

DECISION

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MARTIN

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

FILE: B-209886, B-209886.2 **DATE:** June 3, 1983

MATTER OF: Elliott Company

DIGEST:

Solicitation requirement that the prospective contractor must have manufactured and operated an air compressor meeting particular specifications is not met by a bidder's assertion that while it has not actually done so, it has the capability to manufacture and operate a compliant compressor.

Elliott Company protests the proposed award for compressed air equipment to the Ingersoll-Rand Company by the Department of the Navy under invitation for bids (IFB) No. N62474-81-B-8612. Elliott contends that the proposed rejection of its bid for failure of its compressor to meet the specifications is improper. We ~~deny this part of~~ Elliott's protest. Elliott also protests that the compressor offered by Ingersoll-Rand does not meet the specifications. This part of Elliott's protest is dismissed as untimely.

This was a two-step formally advertised procurement to obtain an air compressor with a capacity of 5,000 standard cubic feet of air per minute (SCFM) and 120 pounds of pressure per square inch gauge (PSIG). Step 1 consisted of the receipt and evaluation of technical proposals and Step 2 consisted of the receipt and evaluation of the bid prices offered by those firms whose Step 1 technical proposals were found acceptable. The Step 1 solicitation was issued on December 14, 1981 and, after amendments, requested the technical proposals by March 3, 1982. The solicitation contained the following requirement:

"1.2.1 Contractor Experience: The Contractor shall have manufactured a 5000 SCFM, 120 PSIG minimum size air compressor within the past

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two years prior to November 1, 1981 having design conditions similar to those specified herein and same arrangement as the unit being provided. The air compressor or compressors shall be in continuous operation during the period from November 1, 1981 to February 1, 1982."

The instructions for the Step 1 proposals required that the competitors submit with their proposals information showing compliance with this experience requirement.

Three of the Step 1 technical proposals received, including those of Elliott and Ingersoll-Rand, were found to be acceptable, and the companies were requested to submit bid prices. Upon receipt of the Step 2 bids on November 16, 1982, Elliott's price was found to be low and that of Ingersoll-Rand was second low. At that time, Ingersoll-Rand protested to our Office that Elliott did not meet the experience requirement in that its proposed compressor had not been manufactured within the 2-year period before November 1, 1981 and had not been in continuous operation from November 1, 1981 to February 1, 1982. In response to the protest, the Navy reviewed the matter and concluded that the compressor proposed by Elliott did not meet the specifications, and therefore proposed to reject Elliott's bid. Elliott then protested to our Office, insisting that its compressor met all requirements.

Elliott's Bid

After submission of the Step 1 proposals, Elliott was asked by the Navy to show that the model it offered complied with the requirements specified in the contractor experience provision. Elliott's response, dated June 2, 1982, stated it had placed in operation in Australia in August of 1981 a compressor, rated at 5100 SCFM, which met the requirement for operation prior to November 1, 1981. The letter also stated that units in Norfolk, Botswana and South Carolina with ratings of at least 5100 SCFM had been shipped in December 1981 and January 1982 and met the capacity requirement but obviously had not been running since November 1981. The Navy determined from this information that the experience requirement was satisfied.

The Navy states that at a meeting with Elliott on December 2, 1982, after Ingersoll-Rand filed its protest, Elliott admitted that its Botswana and Australian units, as installed, had SCFM and PSIG capacities significantly less than required by the Navy's specifications, although Elliott insisted that the Botswana and Australian units could meet the specifications if the impellers were reduced in size. (Elliott's letter of June 2, 1982 stated that the Australian unit met the operating time requirement while the Botswana unit did not.) Elliott's protest of the rejection of its bid contains arguments only with respect to the acceptability of its Botswana unit, and the Navy arguments with respect to Elliott's protest concentrate on the unacceptability of that model.

The Navy states the major reason for the contractor experience provision was to avoid the potential problems frequently encountered with unproven prototype installations. The Navy asserts that to conform the Botswana model to the SCFM and PSIG requirements, the unit would have to be modified in a number of respects (e.g., bull-gear, pinion speed and size, and impeller diameter), which indicates that the Botswana model does not have design conditions and arrangements similar to the unit specified in the solicitation. The Navy argues that the SCFM and PSIG requirements are not met by Elliott's assertion that, if differently configured, the compressor could meet the levels required.

The Navy also points out that even if the Botswana model did conform to the requirements, it was not commissioned until March 16, 1982 and therefore could not meet the requirement that the model have been in continuous operation from November 1, 1981 to February 1, 1982. Although the Navy concedes that the purpose of this requirement might be met in this case with a later 90-day continuous operation period, the Navy contends that it would be unfair to those potential bidders who refused to bid because of the time frame in the solicitation to waive that requirement at this time.

Although Elliott agrees that most of the changes listed by the Navy would have to be made, it denies that the changes required to make the Botswana model conform to

the specifications would be significant. Elliott contends the required changes would involve only the use of parts and components that it has tested and used successfully on other models in the past. Elliott does not contend that it has actually manufactured such a unit but insists that the Botswana model has a design capability that exceeds 5000 SCFM and has a standardized configuration "with designed-in and tested flexibility necessary to meet the wide variety of customer ambient conditions, volume flow and discharge pressure requirements encountered in the marketplace." Elliott argues that the wording of the first sentence of the contractor experience provision requiring a "5000 SCFM, 120 PSIG minimum size compressor" must be interpreted as a reference to the design capacity of the model. It further states that the phrase "having design conditions similar to those specified herein" also must be interpreted as a reference to design capacity, and not as a reference to the actual past performance of a particular model or as a requirement that the unit offered be identical to one previously manufactured and operated. Finally, Elliott maintains that the intent behind the continuous operation requirement was to show a 90-day continuous operation at any time before submission of the final technical proposals in Step 1 (the initial submission date was February 1, 1982), and that the Botswana model therefore conformed to this requirement even though it may not have been in operation during the precise period specified.

We believe the only reasonable interpretation of the experience requirement is that the Navy required a contractor who had manufactured a proven compressor with 5000 SCFM and 120 PSIG capacity, not a contractor who intended to enhance a basic compressor model to the required flow and pressure requirements. Although the provision permits "design conditions similar to those specified," the wording requiring the contractor to have manufactured a 5000 SCFM, 120 PSIG minimum size compressor is unqualified and clearly permits no deviations. Elliott, which did not challenge this requirement before submitting its offer as exceeding the Navy's minimum needs, offered a compressor that did not exist as a production or operating model and which did not meet the specifications. Indeed, as pointed out above, Elliott does not contend that it ever has manufactured a compressor meeting the specifications; it contends only that it has the capability to do so. We therefore believe

that the Navy's determination that Elliott does not meet the contractor experience requirement had a reasonable basis. This part of the protest is denied.

In view of this conclusion--that Elliott never had a compressor meeting the specifications in operation at any time--it is not necessary to resolve the issue as to whether the requirement for a specified operating period was met by a later 90-day operating period.

Ingersoll-Rand's Bid

During a February 23, 1983 conference in our Office on Ingersoll-Rand's protest, Elliott for the first time raised an issue as to whether the unit proposed by Ingersoll-Rand met the specifications. In response, Ingersoll-Rand denies that its unit does not conform to the specifications, and contends that Elliott's protest in this regard is untimely under our Bid Protest Procedures, ~~4 C.F.R. § 21.2(b)(2)~~ (1983), because it was not submitted within 10 working days after bid opening, when Elliott should have known of the alleged deficiencies.

We agree that the protest on this issue is untimely, but not for the reason argued by Ingersoll-Rand. We do not require that a prospective protester file in anticipation of improper action by the contracting agency. See Brandon Applied Systems, Inc., 57 ~~Comp. Gen.~~ 140 (1977), 77-2 CPD 486. Thus, even though Elliott might have been aware of the alleged deficiencies in the Ingersoll-Rand unit as early as November 16, 1982 when the bids were opened, Elliott, the low bidder, had no reason to believe that its interpretation of the specification had not been accepted and thus properly expected that it would receive the award. The timeliness of this issue therefore must be determined from the time Elliott knew or should have known that its bid would be rejected by the Navy and that Ingersoll-Rand's bid would be accepted. See Werner-Herbison-Padgett, B-195956, January 23, 1980, 80-1 CPD 66.

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Elliott knew that the Navy intended to accept Ingersoll-Rand's bid when the firm received the Navy's report of December 21, 1982 in response to Ingersoll-Rand's protest against the acceptance of Elliott's bid, in which the Navy stated that it agreed with Ingersoll-Rand. Elliott received the report on January 3, 1983, but did not challenge the responsiveness of Ingersoll-Rand's bid until the conference on February 23, 1983, which is well after the 10 working day period allowed for such a protest. The protest as it pertains to this issue therefore is untimely and is dismissed.

The protest is denied in part and dismissed in part.

for 
Comptroller General
of the United States