DECISION

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

FILE: B-216260.2 **DATE:** May 13, 1985

MATTER OF: Evans, Inc.

DIGEST:

1. Protest is timely where it was filed with the contracting agency more than 10 working days after bid opening, but within 10 working days after the protester learned of the basis for protest, and subsequent protest to GAO was filed within 10 working days after notice of adverse agency action.

2. Solicitation requirement for manufacturer's certification of extended parts availability is met by certification from bidder which supplies entire system and itself manufactures at least half of the equipment supplied, where the procuring agency determines that the bidder should be considered the manufacturer of the entire system for certification purposes.

3. Discrepancy of 1.5 inches between solicitation dryer dimension requirement of 120-inch and 118.5-inch dryer offered by bidder may be waived by procuring agency as a minor deviation where the solicitation also provided for responsiveness determination on the basis of use history, and the deviation had no material effect on price or performance.

4. Alleged lack of American Society of Mechanical Engineers certification will not be considered since solicitation may not properly require such certification.

5. Alleged failure of bidder to comply with Occupational Safety and Health Administration safety standards is not for consideration by our Office.

6. Bid which indicates compliance with solicitation dryer capacity requirement and utilizes dryer rated by manufacturer at capacity which exceeds these requirements is responsive.

7. Allegation that the system design accepted by procuring agency does not meet general solicitation requirement for a safe and efficient design is denied where the agency technical review team determined that the system does meet the design requirements and the protester's objection is essentially a technical dispute reflecting the protester's disagreement with the merits of the awardee's design approach.

8. Protest that bid was improperly rejected as nonresponsive is academic and not for consideration where protester would not be in line for award even if protest allegation was sustained.

Evans, Inc. (Evans), protests the award of a contract for a laundry system to G.A. Braun, Inc. (Braun), under solicitation No. 532015-84, a small business set-aside, issued by the Veterans Administration (VA). Evans asserts that its bid was improperly found nonresponsive, and that Braun's bid should have been rejected as nonresponsive.

We find the protest without merit.

The VA received only two bids for the system. Braun's bid was evaluated at $1,100,486; Evan's bid was $1,197,325, with an alternate bid of $1,228,025. Evans initially protested Braun's small business size status. Our Office dismissed this protest, Evans, Inc., B-216260, Sept. 13, 1984, 84-2 C.P.D. ¶ 290, because we do not consider size status protests, since the Small Business Administration (SBA) has conclusive authority to determine matters of small business size status for federal procurements. SBA subsequently dismissed the size status protest on the basis that Evans failed to provide support for its allegations.

While the size status protest was pending, the VA, by letter dated September 6, 1984, advised Evans that its bid was determined nonresponsive for four reasons. Evans protested this determination to the VA on September 17, 1984, which was denied by letter dated September 24, 1984.

On September 25, 1984, VA awarded the contract to Braun and sent Evans an award notification letter. Evans' protest was filed (received) in our Office on October 9, 1984.

The VA contends that Evans' protest is untimely filed under our Bid Protest Procedures, 4 C.F.R. §§ 21.2(a) and (b)(2) (1984), since bid opening occurred on August 28, 1984, but Evans' initial protest to VA was not received by the contracting officer until September 17, 1984, more than 10 working days later. However, this assumes that Evans knew at bid opening that VA would find the Braun bid responsive, a fact which Evans did not learn until substantially later. It also assumes that Evans knew that VA would determine Evans' bid to be nonresponsive, which, in fact, was not made known to Evans until some time after September 6. Thus, Evans' initial protest to VA was timely filed within 10 working days after it knew the basis for its protest, and its protest to GAO was filed within 10 working days after it received notice of adverse agency action. Accordingly, the protest is timely filed with our Office.

Evans cites seven reasons why Braun's bid should have been rejected as nonresponsive. We will deal with these allegations individually.

The solicitation required a manufacturer's certification of parts availability for a 10-year period. It is contended that while Braun certified the availability of parts, Braun does not manufacture certain portions of the laundry system. Although Evans characterizes this as a responsiveness issue, it is, in fact, a responsibility matter. Responsiveness concerns the question of whether a bidder has varied or taken exception to a material requirement contained in a solicitation. Braun, the manufacturer of a majority of the components utilized in the system which it bid, specifically stated in its bid cover letter that it was providing the manufacturer's certification called for in the solicitation. Thus, having materially conformed to the solicitation specifications in this regard, the bid is responsive. J. Baranello and Sons, 58 Comp. Gen. 509 (1979), 79-1 C.P.D. ¶ 322.

Evans is actually contesting whether Braun is able to to perform in accordance with the terms of the solicitation, which is a matter of responsibility. More particularly, Evans is challenging whether Braun is able to make the manufacturer's certification, as required by the solicitation, since Braun is not the manufacturer of some of the equipment. This constitutes a question of whether

Braun meets a definitive responsibility criterion--in this instance, a requirement for a parts availability certification for an extended period of time by an entity which manufactures the machinery. Compliance with such a requirement may not be waived by a contracting officer, and our Office will review the agency determination to see whether it had a reasonable basis. However, we have held that compliance does not necessarily mean literal compliance with the specific letter of the definitive criterion. J. Baranello and Sons, 58 Comp. Gen. 509, supra.

In this case, Evans concedes that Braun is the manufacturer of 50 percent of the system, but asserts that since Braun is only a regular dealer for the balance, Braun cannot properly make the spare parts certification. The contracting officer determined that the item being procured under the solicitation is the total laundry system, for which Braun is, in effect, the manufacturer, and can properly make the spare parts availability certification. In our view, since Braun is clearly the manufacturer of a substantial portion of the equipment and is willing to certify to the parts availability of the balance of the equipment which makes up the total system it is offering, the VA could reasonably conclude that this certification met the solicitation requirement.

Regarding an allegation that Braun's ironer is 118.5 inches wide rather than 120 inches as specified by the solicitation, the VA determined that the deviation was immaterial because it did not affect the system performance requirements. Evans does not assert that the deviation has any effect on performance. Rather, Evans contends that the specifications contain a specific requirement from which Braun's bid should not be able to vary without being found nonresponsive.

In our view, VA properly waived the deficiency as minor. We note that while the dimension is derived from Mil Spec. 00-I-1874B, which is incorporated by reference in the solicitation, the solicitation also contains a provision, M-3, which indicates that in determining the responsiveness of bids, individual equipment items would be evaluated on the basis of advertised commercial unit ratings and actual use history. In this instance, the contracting officer determined that the unit has been successfully used in 20 other similar VA installations. Moreover, Evans has not demonstrated, or even argued, that it was prejudiced because it could have offered a less expensive unit had it been able to use the slightly smaller dimension

which VA accepted. In view of the circumstances, we find that the contracting officer had a reasonable basis to waive the deviation. Magnaflux Corporation, B-211914, Dec. 20, 1983, 84-1 C.P.D. ¶ 4; Champion Road Machinery International Corporation, B-200678, July 13, 1981, 81-2 C.P.D. ¶ 27.

Evans further argues that the Braun equipment lacks the required ASME (American Society of Mechanical Engineers) certification. The contracting officer determined that while the Mil Spec. referenced ASME approval, ASME criteria exempt the Braun ironer from ASME certification because it has a capacity below that requiring certification. Moreover, we have specifically held that a solicitation requirement for ASME approval without recognizing equivalents is impermissible since it is unduly restrictive. Precision Piping Incorporated; M & S Mechanicial Corporation, B-204024, Mar. 9, 1982, 82-1 C.P.D. ¶ 215. Accordingly, this basis of protest is denied.

Evans also contends that the Braun system is unsafe because it fails to comply with Occupational Safety and Health Administration (OSHA) regulations. The VA technical evaluators reviewed the Braun system and determined that it met all safety reguirements. Our Office will not consider the allegation that Braun's system does not satisfy OSHA regulations since 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, 678 (1982); King-Fisher Company, B-209097, July 29, 1983, 83-2 C.P.D. ¶ 150.

Evans contends that the Braun dryer does not comply with the solicitation requirement that the dryer tumblers be capable of producing 900 pounds per hour. Evans bases this allegation on various calculations which it has made regarding the operation of the Braun system. However, as VA has pointed out, the dryer specified by Braun is rated by the manufacturer at 1,100 pounds per hour and, thus, exceeds the requirement. Moreover, Braun has not taken any exception in its bid to this requirement. Accordingly, there is no basis to find Braun's bid nonresponsive in this regard.

Evans asserts that the Braun system design is noncompliant with the specifications because it contains bottlenecks in the workflow process because of its sling and garment finishing layout. Evans does not point to any specific solicitation design requirements, but rather to

the general requirement that the design of the system be safe and efficient. A VA technical review team evaluated the Braun system and determined that it complied with all material requirements of the solicitation. Evans' particular objection is that the Braun system utilizes a single lane dryfold sling system which Evans contends is inefficient. The VA technical review team did not find this to be the case. Evans is essentially contending that it has greater technical expertise and a better knowledge of what features are required for the efficient operation of the system than does the contracting activity. However, the determination of an agency's minimum needs is largely discretionary on the part of agency contracting officials. A procuring agency's technical conclusions concerning its actual needs are entitled to great weight and will be accepted unless there is a clear showing that the conclusions are arbitrary. Industrial Acoustics Company, Inc., et al., B-194517, Feb. 19, 1980, 80-1 C.P.D. ¶ 139. It is not the function of our Office to conduct an independent analysis of a contracting agency's needs. Here, we are faced with an essentially technical dispute. Evans has not shown that the VA technical review team's conclusions are arbitrary or unreasonable, but only that it believes that the technical conclusions regarding design efficiency are wrong. Such an argument does not meet the protester's burden of proof. Rack Engineering Company, B-208615, Mar. 10, 1983, 83-1 C.P.D. ¶ 242.

Evans has also objected to the four bases on which its bid was determined to be nonresponsive. However, as indicated above, Braun's low bid was properly determined to be responsive by the VA. Accordingly, even if Evans' bid were found to be responsive, it would not be in line for award. Under these circumstances, the question of the responsiveness of Evan's bid is academic, and we will not consider this aspect of the protest. Universal Parts and Services, Inc., B-216767; B-216806, Dec. 12, 1984, 84-2 C.P.D. ¶ 660.

We dismiss the protest in part and deny it in part.

for Seymour Efros
Harry R. Van Cleve
General Counsel