



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tri Tool Inc.
File: B-229932
Date: March 25, 1988

DIGEST

1. Under solicitation calling for award of firm, fixed-price contract, protester whose price was not second low nevertheless is an interested party to challenge contracting agency's alleged waiver of material specifications by accepting nonconforming low offer since, if the protest is sustained, protester could have opportunity to submit new proposal.
2. Protest in negotiated brand name or equal procurement that agency improperly made award to firm whose proposal did not meet certain salient characteristics is denied where protester does not demonstrate that agency's technical judgment that awardee's proposal meets the salient characteristics is unreasonable.

DECISION

Tri Tool Inc. protests the award of a firm, fixed-price contract to Applied Energy Systems, Inc., under request for proposals (RFP) No. N00311-87-R-0014, issued by the Department of the Navy, Pearl Harbor Naval Shipyard, Pearl Harbor, Hawaii, for five pipe bevelers. Tri Tool contends that the evaluation of its proposal was not on the same basis as that of the awardee because the agency allegedly relaxed specification requirements for Applied Energy without affording Tri Tool an opportunity to submit a price based upon the relaxed specification.

We deny the protest.

The RFP solicited offers on a "brand name or equal" basis, naming for item No. 0001 the Tri Tool Inc. Model 904-S Powerhead, or equal, and for item No. 0002 the Tri Tool Inc. Model 202A Minibeveler, or equal. The RFP advised offerors that the determination as to equality of an offered product would be based "on information furnished by the offeror or identified in his proposal, as well as other information

041681

reasonably available to the purchasing activity." The clause also called for submission of all descriptive materials necessary for the agency to determine whether the product offered met the RFP's salient characteristics, and required offerors to warrant that any "equal" item conforms to the applicable salient characteristics. Award was to be made to the offeror submitting the lowest-priced, technically acceptable proposal.

Four proposals were received, including those from Applied Energy and Tri Tool. Best and final offers were received by December 1, and all four offers were determined to be acceptable. The contracting officer determined that Applied Energy was the low offeror and selected that firm for award, which was made on December 11, in the amount of \$26,626. The second low acceptable offer was submitted by Mactech, Inc., and the third low offer was submitted by Tri Tool Inc.

The protester contends that, to the best of its knowledge, the equipment offered by Applied Energy does not meet the following salient characteristics: item 0001--dual speed drive receptacles, right angle drive motor, 4 to 12 inch pipe size range, form tool cutting of up to 1.5 inch thick wall on certain materials; item 0002--right angle feed. The protester argues that by making an award to a firm not complying with some of the salient characteristics, the agency essentially waived those features and thus evaluated Applied Energy's proposal on a different basis than Tri Tool's proposal. Tri Tool believes it should have been permitted to offer on these allegedly relaxed requirements.

Preliminarily, the agency contends that Tri Tool is not an "interested party" under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551 (Supp. III 1985), and our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1987), because Tri Tool would not be next in line for award even if its protest against Applied Energy were sustained. We disagree. Tri Tool's protest raises the question of whether the Navy improperly waived specifications without notifying Tri Tool and giving the firm an opportunity to offer on those allegedly relaxed requirements. Were we to agree with Tri Tool, the appropriate relief could be a recommendation that Tri Tool and other offerors be given an opportunity to compete on the revised specifications. Under these circumstances, we consider Tri Tool to have a sufficient economic interest in the outcome to be deemed an interested party.

In determining whether a particular item meets the solicitation's technical requirements set forth as salient characteristics, a contracting agency enjoys a reasonable degree of discretion, and we therefore will not disturb its

technical determination unless it is shown to be unreasonable. Panasonic Industrial Co., B-207852.2, Apr. 12, 1983, 83-1 CPD ¶ 379. Further, the protester must show that the agency's determination is unreasonable; the protester's mere disagreement with the agency's technical judgment does not make it unreasonable. VARTA Batterie AG, B-225484, Mar. 19, 1987, 87-1 CPD ¶ 311.

We have examined the record, including the proposal and descriptive literature submitted by Applied Energy, and find no basis for challenging the Navy's conclusion that the firm complied with all the material requirements of the RFP. First, as for the "dual speed drive receptacles" requirement (intended to ensure that the machine could operate at optimum speeds to cover the entire range of pipe size specified), the agency considers Applied Energy's unit to exceed this requirement (and the speed range of Tri Tool's unit) because it provides continuously variable speeds by means of an air control valve. Similarly, regarding the "right angle feed" requirement (intended to ensure that the total horizontal length of the machine would be as short as possible to allow in-place machining of pipes in cramped spaces aboard ship), the agency points out, and we have confirmed, that Applied Energy's description literature indicates that the offered units are constructed with a right angle feed.

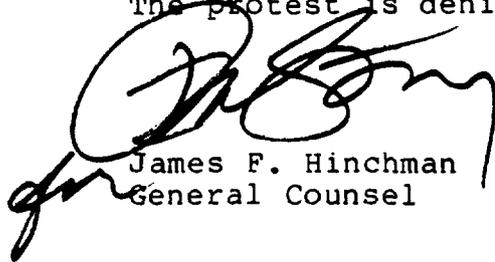
Applied Energy's descriptive literature does not specify whether the units conform to the "4 to 12 inch pipe size range," "form tool cutting," or "right angle drive motor" requirements, but Applied Energy does specifically state in an August 24, 1987, letter accompanying its descriptive literature that the Protom models S-100-12 and S-28 offered meet or exceed the stated specifications and, specifically, that the S-100-12 will definitely handle the 4 to 12 inch pipe size range. The Navy states that it also confirmed these capabilities through oral communications with Applied Energy, and Applied Energy reiterates in its protest comments that it has no problem with the specifications and intends to furnish fully compliant items, as it certified in its proposal.

Tri Tool continues to maintain in its response to the Navy's report that the salient characteristics were relaxed, but does not endeavor to explain in detail why the Navy's determination that Applied Energy's offered unit meets the specifications was in error. That is, Tri Tool has neither specifically addressed the agency's explanation of its basis for concluding that Applied Energy's offered units meet the salient characteristics in question, nor furnished or referenced any documentation that indicates Applied Energy's unit in fact does not meet all specifications. Under these

circumstances, Tri Tool has failed to establish that the Navy unreasonably found, based on all information available, including that obtained through discussions, that Applied Energy's offered unit satisfied all RFP requirements. It follows that there is no basis for Tri Tool's assertion that the award to Applied Energy represents a relaxation of the specifications.

Tri Tool objects to the agency's award to Applied Energy in the face of the protest. The record indicates, however, that the award to Applied Energy was made on December 11, and that Tri Tool's protest was not received until January 4. Since Tri Tool's protest was not received until more than 10 calendar days after award, the agency was not required to order suspension of contract performance. See 31 U.S.C. § 3553(d) (1) (Supp. III 1985); 4 C.F.R. § 21.4(b).

The protest is denied.



James F. Hinchman
General Counsel