that the protest is timely; however, we deny the protest.

The closing date for receipt of quotations was specified as July 9, 1982. Amray states it first contacted Sandia on June 25 to seek resolution of its specification complaints. On July 1, Sandia contacted Amray and Amray states it "clearly indicated that the specifications and the point system were designed on a preferred vendor, JEOL USA, Inc." On July 6, Amray notified Sandia via telex that it intended to protest to this Office; Sandia contacted Amray for specifics of its dissatisfaction with the RFQ, determined that Amray could file a responsive quotation, and encouraged the firm to quote.

Responsive quotations were received from JEOL USA, Inc., and Hitachi Scientific Instruments. No quotation was submitted by Amray. JEOL USA, Inc., was subsequently awarded the contract. By letter of July 13, received in the GAO mailroom on July 19, Amray protested to this Office.

Sandia and DOE assert that the protest is untimely filed because Amray did not protest the specifications prior to the July 9 closing date. Amray's informal phone conversations with Sandia prior to the closing date are considered insufficient to constitute a protest at that time. In rebuttal, Amray views the preclosing date contacts with Sandia as a protest, pointing out that it complained about the specifications and recommended reissuance of the solicitation based on performance rather than design features.

Our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1982), require that a protest, as here, against alleged improprieties in solicitation which are apparent prior to the closing date be filed prior to the closing date. If a protest is timely filed initially with the contracting agency, any subsequent protest to our Office will be considered provided that the protest is filed with GAO within 10 working days of notification of actual or constructive knowledge of initial adverse agency action. 4 C.F.R. § 21.2(a).

Neither Sandia nor DOE specifically refute Amray's characterization of those conversations. We are persuaded that Amray was protesting to Sandia before the closing date because we have held that a conveyance of dissatisfaction and request for corrective action evidences a sufficient intent to protest. See Diesel Parts of Columbus, B-200595, July 20, 1981, 81-2 CPD 50; Gibson & Cushman Dredging Corp., B-194902(1), February 12, 1980, 80-1 CPD 122.

Having concluded that Amray protested prior to the closing date, Sandia's July 6 refusal to take the action recommended by Amray constituted initial adverse agency action. Therefore, our receipt of Amray's protest on July 19, 1982, was within the 10-working-day time limit and the protest is timely.

The determination of the Government's minimum needs, the method of accommodating them and the technical judgments upon which those determinations are based are primarily the responsibility of the contracting officials who are most familiar with the conditions under which the supplies and services have been used in the past and will be used in the future. Generally, when a specification has been challenged as unduly restrictive of competition, it is incumbent upon the procuring agency to establish prima facie support for its contention that the restrictions it imposes are reasonably related to its needs. But once the agency establishes this support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable. Walter Kidde, Division of Kidde, Inc., B-204734, June 17, 1982, 82-1 CPD 539; S.A.F.E. Export Corporation, B-207655, November 16, 1982, 82-2 CPD 445.

Amray protests that the RFQ expresses an unjustified personal preference for a foreign instrument containing specific design features. Sandia points out that the technical capabilities set forth in the RFQ are Sandia's determination as to its minimum needs for the performance required of the scanning electron microscope (SEM). Sandia states that the described features are not based on unsupported "personal preference." Sandia explains that the specifications resulted from a consensus of technical personnel and supports the competitiveness of the specification as follows:

"The technical specifications clearly were not written around a particular foreign instrument. It is Sandia's understanding that at the time of the RFQ no potential supplier had an existing SEM which met all of the technical capabilities set forth in the RFQ. However, it was and remains Sandia's belief that each of the four suppliers to whom Sandia sent the RFQ could meet all of the minimum or mandatory specifications and most of the desired technical capabilities. It should be clearly understood that the mandatory and minimum specifications which were very limited in number, were the only technical capabilities that a supplier was required to meet. All other technical capabilities were desired

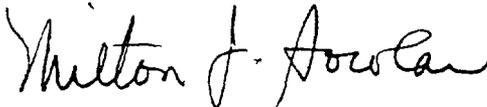
features and a supplier was not disqualified if he could not satisfy particular ones of those technical capabilities. It is clear from the technical evaluation procedure that one supplier could supply a smaller number of desired technical capabilities but still obtain a higher total score than another supplier who might provide a greater number of technical capabilities. The RFQ clearly indicated that there was a range of possible points for each technical capability depending upon how closely the proposal met the desired capability.

"Amray had an SEM which met all of the mandatory requirements. The only mandatory requirement on which any question was raised was the requirement regarding 0 to 35 kilovolt accelerating voltage. Amray's existing SEM did not have such a feature in its 'off-the-shelf' condition. However, Amray had available at a modest cost a standard option which added such feature and, accordingly, Amray could easily meet the minimum and mandatory requirements. Amray could also meet most of the desired but not mandatory technical capabilities. This situation was discussed with Amray and they were strongly encouraged to submit a quotation. The advantage of their position as a domestic supplier was also discussed with them. Accordingly, Amray's allegation that a thorough, fair and competitive technical evaluation would not be encouraged is clearly without foundation."

In our view, the above constitutes prima facie support for the specification. However, rather than specifically rebut this, Amray has merely generally emphasized the closeness of the specifications to the awardee's product and has not provided evidence that Sandia's needs could be met with other specifications. In this regard, a specification written around a particular product is not in and of itself improper, as long as the agency establishes that the specification is reasonably related to its minimum needs. See Data Card Corporation, Orbitran Division, B-202782, October 8, 1981, 81-2 CPD 287. Finally, we note that a firm

other than the alleged favored vendor was able to submit a competitive quotation and that even the alleged favored vendor did not achieve full specification compliance. Therefore, the protester has not sustained the burden of proving that Sandia's determination of its minimum needs was unreasonable.

Accordingly, we deny the protest.

for 
Comptroller General
of the United States