

DECISION

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

31677

FILE: B-218413 **DATE:** July 12, 1985
MATTER OF: Davlin Paint Company

DIGEST:

Agency's specifications are not unduly restrictive of competition where the agency presents a reasonable explanation why the specifications are necessary to meet its minimum needs, and the protester fails to show that the restrictions are clearly unreasonable under the circumstances.

Davlin Paint Company (Davlin) protests that the specifications used by the Air Force under invitation for bids (IFB) No. F64605-85-B-0035 unduly restrict competition. We deny the protest.

The IFB was issued on February 27, 1985, for an emergency purchase of 14,850 gallons of water repellent concrete stain and 1,100 gallons of stain reducer to be used in camouflaging concrete structures and runways at Osan Air Base, Korea. Due to construction in 1983 which left a checkerboard pattern on the runway, the Air Force determined that it was urgent to accomplish tonedown of the runway because the base's defense capability was in jeopardy. The IFB was issued for brand name(s)--"Canyon Tone Stain" manufactured by United Coatings and "Keim-Concreton Stain" manufactured by Keim Industries (KI)--or equal products and listed several salient characteristics of the products, including a minimum flash point of 100°F. Bidders offering equal products were required to submit notarized certificates of product conformance accompanied by laboratory test results showing equality of the product, along with descriptive literature.

Davlin contends that the flash point, testing, and descriptive literature requirements were drafted by the Air Force to restrict the IFB to only one product, Canyon Tone stain. Davlin advises that it investigated the KI product line and found that KI's products do not comply with the IFB's requirements. Also, Davlin alleges that KI will not be able to bid for the contract because its supplier does not keep a sufficient amount of stain in stock. Davlin

032549

further alleges that the flash point requirement is excessive. It points out that in 1982 it provided its own stain, "Davlin Acryton 2130", with a flash point of 47°F for the same requirement, and that the stain reducer, which will accompany the stain, does not have the same flash point requirement.

Davlin also contends that the requirements prevent a new manufacturer from competing because there was an insufficient amount of time between issuance of the IFB and bid opening on March 29, 1985, to have a new product tested and to make descriptive literature available. Davlin advises that it is fully capable of reformulating its product to comply with the flash point requirement but that the testing and descriptive literature requirements make it impossible to compete for the contract.

Where, as here, a protester challenges specifications as being unduly restrictive of competition, the procuring agency bears the burden of presenting prima facie support for its position that the restrictions are necessary to meet its actual minimum needs. Deere & Co., B-212203, Oct. 12, 1983, 83-2 C.P.D. ¶ 456. If such support is submitted, the burden then shifts to the protester to show that the specifications in dispute are clearly unreasonable. Id. The contracting agency's initial burden reflects its statutory obligation to create specifications that permit such free and full competition as is consistent with the agency's actual needs, 10 U.S.C. § 2305 (1982), while the protester's burden of proof stems from the fact that the determination of the government's minimum needs and the best method of accommodating those needs are primarily matters of the contracting agency's discretion. See Bataco Industries, Inc., B-212847, Feb. 13, 1984, 84-1 C.P.D. ¶ 179.

In this regard, specifications based upon a particular product are not improper in and of themselves, and a protest that a specification was "written around" design features of a competitor's product fails to provide a valid basis for protest where the agency establishes that the specification is reasonably related to its minimum needs. Amray, Inc., B-208308, Jan. 17, 1983, 83-1 C.P.D. ¶ 43. A specification is not improper merely because a potential bidder cannot meet its requirements. Tooling Technology, Inc., B-215079, Aug. 6, 1984, 84-2 C.P.D. ¶ 155; Deere & Co., supra.

The Air Force reports that by the March 29 bid opening date, which was postponed due to the protest, eight bids had been received. The Air Force further reports that the specifications were based on those currently used by the

Corps of Engineers for the purchase of concrete stains. Regarding the minimum flash point, the Air Force states that it was established as a necessity for air transportation of the stain. Also, the Air Force advises that the stain reducer is required to clean the spray equipment and as such can be shipped by (ocean-going) vessel when available. The Air Force states that:

"the primary urgency lies in application of the stain and although it would be convenient to ship both stain and reducer together, it is not necessary because some quantities of suitable solvents are available at the site for immediate use in cleaning spray equipment."

The Air Force reports that the requirement for submitting descriptive literature and test results was necessary to determine product acceptability during the evaluation phase of the procurement. The Air Force states that testing product properties is not in itself unique and is normally performed on commercial products by manufacturers in the industry. The Air Force advises that due to the fact that application of the stain will begin soon after its receipt, there is not time for government testing of the stain prior to acceptance. The Air Force has cited difficulties it has had with stains previously procured without descriptive literature and test results. The Air Force advises that the requirement for currently manufactured and proven material is necessary to assure the reliability of the material.

In our view, the Air Force has established that the specifications are prima facie reasonable and Davlin has failed to establish that the specifications are unreasonable. Davlin in rebuttal argues that the flash point requirement has nothing to do with transporting the stain because the requirement originated from a master guide specification. Notwithstanding the derivation of the requirement, we do not find it unreasonable that the Air Force would set a relatively high flash point since it reduces the risk in transporting the stain and permits shipment by air when such shipment is necessary. Moreover, descriptive data was needed to determine prior to award whether the equal product offered met the specifications and to establish precisely what the bidder was furnishing. This requirement flows from the "brand name or equal" clause contained in the solicitation and to which the protester has not objected.

Regarding Davlin's argument that KI's product does not comply with the specifications, Davlin draws this conclusion from technical data sheets for other KI products. Davlin states it has been unable to locate a data sheet for KI's concrete stain. Therefore, we view Davlin's conclusions as mere supposition and speculation, which does not meet its burden of proof. R. P. Sita, Inc., B-217027, Jan. 14, 1985, 85-1 C.P.D. ¶ 39.

The protest is denied.

for *Raymond E. Evers*
Harry R. Van Cleve
General Counsel