

**DECISION**



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

**FILE:** B-208153

**DATE:** March 29, 1983

**MATTER OF:** Squibb Vitatek, Inc.

**DIGEST:**

1. When detailed list of design and performance specifications is incorporated into brand name solicitation, protest based on failure to list salient characteristics is academic.
2. When protest alleging undue restrictiveness of specifications incorporated into solicitation after issuance is not filed until after due date for best and final offers, protest is untimely and GAO will not consider it.
3. When technical defects are not susceptible to correction through discussions, GAO will deny protest based on agency's alleged failure to conduct meaningful discussions.
4. When determination that award notwithstanding protest is most advantageous to Government is made in accord with applicable regulations, GAO will deny protest on this basis. In any event, award notwithstanding a protest is a procedural deficiency that does not affect the validity of an award.

Squibb Vitatek, Inc., protests the award of a contract for 128 portable patient monitors to Physio Control Corporation under a solicitation issued by the Naval Regional Contracting Center, Philadelphia, Pennsylvania.

The protester initially argued that the solicitation was defective because it listed only two brands of allegedly unequal equipment, did not provide for

"equal" offers, and contained no list of salient characteristics. It now argues that the specifications subsequently incorporated into the solicitation are unduly restrictive. We find the protest concerning salient characteristics academic and that concerning restrictiveness untimely.

Request for proposals N00140-82-R-9716, issued May 24, 1982, specified either Squibb Vitatek's model 414, with various options and accessories, or Physio Control's model VSM-1 (Vital Signs Monitor-1). Although "equal" products were not specifically requested, the solicitation provided for consideration of other monitors, subject to preaward testing and approval by the Bureau of Medicine and Surgery.

Squibb Vitatek protested to our Office on July 1, 1982, one day before the closing date for receipt of initial proposals, arguing that an intended award shortly after this date would prevent such testing and approval. In addition, the firm argued that because no evaluation criteria were listed, there was no common basis for comparing the brand name equipment with other monitors, and that because the Physio Control model listed was cheaper than its own, the Navy was in effect making an improper sole source procurement.

On August 6, 1982, the Navy responded to Squibb Vitatek's protest by issuing a five page, detailed list of design and performance specifications for the monitors; it also established August 30, 1982, as the due date for best and final offers.

Squibb Vitatek submitted three alternate best and finals: its model 414; a scaled-down, lower-priced model 414; and a model 415, a new unit not previously marketed that Squibb Vitatek stated contained the essential features of Physio Control's VSM-1. On September 29, 1982, the Navy awarded a \$788,245 contract to Physio Control, rejecting Squibb Vitatek's model 414 because of its higher price, \$825,754, and finding the other alternatives technically unacceptable.

In comments dated September 9, 1982, and in a supplemental protest filed October 14, 1982, Squibb Vitatek argues that the specifications incorporated into the solicitation were unduly restrictive. The firm points out that its model 414, listed in the solicitation and described by the contracting officer as "responsive" and "acceptable," actually did not meet these specifications. Squibb Vitatek maintains

that the specifications therefore cannot be regarded as representing the Navy's minimum needs, but rather that they merely parrot the characteristics of Physio Control's monitor and permitted the Navy to decide, after best and finals, which were important and which could be waived.

The Navy contends that this basis of protest is untimely. We agree. Our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1982), state that alleged improprieties that do not exist in an initial solicitation, but are subsequently incorporated into it, must be protested not later than the next closing date for receipt of proposals.

The specifications at issue were incorporated into the solicitation on August 6, 1982. Since Squibb Vitatek did not challenge them or point out that its own, brand name model did not meet them until after the August 30, 1982, due date for best and final offers, the allegation of restrictiveness is clearly untimely. Incorporation of the specifications into the solicitation, however, resolved the firm's original protest concerning lack of salient characteristics, and we will not consider either of these bases of protest further.

As for the remainder of the protest, it is clear from the record that both Physio Control's and Squibb Vitatek's monitors have been tested and approved for use aboard ship and by the Fleet Marine Force, making them equally acceptable for purposes of this procurement. Although the Navy did not specifically solicit other than the brand name products, it did evaluate (although not field test) Squibb Vitatek's purportedly equal model 415. The Navy found, however, that this monitor did not meet specifications; for example, it required 30 hours for battery recharging, rather than the 12 hours specified. In addition, the model 415 did not meet the Navy's requirement for a minimum operating time of 2 hours. Although Squibb Vitatek contends that this is unnecessary because the model 415 can be operated from an ordinary vehicle battery, the Navy found it unsuitable for air evacuation of seriously ill or wounded personnel. In view of this finding, we do not believe that the alleged lack of sufficient time for testing and approval of "equal" products prejudiced Squibb Vitatek.

With regard to the alleged lack of evaluation criteria, we believe it was clear from the solicitation that cost would be the determining factor, with award to be made to the lowest offeror of either of the two brand name monitors

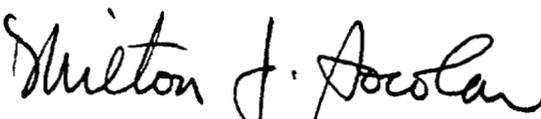
or to any other low offeror whose equipment met specifications and was approved by the Bureau of Medicine and Surgery. Moreover, in the solicitation the Navy specifically reserved the right to make a single award to the low offeror.

We find no merit to the allegation that this was a disguised sole source procurement; competition was not restricted to one offeror, as shown by the alternatives offered by Squibb Vitatek and evaluated by the Navy.

The remaining bases of protest, raised in Squibb Vitatek's post-award submission, also are without legal merit. For example, the firm argues that the Navy did not conduct meaningful discussions. We fail to see, however, how discussions would have corrected the deficiencies in Squibb Vitatek's competitively priced alternate models. Rather, excessive recharging time in the model 415 and failure to provide simultaneous digital readouts of heartbeat, pulse, and blood pressure, which the Navy found in the scaled-down model 414, appear to be deficiencies that would not have been susceptible to correction through discussion.

Finally, Squibb Vitatek contends that award improperly was made while its protest was pending. The record indicates that on September 15, 1982, the Navy determined that award to Physio Control would be most advantageous to the Government and would eliminate further delay in delivery of essential medical equipment to operating forces. The record indicates that the determination was made in accord with Defense Acquisition Regulation §§ 1-407.8 and 3-509 (DAC 76-25, October 31, 1980), and was approved at a level higher than the contracting officer. In any event, an award notwithstanding a protest is a procedural deficiency, and does not affect the validity of the award. Mosler Systems Division, American Standard Company, B-204316, March 23, 1982, 82-1 CPD 273.

The protest is dismissed in part and denied in part.

  
Acting Comptroller General  
of the United States