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DECISION

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

FILE: B-209097 **DATE:** July 29, 1983

MATTER OF: King-Fisher Company

DIGEST:

1. Determination of the needs of the Government and the methods of accommodating such needs are primarily the responsibility of contracting agencies, and GAO will not question an agency's assessment of its needs where the protester fails to show that its determination is clearly unreasonable. When either of two National Fire Protection Association standards arguably applies to procurement, disagreement between protester and agency, or among experts, is not sufficient to show that the agency's decision as to the appropriate standard is clearly unreasonable.

2. Absent evidence of possible fraud or willful misconduct on the part of contracting officials, GAO will not consider the merits of a protest that the Government's interest as a user was not protected because the specifications were insufficiently restrictive.

3. GAO will not consider the merits of a protest that deletion of a requirement for listing by an approved testing laboratory from specifications allows bidders to offer, and the agency to accept, a fire alarm system that does not satisfy Occupational Health and Safety Administration regulations. There is no legal requirement that an agency use specifications adhering to Underwriters Laboratory (UL) or similar standards.

4. When a protest is filed initially with a procuring agency, GAO will not consider a subsequent protest unless it is received within 10 working days after the protester has actual or constructive knowledge of initial adverse agency action. Bid opening without action requested by the protester is

adverse agency action, and a protest to GAO filed more than 10 working days later is untimely.

King-Fisher Company protests the Army's opening of bids and subsequent award of a contract for installation of an FM radio fire alarm system at Fort Leavenworth, Kansas, under invitation for bids (IFB) No. DABT19-82-B-0062. We deny the protest in part and dismiss the remainder.

Background

The IFB called for FM transmitter/receiver units to be installed in various buildings at Fort Leavenworth. The units were to be linked by wire with existing fire equipment such as detectors, alarms, and sprinkler systems, and by FM radio with control consoles at Fire Station No. 1, Military Police Headquarters, and the Fire and Rescue Station. In addition, new manual (pull-type) alarm boxes were to be added. The operation of any fire control panel, automatic protection device, or manual alarm was to result in the continuous ringing of all alarm bells in the affected building and in the transmittal of a coded radio signal to the control consoles.

In response to technical questions raised by King-Fisher after the issuance of the IFB on August 18, 1982, the Army amended the solicitation. Dissatisfied with the changes, King-Fisher protested to the agency before bid opening. However, the Army proceeded with the scheduled opening at 10 a.m. on September 17, 1982, and received 13 responsive bids for equipment produced by four different manufacturers. King-Fisher did not bid, but instead protested to our Office the afternoon of the 17th. During development of the protest, the Army awarded a $279,800 contract to Hatfield Heating and Air Conditioning, Inc., the low bidder, for installation of Motorola equipment.

King-Fisher's Allegations

King-Fisher makes two general allegations in its protest to our Office. First, the firm asserts that the Army used the incorrect one of two arguably applicable standards promulgated by the National Fire Protection Association (NFPA) and incorporated in the solicitation by a requirement that, unless otherwise indicated, the installation should conform in all respects to the NFPA standard. Second, King-Fisher contends that in amending the solicitation, the Army improperly removed "all quality requirements," i.e., requirements for listing by approved testing

laboratories, for the equipment to be installed. In our opinion, neither of these allegations provides a basis for overturning the award.

National Fire Protection Association Standards

With regard to the first, King-Fisher alleges that the Army incorrectly specified NFPA Standard 72D (1979), covering "Installation, Maintenance and Use of Proprietary Protective Signaling Systems," rather than Standard 1221 (1980), for "Installation, Maintenance, and Use of Public Fire Service Communications." King-Fisher contends that 72D is inappropriate because the system at Fort Leavenworth is not a proprietary protective signaling system, as defined in that standard. King-Fisher also argues that 72D was designed for use with systems that transmit alarms by wire, and accordingly provides no effective standards by which to evaluate radio alarm systems.

The Army, while acknowledging that there is a difference of opinion among fire protection experts, nevertheless contends that 72D is the appropriate standard for Fort Leavenworth. As indicated by its title, 72D applies to proprietary protective signaling systems, defined as those serving "contiguous and noncontiguous properties under one ownership from a central supervising station located at the protected property, where trained, competent personnel are in constant attendance." The Army considers Fort Leavenworth to be a contiguous property, under common, i.e., Government ownership. In addition, the Army states that the alarm system will be monitored by central supervising stations at Fire Station No. 1, Military Police Headquarters, and the Fire and Rescue Station. All of those are located within Fort Leavenworth, the protected property, and are constantly manned by police and firefighters, who are trained, competent, emergency personnel. The Army also states that 72D has been modified to include radio as a channel for the transmission of alarms.

As we frequently have stated, it is a fundamental procurement principle that the determination of the needs of the Government and the methods of accommodating such needs are primarily the responsibility of contracting agencies. Therefore, we will not question an agency's assessment of its needs unless a protester shows that the

determination is clearly unreasonable. See Tri-Country Fence Co., Inc., B-209262.2, April 12, 1983, 83-1 CPD 381; Philips Information Systems, Inc., B-208066, December 6, 1982, 82-2 CPD 506; Integrated Forest Management, B-200127, March 2, 1982, 82-1 CPD 182.

In our opinion, King-Fisher has failed to show that the Army acted without a reasonable basis in specifying that 72D, rather than 1221, was to govern the installation of the radio fire alarm system at Fort Leavenworth. While Standard 72D applies to proprietary systems, by contrast, Standard 1221 applies to public fire service communications facilities receiving fire alarms or other emergency calls from the public; it does not apply to fire alarm systems on private premises. Arguably, Fort Leavenworth is more analogous to a large private facility than to one receiving calls from the general public. The difference of opinion among fire protection experts cited in the record as to the more appropriate standard for Fort Leavenworth does not, in our opinion, show that the Army's use of Standard 72D is clearly unreasonable.

Further, 72D now also provides that a path for signal transmission can consist of radio waves, and sets forth minimum requirements for the use of radio as a signaling channel.

As for King-Fisher's contention that 72D offers no means of evaluating radio alarm systems, we note that both 72D and the solicitation include detailed performance specifications for transmitters and receivers. In addition, the specifications require that transmitters and receivers satisfy standards set by the Federal Communications Commission.

Quality Requirements

King-Fisher also alleges that the Army improperly amended the specifications to remove "all quality requirements," thus contravening public policy favoring increased fire safety measures and allowing bidders to offer (and the Army to accept) systems not conforming to Occupational Health and Safety Administration (OSHA) regulations.

The solicitation originally required all materials and equipment to conform to Underwriter's Laboratory (UL) or Factory Mutual System (FMS) requirements, with the contractor to submit proof of such conformity, either by UL or FMS labels or seals or a listing by the approving laboratory.

By amendment, however, the Army deleted this requirement. The Army states that it did so because prospective bidders were mistakenly led to believe that an entire fire alarm system, as distinguished from its component parts, must be approved by UL or FMS. Since only one manufacturer's equipment was listed as a "system," the Army believed the requirement unduly restricted competition. The Army contends that, in any case, the provision was redundant because 72D already required equipment to be listed by UL or FMS.

To the extent that King-Fisher is alleging that the Government's interest as a user is not protected because the specifications are insufficiently restrictive, we will not consider this ground of protest. King-Fisher's presumable interest as a beneficiary of more restrictive specifications is not protectable under our bid protest function, since our purpose is to ensure that the statutory requirement for free and open competition is met. Further, procurement officials and user activities are responsible for ensuring that sufficiently rigorous specifications are employed, since they must suffer any difficulties due to inadequate equipment. Therefore, absent evidence of possible fraud or willful misconduct on the part of such officials, we consistently have refused to review allegations that more restrictive specifications should have been used. See Gentex Corporation, B-209083, April 13, 1983, 83-1 CPD 394. Miltope Corporation--Reconsideration, B-188342, June 9, 1977, 77-1 CPD 417. King-Fisher has not met either criterion.

Nor will we consider King-Fisher's allegation that deletion of the UL and FMS requirements allows bidders to offer, and the Army to purchase, a system that does not satisfy OSHA regulations. The parties have disputed at length whether the regulations cited by King-Fisher, particularly those covering Fire Detection Systems and Employee Alarm Systems, 29 C.F.R. §§ 1910.164 to 1910.165 (1982), apply to this procurement. The Army argues that they do not, asserting that this is a fire reporting system and that fire detection is outside its scope; it points out that §§ 1910.381 to 1910.398 are reserved for Safety Requirements for Special Equipment, which the Army considers this system to be. OSHA has not yet issued regulations for such equipment.

We are not aware of, and neither party has cited, any decisions interpreting the OSHA regulations. We have,

however, previously stated that there is no legal requirement, enforceable by this Office, that the Army use specifications adhering to UL standards. See SAFE Export Corporation, B-209391, B-209392, December 20, 1982, 82-2 CPD 554; Security and Assistance Forces and Equipment oHG, B-209555, November 16, 1982, 82-2 CPD 449. Enforcement of the Occupational Safety and Health Act of 1970, as amended, is within the jurisdiction of the Secretary of Labor. See 29 U.S.C. §§ 651 to 678 (1976).

Untimely Issues

King-Fisher makes a number of other allegations that are untimely under our Bid Protest Procedures, 4 C.F.R. § 21.2 (1983). The firm contends that certain specifications unduly restrict competition or are proprietary to one manufacturer, Monaco. King-Fisher protested these alleged defects to the Army before bid opening on September 17, but we did not receive its protest on these grounds until October 18, 1982. If a protest is filed initially with a contracting agency, we will consider a subsequent protest to our Office only if we receive it within 10 working days after the protester has actual or constructive knowledge of initial adverse agency action. Here, the Army's opening of bids without further amending the specifications constituted initial adverse agency action, so that the grounds of protest first raised on October 18, 1982, or in submissions after that date, are untimely. Logan Industries, B-208858, November 30, 1982, 82-2 CPD 490.

The protest is dismissed in part and denied in part.

Milton J. Socolar

for Comptroller General
of the United States