

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

24151

FILE: B-209188

DATE: January 31, 1983

MATTER OF: All Star Dairies Inc.

DIGEST:

1. A protest that certain solicitation provisions are restrictive is untimely under GAO's Bid Protest Procedures where the protest is filed after the closing date for receipt of proposals.
2. The determination that a proposal is technically unacceptable because it did not offer required size of containers is within the contracting agency's discretion and will not be disturbed absent a clear showing that it was unreasonable. A closer scrutiny will be given where elimination of a proposal will leave a competitive range of one.

All Star Dairies Inc. (All Star) protests the award of a contract to Clinton Milk Company (Clinton) under request for proposals (RFP) No. DL13H-82-R-9222 issued by the Defense Logistics Agency, Defense Personnel Support Center, Philadelphia, Pennsylvania (DPSC). All Star contends that DPSC acted unreasonably in determining its lower priced proposal to be technically unacceptable and in awarding the contract to Clinton, without holding any discussions. It concedes that it offered fruit drinks in half-gallon and pint containers instead of quart containers as required by the RFP, but argues that this was a technically acceptable offer and identical to three previous proposals on which awards had been made. We deny the protest.

The solicitation, which was comprised of two groups of items, requested proposals for a 6-month, requirement-type contract for various fruit drinks, milk, and milk products. This protest concerns group I, which consisted of 16 items and centers around the requirements for fruit flavored drinks. The solicitation called for the fruit flavored drinks to be packaged in quart containers. In addition, the

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RFP standard form 33A, clause 10(g), gave notice of the possibility of award based on initial proposals without discussion.

Two proposals were submitted for group I. Clinton's offer contained no restrictions and was for \$90,750.70. All Star's \$80,611 proposal included the following qualifications:

"Bidder/Offeror Qualifications

1. Bid for Group I is for 'all or none.'
2. Item #15-price quoted is per qt.; package size offered is 1/2 gal.
3. Item #14-price quoted is per qt.; package size offered are pints or 1/2 gals.
4. Item #12-assorted flavors to be ordered in multiples of 12.
5. Item #13-price quoted per qt.; available seasonally in pint packages."

Based on these restrictions in All Star's offer, DPSC found it to be "technically unacceptable" and the award was made to Clinton. No discussions were held, as only one proposal was found to be in the competitive range, and it was determined to be at a fair and reasonable price.

All Star disputes DPSC's technical assessment of its proposal. It finds the requirement of quart containers for fruit drinks to be too narrow. All Star states that the quart container was not available in the area. Further, it argues that since it has provided the fruit drinks in pint and half-gallon containers without complaints for 18 months, it had no notice that it would now be unacceptable. Therefore, it would not have been reasonable for it to protest the quart requirement prior to the submission of offers.

While All Star contends that it had previously delivered nonconforming containers, we have been advised that the prior solicitations specified pints and this is the first procurement of quarts. Therefore, the prior deliveries were not nonconforming, but in compliance with the specifications. Thus, to the extent that All Star is asserting that the changed requirement to quart containers

is unduly restrictive, its protest is untimely and not for consideration. Our Bid Protest Procedures require that protests of alleged improprieties on a solicitation which are apparent prior to the closing date for submission of initial proposals be filed prior to that date. 4 C.F.R. § 21.2(b)(1) (1982).

As to the technical determination, DPSC found All Star to be unacceptable because it deviated from the stated requirements of the solicitation. Since All Star's proposal was "all or none," DPSC concluded that the discrepancy eliminated the entire proposal from the competitive range.

Once a proposal is determined to be technically unacceptable, it is generally proper to exclude it from the competitive range. The determination of whether a proposal is in the competitive range, particularly with respect to technical consideration, is primarily a matter of administrative discretion. This will not be disturbed by our Office, absent a clear showing that the determination lacked a reasonable basis. Dynalectron Corporation, B-185027, September 22, 1976, 76-2 CPD 267; Donald N. Humphries & Associates et al., 55 Comp. Gen 432 (1975), 75-2 CPD 275. We, however, will scrutinize more closely any determination that results in only one offeror being included in the competitive range. Coherent Laser System, Inc., B-204701, June 2, 1982, 82-1 CPD 517.

We cannot say that DPSC's decision finding All Star technically unacceptable was unreasonable or arbitrary. The solicitation clearly stated that quart containers for fruit drinks were required. DPSC, on finding that All Star qualified its proposal, contacted the requisitioning facility to satisfy itself that the proposal should be eliminated from the competitive range. The requisitioning facility, a Veterans Administration Medical Center, confirmed the necessity for quart containers, indicating that the quart size provided for easier storage and handling. Under these circumstances, we will not disturb DPSC's determination to eliminate All Star from the competitive range, despite the fact that All Star's proposal was lower in price.

It is All Star's belief that because it offered the lowest price, discussions should have been held, regardless of the fact that its proposal was deemed technically unacceptable. This contention is without merit. In negotiated procurements, discussions are generally required to be conducted only with offerors within a competitive range. Where an offeror's proposal is eliminated from the competitive range because it is properly found to be technically unacceptable, it is, in effect, an offer to do something other than what the Government requires, and the price at which the firm offers to perform is not controlling. Q. S. Inc., B-203503, May 4, 1982, 82-1 CPD 417. Therefore, the award to Clinton without discussions was proper.

The protest is denied.

Milton J. Pocolan
for Comptroller General
of the United States