



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Everpure, Inc.
File: B-226395.2; B-226395.3
Date: September 20, 1988

DIGEST

1. A solicitation requirement is ambiguous only where it is susceptible to two or more reasonable interpretations. Where five patents were referenced at the end of the specifications and it was stated they "may apply to the design", "are supplied as examples" and "this list is not intended to constitute a complete patent search", the protester's inference that one common feature of the five patents was necessarily required by the solicitation is unreasonable.

2. Where awardee's technical proposal was superior to protester's and was 43 percent lower in cost than protester's, the agency properly concluded that there was no reasonable chance that protester could achieve significant cost reductions along with improvements in its technical proposal so as to be competitive with awardee's proposal and a competitive range of one was justified.

DECISION

Everpure, Inc., protests a contract to ElTech Research Corporation under request for proposals (RFP) No. N00167-86-R-0138, issued by the David W. Taylor Naval Ship Research and Development Center for the design of an electrolytic chlorine generator system to disinfect potable water aboard United States Navy surface ships.

The protest is denied.

Everpure first protested that the Navy made an award to ElTech without ever requesting best and final offers. After learning that Everpure was not included in the competitive range, Everpure protested that it was improper for the Navy to exclude it from the competitive range. Everpure also protests that it was misled by the terms of the solicitation.

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With respect to the latter issue, Everpure contends that the RFP was defective because paragraph 8.1.2 of the solicitation misled Everpure.

Paragraph 8.1.2 states:

"Other Documents. The following patents may apply to the design of the electrolytic chlorine generator. They are supplied as examples and this list is not intended to constitute a complete patent search.

U.S. PATENT OFFICE

Patent Numbers

4,334,968	Apparatus for Generation of Chlorine/Chlorine Dioxide Mixtures, June 1982
4,324,635	Generation of Chlorine-Chlorine Dioxide Mixtures, April 1982
4,248,681	Generation of Chlorine/Chlorine Dioxide Mixtures, February 1981
4,308,117	Generation of Chlorine-Chlorine Dioxide Mixtures, December 1981
4,256,552	Chlorine Generator, March 1981."

Everpure states that since all five patents listed in paragraph 8.1.2 involve the use of a third electrode, Everpure designed its offered system to use a third electrode. Everpure contends that paragraph 8.1.2 in effect required the use of the third electrode and it was shocked to learn at the debriefing that the Navy considered the use of a third electrode as being disadvantageous. Everpure states that had it been informed during discussions that the third electrode was disadvantageous it would have made significant revisions to its proposal which would have reduced the proposed cost of its offered product.

Everpure contends, therefore, that since the Navy's ambiguous and misleading solicitation caused Everpure to misread the Navy's actual requirements, it has been improperly denied the opportunity to compete.

The Navy asserts that the 28 pages of specifications were unambiguous and had the Navy required a three electrode chlorine generator it would have clearly stated that requirement. The Navy does not see how an offeror could have been misled by the mere referencing of five patents at the end of the specifications, especially since they were preceded by the language that they "may apply to the design of the electrolytic chlorine generator." This language, the Navy states, clearly indicates that use of these patents was not mandatory. Moreover, the Navy states that the five patents were only examples of chlorine generators, not three-electrode chlorine generators, and Everpure unduly relies on its own interpretation of what the Navy requires to conclude that three-electrode chlorine generators were mandatory.

A solicitation requirement is ambiguous, in a legal sense, only where it is susceptible of two or more reasonable interpretations. The Owl Corp., B-224174, Dec. 23, 1986, 86-2 CPD ¶ 706. Our Office will reject allegations that specifications are subject to more than one interpretation if those allegations are based on an unreasonable or dubious interpretation of the solicitation and the requirements are stated clearly. A&C Building and Industrial Maintenance Corp., B-230270, May 12, 1988, 88-1 CPD ¶ 451.

We think that Everpure's inference that one common feature (use of a third electrode) of the five patents referenced in paragraph 8.1.2 was required by the RFP is unsupported. Nothing in the RFP required the use of any or all of the features of the five patents, and indeed paragraph 8.1.2 only indicated that the patents "may apply" and that the listed patents did not "constitute a complete patent search." Everpure merely inferred a requirement for the use of a third electrode but nothing in the RFP gives a basis for believing the third electrode was required. In fact, paragraph 2.0 of the specifications described the objective of the RFP to be designing the lightest and smallest electrolytic generator that can be achieved with state-of-the-art technology and that can perform under the constraints of Naval shipboard use and which would be simple to operate. Moreover, paragraph 4.1 of the RFP entitled "General System Configuration" only mentions a cathode electrode and an anode electrode, not the third graphite electrode unutilized by Everpure. Despite this explicit statement, Everpure chose to rely on its interpretation as to what might be required from the five referenced patents and in doing so its design was accordingly downgraded in the simplicity area of evaluation. We see neither latent nor patent ambiguity in the inclusion of paragraph 8.1.2. This basis of Everpure's protest is denied.

With respect to Everpure's exclusion from the competitive range, Everpure points out that this left only ElTech in the competitive range. The Navy states that Everpure and ElTech were both considered technically acceptable, Everpure receiving a technical score of 74.6 and ElTech 85.4. ElTech's cost proposal of \$773,142, however, was about 43 percent lower (\$333,040 lower) than Everpure's \$1,106,182, and after the appropriate greatest value analysis was made, ElTech had a total combined weighted score of 91 points to Everpure's 73. The Navy formed a competitive range of one based on the expectation that discussions with Everpure would not increase its technical score sufficiently nor reduce its cost significantly so as to improve its chances for award.

The purpose of a competitive range determination in a negotiated procurement is to select those offerors with which the contracting agency will hold written or oral discussions. Federal Acquisition Regulation (FAR) § 15.609(a); S&O Corp., B-219420, Oct. 28, 1985, 85-2 CPD ¶ 471. We have consistently defined the competitive range as consisting of all proposals that have a "reasonable chance" of being selected for award, that is, as including those proposals which are technically acceptable as submitted or which are reasonably susceptible of being made acceptable through discussions. Information Systems & Networks Corp., B-220661, Jan. 13, 1986, 86-1 CPD ¶ 30; Fairchild Weston Systems, Inc., B-218470, July 11, 1985, 85-2 CPD ¶ 39.

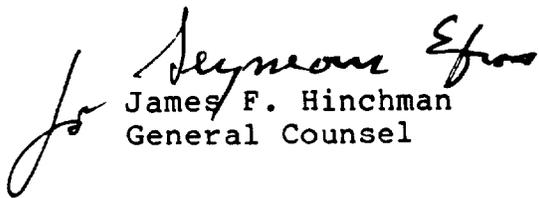
However, we also recognize that the determination of whether a proposal is in the competitive range is principally a matter within the contracting agency's reasonable exercise of its discretion. Cotton & Co., B-210849, Oct. 12, 1983, 83-2 CPD ¶ 451; see also Tracor Marine, Inc., B-222484, Aug. 5, 1986, 86-2 CPD ¶ 150. Although we closely scrutinize an agency decision which results, as here, in a competitive range of one, Art Anderson Assocs., B-193054, Jan. 29, 1980, 80-1 CPD ¶ 77, we will not disturb that determination absent a clear showing that it was unreasonable, arbitrary, or in violation of procurement laws or regulations. Systems Integrated, B-225055, Feb. 4, 1987, 87-1 CPD ¶ 114.

It is proper for an agency to determine whether or not to include a proposal within the competitive range by comparing the initial proposal evaluation scores and the offeror's relative standing among its competitors. This "relative" approach to determining the competitive range may be used even where the result is a competitive range of one.

Therefore, a proposal that is technically acceptable as submitted need not be included in the competitive range when, relative to other acceptable offers, it is determined to have no reasonable chance of being selected for award. Systems Integrated, B-225055, supra.

In the latter case, we found that although the protester's technical proposal held a slight technical advantage over the awardee's proposal, where the protester's cost was some 30 percent higher than the awardee's cost, it was proper to exclude the protester's proposal from the competitive range leaving a range of one as there was no reasonable chance that significant cost reductions would have been achieved if discussions were held and best and final offers requested. In the case at hand, not only was ElTech's technical proposal superior to Everpure's, its cost was about 43 percent lower. Therefore, we find that the Navy properly concluded there was no reasonable chance that Everpure could achieve the significant cost reductions along with improving its technical proposal so as to be competitive with ElTech's proposal. Accordingly, Everpure was not unreasonably excluded from the competitive range.

The protests are denied.


James F. Hinchman
General Counsel