



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: American Sterilizer Company

File: B-223493

Date: October 31, 1986

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### DIGEST

1. Protest against allegedly restrictive specifications is academic where the protester's products are, in fact, acceptable under these specifications.
2. Protester's interest in benefiting from more restrictive specifications is not protectable under General Accounting Office bid protest function.
3. Specification that storage modules be made of material with "integral color throughout," and specification requiring wall-unit storage modules to have hooks that are molded on, rather than adjustable, are overly restrictive where the agency does not make a prima facie showing that the restrictions are necessary to meet its actual minimum needs.
4. Protest that evaluation system established in request for proposals improperly favors one offeror's product is untimely where the protester did not provide factual details of this basis of protest until protester filed comments on agency report. In any event, evaluation point score system does not appear to be improper since the system is based directly on the specifications and merely incorporates a numerical system to reflect the degree of compliance with the specifications.
5. Protest based on alleged improprieties in a solicitation is untimely where these alleged improprieties were not raised until conference on initial grounds of protest which did not take place until after the closing date for receipt of initial proposals.

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### DECISION

American Sterilizer Company (Amsco) protests against the specifications issued by the Veterans Administration (VA) in

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request for proposals (RFP) NO. 640-34-86, alleging that the specifications are overly restrictive and preferential to one manufacturer.

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

The solicitation is for a system of modular storage units for the management of clean and sterile medical supplies, soiled medical supplies and equipment, and storage of clean linens for the VA Medical Center in Palo Alto, California. The solicitation was initially issued on February 15, 1985, as a brand-name or equal procurement, using sealed bidding procedures. The invitation for bids (IFB) designated Amsco's brand name Unicell as the desired system. Competitive bids were solicited and bids were received from Amsco and Space Designs (offering storage units manufactured by Herman Miller, Inc. as an "equal" product). The agency awarded the contract to Space Designs, Inc., and Amsco protested the award on the basis that the Herman Miller system was nonresponsive to the terms of the IFB. See American Sterilizer Co., 64 Comp. Gen. 868 (1985), 85-2 CPD ¶ 313. As a result of the protest and a complaint filed in the United States District Court for the District of Columbia, see American Sterilizer Co. v. Harry N. Walters, Civil Action No. 85-2310, the VA terminated the contract that had been awarded to Space Designs, Inc. and reissued the solicitation as the RFP now in dispute.

The present RFP lists salient characteristics for each of the required components in the storage system and indicates that these represent the minimum requirements of the medical center. Offerors are warned that products not meeting each of the listed characteristics would be subject to rejection. Only Herman Miller, Inc. (HMI) has submitted a proposal in response to this RFP.

Generally, Amsco protests that the RFP was drafted to describe a line of products offered by HMI, that the features listed as salient characteristics do not in fact reflect the agency's actual minimum needs, and, therefore, the RFP is unduly restrictive of competition. Amsco also contends that the evaluation scheme favors only the particular features of HMI's product.

Amsco provides several specific examples of requirements it considers unduly restrictive of competition. First, Amsco cites two provisions covering "basic support elements," or rails: that thermoplastic rails must be of integral color throughout, and that rails must be able to be cut to any length using simple hand tools. The VA notes, however, that

the specifications indicate that rails may be made of "cold-rolled steel, extruded aluminum or of fire-retardant thermoplastic" and that the requirement for integrated color relates only to rails made of thermoplastic. Therefore, the agency points out that Amsco's product, with rails made of extruded aluminum, is acceptable under the specification. Similarly, the agency reports that Amsco's rail can be cut by simple hand tools and thus satisfies this requirement in the RFP. Since the agency indicates that Amsco's product is acceptable under these specifications, we dismiss these bases of Amsco's protest as academic. See Advance Machine Co., B-219766, Nov. 5, 1985, 85-2 CPD ¶ 526.

Amsco also protests a specification requiring panels in sizes "obviously preferential to HMI." The protester alleges that the VA has drafted the specifications around HMI's product lines to require standard, fabric, and open panels in three sizes and glazed panels in only two sizes. Amsco manufactures the panels in the sizes required by the specifications, as well as the additional sizes it contends should be required. Amsco contends that the agency should require coordinated sizes for all types of panels rather than describing the panel sizes of HMI's standard products.

Similarly, Amsco objects that the RFP requires built-in "stops" in drawers to prevent accidental removal, but includes no such requirement for stops in shelves. Amsco's product meets the specifications as written, since it includes the "stops" in its shelves as well as its drawers. The protester alleges that HMI only provides this feature in its drawers and that the agency's failure to require stops in the shelves again reflects a bias in favor of HMI.

We find no merit to either of these bases of protest. Amsco's product complies with each of these requirements. In each case, Amsco is in effect arguing that the specifications should have been more restrictive, rather than less. However, our Office will not consider the merits of such an allegation, since our role in resolving bid protests is to ensure that statutory requirements for full and open competition have been met. See California Mobile Communications, B-224398, Aug. 29, 1986, 86-2 CPD ¶ 244. Since the VA has determined that these specifications meet its minimum needs, and because the protester's interest in benefiting from more restrictive specifications is not protectable under our bid protest function, we will not consider these bases of protest further.

Amsco also cites the following specification for "material handling components" as unduly restrictive: "all components

must have their color integral throughout the material used for construction to prolong acceptable appearance and minimize maintenance when scratched or abraded. For example, painted surfaces can fade or be abraded exposing the base material, thereby requiring refinishing." Amsco argues that this requirement merely describes the material used by HMI and that in fact the specified raw plastic products will show greater wear from abrasion than the urethane-coated units manufactured by Amsco.

The VA responds that this requirement reflects the Medical Center's sanitation requirements and that the Medical Center requires products that will "prevent the growth of bacteria, prevent injury to patients, visitors or staff, support the concept of modularity, limit their size and weight, make them rust resistant and etc." The agency also argues, in essence, that the specifications are to some extent discretionary rather than absolute, pointing out that the opening paragraph on salient characteristics states that "products not meeting all of the characteristics may be rejected in total as nonresponsive." The VA emphasizes the use of "may," rather than "shall," in this provision.

A contracting agency may impose restrictions on competition only if it can be shown that the restrictions are deemed necessary to meet its actual minimum needs, since the benefit of competition both to the government and to the public in terms of price and other factors is directly proportional to the extent of the competition. Tennant Co., B-205914.2, Dec. 20, 1982, 82-2 CPD ¶ 546. When a protester challenges specifications as 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. This requirement reflects the agency's obligation to create specifications that permit full and open competition to the extent consistent with the agency's actual needs. 41 U.S.C. § 253(a)(1)(A) (Supp. II 1982).

The determination of the government's minimum needs and the best methods of accommodating those needs are primarily matters within the contracting agency's discretion. Bataco Industries, Inc., B-212847, Feb. 13, 1984, 84-1 CPD ¶ 179. The adequacy of the agency's justification for its chosen method of accommodating its needs is ascertained through examining whether the agency's explanation is reasonable, that is, whether the explanation can withstand logical scrutiny. R. R. Mongeau Engineers, Inc., et al., July 8, 1985, 85-2 CPD ¶ 29. Once this prima facie support is established, the burden shifts to the protester to rebut

the agency's position and show that the allegedly restrictive provisions are unreasonable. UNICO, Inc., B-217255, Aug. 7, 1985, 85-2 CPD ¶ 138.

We do not find that the VA has made a prima facie showing that the restrictive provision is necessary to meet its needs. We do not believe the agency's reference to sanitation requirements and injury prevention, etc., reasonably explains why only materials with integral color are acceptable for these components. The agency asserts that procuring agencies enjoy broad discretion in determining their own minimum needs and concludes that this requirement is necessary to meet its actual minimum needs, but offers no explanation as to why competition must be restricted to this one type of material.

Furthermore, we do not agree that the requirement, as expressed in the RFP, is discretionary. The introductory language (explaining the role of salient characteristics in the RFP) cited in the agency response goes on to explain: "Therefore, even though a product may command a perfect evaluation score providing all the features deemed 'highly desirable,' it must still possess each and every one of the salient characteristics listed below or be subject to rejection." While the contracting officer stated in his response to the protester; "I am familiar with your products surfaces and would not reject your offer based upon this factor alone," this assurance does not mean that Amsco's product would be evaluated as fully satisfying the specification. Indeed, such assurance would be improper because it contradicts the "salient characteristics" terms of the RFP. Accordingly, we find that this specification is unduly restrictive.

Amsco also objects to a requirement in the specifications that large storage modules must have "hooks integrally molded to the back." The protester contends that this requirement represents a particular feature offered by HMI that neither is necessary to meet the agency's needs, nor is it the best mounting system available.

The agency responds that the requirement for integrally molded hooks "provides for smooth surfaces, facilitates washing and prevents the harboring and accumulation of dirt." Further, it notes that modules with separate mounting attachments create unnecessary additional areas for bacterial growth and require an additional expenditure of labor for adjusting the hooks and maintaining spare parts.

In rebuttal, Amsco points out that although HMI's molded hooks may eliminate some dirt and bacteria-harboring crevices, any advantage gained thereby is negated by the fact that HMI's lockers are constructed of five separate pieces, and the seams that result from bonding the five panels together provide even greater potential for harboring dirt and bacteria. Amsco also points out that its own storage units while molded of one solid piece to minimize crevices conducive to the accumulation of dirt and bacteria, use an adjustable mounting key with a wider area of attachment than HMI's molded hook and have four different mounting positions.

Although the agency's argument is not without an element of reason, we do not find that the VA has established prima facie support for this requirement. The agency report offers no explanation why the elimination of crevices on the back of the wall units, around the hooks, represents the government's minimum need, given the fact that the specifications do not generally express a preference for molded construction or require that the units have as few crevices or seams as possible. Furthermore, the agency has not offered any support for its conclusion that an adjustable hook system would require a significant amount of additional labor. In our view, the VA's response does not demonstrate that the requirement is a legitimate restriction based on the agency's minimum needs. We find this conclusion questionable in light of the fact that only one offeror is known to be able to supply this feature and because that one offeror's product has a number of seams which would appear to be as likely to harbor dirt and bacteria as would the junction of the hook and the back of the modules. We are mindful, in this regard, of the general rule that if a specification requirement is reasonable and necessary, the fact that only one firm may be able to comply with it does not indicate that a violation of the competitive procurement regulations has occurred. See Advance Machine Co., B-219766, supra. However, since the VA has not clearly shown that the requirement is necessary, and the restriction has the effect of needlessly excluding potential competitors, we find that the solicitation does not satisfy the requirement for full and open competition. Here, the solicitation was initially issued on a "brand-name or equal" basis and named the protester's product; we find it especially questionable in these circumstances that the revised specifications should include design details that the previously preferred product does not offer. We therefore sustain this portion of the protest.

Amsco also has protested against the "mock-up" evaluation system established in the RFP, in which a specified number of

points are awarded to a proposed product when the enumerated evaluation criteria are satisfied. Amsco contends that the system does not permit any credit to be given for products offering features different from those offered by HMI, even where the product is superior to HMI's product. The protester concludes, therefore, that the system is arbitrary and capricious.

Amsco is arguing, in effect, that the evaluation system only allows a high score to be given where the proposed product conforms to the specifications as written, but does not allow special consideration of products with features that exceed the product features described in the RFP. However, Amsco provided no detail on this protest issue until it filed its comments on the agency report. Accordingly, such information furnished on a piecemeal basis does not satisfy the protester's responsibility to provide a detailed statement of the factual grounds of protest. See Beech Aerospace Services, Inc., B-220078, Dec. 20, 1985, 85-2 CPD ¶ 694 at 4; 4 C.F.R. § 21.1(b)(4) (1986).

In any event, here, the "evaluation criteria form" is basically a reiteration of the specification requirements that incorporates a point-score system to reflect the offered product's level of compliance (or noncompliance) with the specifications. To the extent the specifications legitimately reflect the agency's minimum needs, we, therefore, cannot agree that it is arbitrary or capricious.

Finally, Amsco raised several other objections to specific requirements in the RFP during the bid protest conference held in our Office and in its written comments submitted thereafter. These points were untimely raised, since they involved alleged improprieties apparent on the face of the solicitation but were not raised before the closing date for receipt of initial proposals (June 27, 1986) as required under our Bid Protest Regulations. Beech Aerospace Services, Inc., B-220078, supra at 5; 4 C.F.R. § 21.2(a)(1).

We sustain Amsco's protest on the basis that the specifications discussed above--requiring components to be constructed of materials with integral color and requiring hooks on storage units to be molded on--are unduly restrictive of

competition. Accordingly, we are recommending that the VA amend the RFP to provide specifications that permit full and open competition and accurately represent the agency's minimum needs.

*for Milton J. Fowler*  
Comptroller General  
of the United States