DECISION

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

FILE: B-213060 **DATE:** March 27, 1984

MATTER OF: Polymembrane Systems, Incorporated

DIGEST:

Where the protester alleges that the solicitation's specifications requiring a certain category of single-ply roofing membrane are unduly restrictive of competition, the contracting agency is required to make a prima facie case that the specifications are related to its minimum needs. However, once the contracting agency has made such a case, the protester must bear the burden of affirmatively proving its case. The protester fails to carry this burden when its arguments do not clearly show that the agency's determination of its actual minimum needs has no reasonable basis.

Polymembrane Systems, Incorporated (PMS), protests any award of a contract under invitation for bids (IFB) No. N62474-83-B-2106 issued by the Naval Facilities Engineering Command (NFEC), Department of the Navy, for installation of single-ply roofing membrane.

We deny the protest.

PMS contends that the specifications in the solicitation are unduly restrictive of competition because the IFB limits the materials to be used to one generic category of roofing membrane, ethylene propylene diene terpolymer (EPDM), while PMS's product, Sucoflex, which is one type of another generic category of roofing membrane, polyvinyl chloride (PVC), performs equally to EPDM. PMS also asserts that NFEC required PVC under a solicitation at another installation, which further brings into doubt NFEC's determination under the instant IFB that only EPDM can meet its minimum needs.

Initially, NFEC argues that PMS's protest is untimely since the protest was filed with our Office at 9:17 a.m., e.s.t., the day of bid opening without any notice of the protest to NFEC, while bid opening on the west coast took

place at 5 p.m., e.s.t. NFEC claims that, under these circumstances, it would have been unable to revise the specifications even if it determined that a revision was necessary.

Our Bid Protest Procedures require that where a protest concerns an alleged impropriety in a solicitation which was apparent prior to bid opening, the protest must be filed with our Office prior to the time set for bid opening. 4 C.F.R. § 21.2(b)(1) (1983). For protests filed with us, the term "filed" means receipt in our Office. Canaveral Towing & Salvage, Inc., B-211627.2, B-211627.5, B-211627.6, December 19, 1983, 83-2 CPD 702. Accordingly, since the protest was filed with our Office prior to the time set for bid opening, we conclude that the protest is timely. Cf. Dun's Marketing Services--Reconsideration, B-195453.2, August 31, 1979, 79-2 CPD 170.

NFEC also asserts that the protest should be dismissed because PMS is currently litigating in United States District Court the issue of whether Sucoflex may be precluded as an equal to the material specified. PMS contends that the litigation NFEC refers to involves a different solicitation and a different roofing material other than EPDM, and that the parties to the litigation filed a stipulation of voluntary dismissal on December 7, 1983. The record indicates that PMS's position is correct, and we therefore find that this previous litigation provides no basis for us not to consider this protest.

With regard to whether the specifications are unduly restrictive of competition because they preclude the use of Sucoflex, we have held that when a protester challenges a specification as unduly restrictive of competition, the burden is on the procuring agency to establish prima facie support for its contention that the restrictions it imposes are needed to meet its minimum needs. But, once the agency establishes this prima facie support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable. Stryker Corporation, B-208504, April 14, 1983, 83-1 CPD 404. Also, we have consistently held that in technical disputes, a protester's disagreement with the agency's technical opinion does not invalidate that opinion. Carolina Concrete Pipe Company, B-192361, March 4, 1981, 81-1 CPD 162.

NFEC essentially contends that PVC tends to shrink and become brittle, resulting in structural damage and water penetration, while EPDM technology has been utilized for over 30 years with favorable results. Specifically, NFEC alleges that the plasticizers utilized in PVC to provide elasticity (EPDM does not depend on plasticizers) tend to migrate to the surface over time, which can cause either sheets of membrane to pull apart or membrane to pull away from the underlying roof structure, pipes or other structures. NFEC claims that any of these circumstances can lead to water entry and damage to the underlying insulation and roof support structure. NFEC also asserts that personal observation of two buildings where PVC had been installed revealed significant shrinkage of the membrane after 5 years. Further, NFEC claims that, since United States standards for single-ply roofing have not yet been established, NFEC lacks a basis for concluding that PVC is no longer subject to shrinkage and embrittlement due to plasticizer migration.

On the other hand, PMS contends that Sucoflex does not shrink, while EPDM does, and claims that the latter fact is evidenced by reading EPDM installation instructions which state that the applicator must let the membrane sit for 30 minutes after unrolling because the EPDM begins to shrink immediately. PMS asserts that this shrinkage to EPDM will continue for years. PMS also produces a technical data table reporting that Sucoflex showed 0-percent shrinkage using the applicable American Society of Testing and Materials (ASTM) testing procedure and demonstrated excellent resistance to ultraviolet light under a 10,000-hour xenon test. As objective support, PMS submits tests conducted and certified by Canadian and Swiss testing firms under standards established in their respective countries for single-ply roofing membrane. The Canadian firm's findings indicate that Sucoflex did not crack during a low temperature flexibility test conducted at -30°C and showed no decrease in its tensile strength, no delamination, and an acceptable amount of elongation at break during a resistance to heat aging test conducted at 130°C for 24 hours. The Swiss firm's findings indicate that Sucoflex passed "artificial weathering" xenon tests conducted for 4,000 and 5,000 hours, including exposure to light for 4 days and storage in water deionized at 40°C for 3 days and for 10,000 hours. PMS further alleges that it presented

NFEC a 20-year-old PVC sample that did not show signs of shrinkage and embrittlement, and PMS references several buildings in North America using PVC which have aged very well during periods up to 7 years.

Concerning PMS's argument that Sucoflex is not subject to plasticizer migration, shrinkage or brittleness, NFEC contends that the test that showed 0-percent shrinkage for Sucoflex did not specify time or temperature, factors which affect test results. NFEC asserts that 0-percent shrinkage under certain test conditions is not necessarily an indicator of shrinkage after a number of years under actual weather conditions. NFEC also argues that PMS's allegation that Sucoflex has excellent resistance to ultraviolet light based on xenon testing is inconclusive as to shrinkage and embrittlement because, while the ultraviolet light component of sunlight does contribute to plasticizer migration and loss in PVC membrane, exposure to heat and water is also a very significant contributor to shrinkage and embrittlement. Further, NFEC alleges that while accelerated testing under simulated environmental conditions is useful, the most credible test results are those under actual environmental conditions, which results PMS has not provided in spite of claiming that Sucoflex has proven successful over 20 years.

PMS also argues that Sucoflex is superior to EPDM in the following critical areas of product performance: seam strength, vapor permeability, elongation, tensile strength, and flammability. PMS submits supporting documentation.

However, NFEC contends that this argument is irrelevant because it fails to deal with the stated basis for excluding PVC--shrinkage and embrittlement of the membrane with resulting damage to the roof.

Finally, PMS claims that another NFEC installation issued a solicitation specifying PVC with the exact generic physical properties as Sucoflex and, thus, NFEC should not have excluded Sucoflex under the instant IFB.

NFEC asserts that neither its divisional office with knowledge of the instant IFB nor its headquarters was aware of the solicitation PMS mentions, and that the specifications for that solicitation were prepared by an architect/ engineer under contract with the contracting activity.

As indicated above, NFEC has defended its decision to limit the materials to be used under the solicitation to EPDM by contending that PVC, since it utilizes plasticizers while EPDM does not, is subject to shrinkage and embrittlement due to plasticizer migration, which can result in structural damage and water penetration. NFEC claims that it has personally observed in two cases significant shrinkage of PVC membrane after 5 years. NFEC asserts that it lacks a basis for determining that PVC is no longer subject to shrinkage and embrittlement due to plasticizer migration in the absence of established standards and criteria for single-ply roofing. We find that this is the prima facie support that the contracting agency is required to provide when a protester challenges a specification as unduly restrictive of competition. In view of this, we conclude that the burden is on PMS to prove that NFEC's requirement of EPDM was clearly unreasonable.

As to PMS's allegation that EPDM is subject to shrinkage, we are not persuaded that the fact that EPDM installation instructions state that the applicator must let the membrane sit for 30 minutes after unrolling because the EPDM begins to shrink immediately shows EPDM is subject to shrinkage after installation. Further, PMS's unsupported contention that shrinkage of EPDM will continue for years after installation is insufficient to meet the burden on the protester to present evidence affirmatively establishing its case. See SETAC, Inc., B-209485, July 25, 1983, 83-2 CPD 121.

As NFEC contends, the shrinkage test does not specify time or temperature, factors which affect test results. We find persuasive NFEC's argument that the shrinkage test (to which may be added the related low temperature flexibility test and resistance to heat aging test) is not necessarily an indicator of shrinkage after a number of years under actual weather conditions. While some of the xenon tests included exposure to water, none of the tests included exposure to heat, which NFEC alleges is a significant contributor to shrinkage and embrittlement. Under these circumstances, we cannot conclude that PMS has shown that it was clearly unreasonable for NFEC to determine that PVC materials are subject to shrinkage and embrittlement due to plasticizer migration.

With regard to PMS's allegation that Sucoflex is superior to EPDM in other critical areas, we agree with NFEC that this allegation is irrelevant since it does not address the stated basis for excluding PVC--shrinkage and embrittlement.

Concerning the other NFEC solicitation requiring PVC, NFEC denies that either its divisional office or its headquarters had knowledge of that solicitation and claims that the specifications were prepared by an architect/engineer firm. PMS presents no evidence proving otherwise. Accordingly, we cannot conclude that NFEC has inconsistently determined that only EPDM can meet its minimum needs where an NFEC installation, apparently acting independently of the divisional office and headquarters, required PVC under a solicitation.

We deny the protest.

Milton J. Socolar

for Comptroller General
of the United States