The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Interface Flooring Systems, Inc.

File: B-225439

Date: March 4, 1987

DIGEST

1. Protest to General Accounting Office (GAO) after denial of agency-level protest challenging specifications as defective is timely even though filed more than 10 days after receipt of initial proposals under challenged solicitation where protester reasonably concluded from the contracting officer's statements that receipt of proposals did not represent adverse action on the protest, and subsequent protest to GAO was filed within 10 days after protester received agency's formal denial of the protest.

2. Contention that contracting agency's decision to allow offerors to propose alternate backing materials for carpet tiles is inconsistent with applicable specification because the alternate materials do not meet the shrinkage standard in the specification is without merit where protester fails to show that the alternate materials exceed the maximum shrinkage rate.

3. Specification for antimicrobial carpet is ambiguous and vague since it does not adequately describe the type of antimicrobial activity or level of effectiveness required.

DECISION

Interface Flooring Systems, Inc. protests any award for antimicrobial carpet and Class 2 vinyl hardback carpet tiles under request for proposals (RFP) No. FCNH-F8-1887-N-7-22-86, issued by the General Services Administration (GSA). Interface maintains that (1) the specification in the RFP for vinyl hardback tile is defective because it permits the use of alternate backing materials which do not meet the shrinkage standard in the applicable general federal specification; and (2) the specification for antimicrobial carpet is ambiguous with regard to the type and degree of antimicrobial activity required. We sustain the protest in part and deny it in part.

The RFP, issued on June 18, 1986, provided for award of indefinite quantity Federal Supply Schedule contracts for various types of floor coverings, including carpet, carpet tiles, and carpet cushions. On July 14, Interface filed a protest with GSA challenging as defective the specifications for antimicrobial carpet and vinyl hardback carpet tile. Initial proposals then were received on July 29, followed by best and final offers on September 23. GSA subsequently denied Interface's protest by letter dated October 9, which was received by Interface on October 15.

Interface then filed its protest with our Office on October 29. That same date, GSA awarded a contract to J&J Industries, Inc. for one of the two line items for antimicrobial carpet.1/ On December 3, GSA authorized continuation of performance under the contract notwithstanding the protest based on its finding under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(d)(2)(A)(ii) (Supp. III 1985), that urgent and compelling circumstances significantly affecting interests of the United States would not permit delaying contract performance until the protest is resolved. In addition, on January 13, 1987, GSA authorized the award of contracts for the line items for vinyl hardback carpet tiles, based on its finding under CICA, 31 U.S.C. § 3553(c)(2), that urgent and compelling circumstances would not permit further delay in making those awards.

As a preliminary matter, GSA argues that the protest is untimely because it was not filed within 10 days after the due date for initial proposals, July 29. We disagree. As discussed above, Interface filed a protest with GSA on July 14, raising the same issues as the current protest to our Office. Interface maintains, and GSA does not dispute, that before the initial closing date, the protester telephoned the contracting officer to request a decision on the protest. According to Interface, the contracting officer stated that GSA would not issue a decision on the protest until after submission of initial offers on July 29. Interface states further that during the following month, it telephoned the contracting officer again with regard to the protest, and was advised that no decision on the protest would be issued until after submission of best and final

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1/ Since GSA was not advised by our Office that the protest had been filed until October 30, the day after award was made, the statutory suspension of contract award pending resolution of a protest did not apply. See CICA, 31 U.S.C. § 3553(c)(1).

offers. After receiving GSA's request for best and final offers, issued on September 10, Interface was advised by the contracting officer that a decision on the protest would be issued prior to contract award, but not before receipt of best and final offers, due September 23. On October 15, Interface received from GSA a letter dated October 9, denying the protest. On October 29, the tenth working day after receiving the GSA letter, Interface filed its protest with our Office.

Under our regulations, protests challenging specifications as defective generally must be filed with either the contracting agency or our Office before the due date for initial proposals. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1986). Where, as here, the protest is filed first with the contracting agency, a subsequent protest to our Office must be filed within 10 days of adverse action on the protest by the agency. 4 C.F.R. § 21.2(a)(3). Acceptance of initial proposals in the face of a protest generally constitutes adverse agency action triggering the 10-day filing requirement. Federal Acquisition Management Training Service, B-220070, Nov. 26, 1985, 85-2 CPD ¶ 604.

We have held that a protest is timely even when filed more than 10 days after receipt of proposals, however, when the contracting officer indicated to the protester that the decision to proceed with receipt of proposals should not be interpreted to mean that the protest had been denied, and the subsequent protest to our Office was filed within 10 days after the agency's formal denial of the protest. Centurial Products, 64 Comp. Gen. 858 (1985), 85-2 CPD ¶ 305. Similarly here, in view of the contracting officer's statements to Interface that no decision on the protest would be made until initial, and then best and final, offers were received, it was reasonable for Interface to conclude that GSA's receipt of proposals as originally scheduled did not represent adverse action on its protest, and to await GSA's formal response to the protest before filing with our Office. Since the protest was filed here within 10 days after Interface's receipt of the GSA letter denying the protest, we find that the protest is timely.

VINYL HARDBACK CARPET TILES

As Interface states, the general federal specification for vinyl hardback carpet tile, in effect since 1972, provides in part that the shrinkage rate of the tile may not exceed .08 percent. In January 1986, GSA issued a technical requirements booklet which modifies various provisions of the

1972 specification. Paragraph 16 of the booklet provides as follows:[2]/

> "Tufted Carpet Tiles
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> Whenever PVC Hardback or Class 2 Vinyl Cushioning is specified in the Item Listing, Purchase Description or Specification, alternatively, the following materials may be furnished in a hardback construction.
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> EVA (Ethylene vinyl acetate)
> Atactic Polypropylene [APP]
> PE (Polyethylene)"

Interface argues that this provision is inconsistent with the original 1972 specification because it allows the use of alternate backing materials (EVA, APP, and PE) which do not meet the .08 percent shrinkage requirement set out in the specification. We find this argument to be without merit.

GSA first argues that Interface's challenge to the revised specification for vinyl hardback tiles is untimely because Interface did not raise the specific basis for its protest--the alleged noncompliance of the alternate backing systems with the shrinkage standard--until the bid protest conference at our Office and its subsequent written comments on the GSA report. While Interface's initial protests to GSA and our Office challenged the performance characteristics of the alternate materials in general terms, those performance characteristics included shrinkage. GSA's October 9 reply to Interface's initial agency-level protest, specifically discussed the shrinkage issue, referring in particular to shrinkage testing data supplied to GSA by Interface.[3]/ We

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[2]/ These requirements in the general federal specification and the booklet are all incorporated into the subject solicitation.

[3]/ As Interface points out, GSA's October 9 letter does not acknowledge that the 1972 specification establishes a maximum shrinkage rate of .08 percent; instead, the letter states only that rates in excess of .08 percent (specifically, 0.1 percent and 0.2 percent) represent a commonly accepted standard. Despite this language in the October 9 letter, GSA does not contend that its decision to allow use of the alternate backing materials constitutes an implicit waiver of the shrinkage standard in the 1972 specification. On the contrary, GSA maintains that the alternate backing materials do meet the original shrinkage standard.

believe it is appropriate to consider Interface's challenge to the revised specification as it relates to the shrinkage standard because Interface's initial protest letter referred in general to performance characteristics which included shrinkage. Further, GSA apparently was on notice of the specific basis for Interface's objection from the time the initial protest to GSA was filed.

As support for its argument that the alternate materials do not meet the shrinkage standard in the 1972 specification, Interface relies on test results showing that certain carpet tiles made with two of the alternate backing materials, EVA and APP, have shrinkage rates exceeding the .08 percent standard. In our view, this information at most demonstrates the shrinkage properties only of the particular products tested since, as we read the record, carpet tiles using the same base material for the backing may have different characteristics depending on the precise formulation used. Thus, for example, while Interface has submitted test results for one APP-based backing which exceeds the .08 percent shrinkage standard, other test results submitted by another offeror under the RFP show not only that its own APP-backed product meets the shrinkage standard, but also that certain PVC-based backings, one of the original materials allowed by the 1972 specification, fail to meet the shrinkage standard. In addition, Interface has submitted no evidence regarding the shrinkage rate of PE, the third alternate backing material listed in the revised specification.

Since we find that Interface has failed to show that carpet tiles using the alternate backing materials necessarily exceed the maximum shrinkage rate in the specification, we deny this ground of the protest.

ANTIMICROBIAL CARPET

With regard to the requirement for carpet with antimicrobial properties, paragraph 15 of the applicable technical requirements booklet provides in pertinent part as follows:

> "Protection is to be contained in the yarn, in the backing or by other means. Carpet shall demonstrate antibacterial activity against Gram negative bacteria and Gram positive bacteria; antifungal activity against key fungi; and shall be unaffected after carpet samples have been subjected

to repeated washings following recognized laboratory procedures."[4]/

Interface argues that this specification does not adequately describe either the type or degree of antimicrobial activity the carpet is required to demonstrate or the means by which that activity will be measured. Specifically, Interface maintains that the requirement for "antibacterial activity" and "antifungal activity" is ambiguous since it reasonably could be interpreted to call for actually destroying bacteria and fungi; merely inhibiting their growth; or both.

Further, Interface maintains that the provision does not specify the degree of initial or long-term antimicrobial effectiveness required, and fails to identify how the antimicrobial properties of the carpet will be measured. According to Interface, the language calling for "repeated washings following recognized laboratory procedures" is vague since it does not specify the number or type of washings to be performed, and gives no indication of what constitutes "recognized laboratory procedures." In addition, by stating that the antimicrobial properties of the carpet are to be "unaffected," the specification fails to indicate what, if any, reduction in effectiveness over time will be acceptable.

With regard to the type of antimicrobial activity required, GSA argues that the specification clearly calls only for "inhibition" of the growth of bacteria and fungi. We disagree. In our view, the terms used in the specification--"antibacterial activity" and "antifungal activity"--on their face reasonably can be interpreted to mean any one or all of the antimicrobial effects described by Interface (destroying microbes, inhibiting their growth, or both). In addition, as part of its report on the protest, GSA submitted literature describing the four principal products used to add antimicrobial properties to carpet tile. That literature confirms Interface's contention that the terms used in the specification are subject to more than one reasonable interpretation, since the available products have different antimicrobial effects. Specifically, two of the products work only as poisons which, after ingestion by microbes present in the carpet tile, render them incapable of reproduction; the effect of these products thus is to inhibit the growth of the

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[4]/ Under the first article test provisions of the solicitation, after award is made the contractor is required to test a sample of the carpet to verify compliance with the specification. The test results then are to be submitted to GSA for approval.

microbes. A third product is described as working as a "sword," which, rather than inhibiting growth, instantly kills the microbes. A fourth product functions as both a poison and a "sword"; the advantage of this product is said to be that it helps ensure against development of microbial mutations resistant to the poison alone.

Whether any of these products meets GSA's requirement for antibacterial and antifungal activity depends on how the terms in the specification are interpreted. For example, if the specification is interpreted to require actually destroying the microbes--in our view, a reasonable interpretation--only products acting as "swords" would be acceptable; the two products acting as poisons would not meet the requirement. Further, while an offeror could overcome the ambiguity in the specification by offering a product capable of both destroying microbes and inhibiting their growth, Interface maintains, and GSA does not dispute, that the different products vary in cost, and thus the offeror's price is affected by the product he selects.

With regard to the level of effectiveness of the products and the testing methods used to establish both their initial and longer term effects, the product literature shows that different manufacturers use different tests which vary both as to testing techniques and measurement standards. The testing techniques described include a visual inspection of a treated area for the presence of bacteria; a quantitative analysis of bacterial and fungal growth; and a qualitative test measuring the "zone of inhibition" or distance around the carpet where fungus will not grow. Further, regarding the methods used to measure the duration of the antimicrobial effects, the product literature shows a wide variety of methods, ranging from 3 to 100 washings of sample carpet and including one or more different cleaning methods such as steam cleaning, shampooing, and dry powder cleaning. Thus, for example, one product claims that no bacterial growth is noticed on visual inspection after 20 shampoos of the carpet, while another product claims it produces a "zone of inhibition" after 100 "washings."

As a general rule, offerors must be given sufficient detail in an RFP to allow them to compete intelligently and on a relatively equal basis. The specifications must be free from ambiguity and describe the contracting agency's minimum needs accurately. Amdahl Corp., et al., B-212018, et al., July 1, 1983, 83-2 CPD ¶ 51. In this case, the specification is both ambiguous and vague since, as discussed above, it does not adequately describe the type of antimicrobial activity or level of effectiveness required. Because of these defects in the specification, offerors cannot determine which carpet

product will meet GSA's needs. For example, Interface states that the standard antimicrobial carpet tile it offers consists of a basic tile with an antimicrobial agent in the fiber, to which Interface adds another antimicrobial agent, "Intersept," to the carpet backing. According to Interface, it could offer the basic tile without Intersept at a substantially lower price. Since the specification fails to describe GSA's needs adequately, however, Interface cannot determine whether the lower priced product would be acceptable.

GSA argues that the specification does not describe the antimicrobial properties required more precisely because antimicrobial carpet is a relatively new product for which the carpet industry has not yet developed standard measurements or testing techniques. In effect, GSA maintains that because the carpet industry has not yet developed standards defining the properties of the product GSA seeks, the agency is justified in allowing the offerors to propose whatever product they choose, along with their own tests supporting their claims for the product's performance. The flaw in GSA's position, however, is that it permits each offeror to define the specification for itself, and to the extent they do so differently, the offerors are not competing on an equal basis. See North American Reporting, Inc., et al., 60 Comp. Gen. 64 (1980), 80-2 CPD ¶ 364.

Further, in order to determine whether any offeror's product meets the specification, GSA will have to decide whether the antimicrobial activity claimed by the offeror (and presumably supported by its own tests) is sufficient to meet GSA's needs. It is unclear how GSA will make this determination, since it admittedly has not yet established any standards for initial or long-term effectiveness; however, since GSA apparently believes that it will be able to determine if a product meets its requirements after award is made, we see no justification for failing to disclose those requirements in the specification itself.

Since we find that the specification for antimicrobial carpet is ambiguous and vague, we sustain the protest on that ground. Accordingly, we recommend that GSA terminate for convenience the contract already awarded and recompete both line items for the carpet using a new specification which more clearly sets out GSA's requirements.5/ In addition,

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5/ As noted above, the RFP contained two line items for antimicrobial carpet. GSA made award and authorized performance of the contract notwithstanding the protest under one line item; no award has yet been made for the second line item.

we find that Interface is entitled to recover the costs of filing and pursuing the protest, since, by successfully challenging the specification for antimicrobial carpet, Interface has helped enhance competition under the RFP. See Southern Technologies, Inc., B-224328, Jan. 9, 1987, 66 Comp. Gen.____, 87-1 CPD ¶ ___.

We, however, deny Interface's request for recovery of its proposal preparation costs, because it chose to submit a proposal despite its view that the specifications were defective. 4 C.F.R. § 21.6(e).

The protest is sustained in part and denied in part.

for Milton J. Socolar
Comptroller General
of the United States