

C. MURROW
11-15-89



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Air Inc.
File: B-236334
Date: November 13, 1989

DIGEST

Protest against allegedly unduly restrictive specification filed approximately 4 months after the bid opening is untimely. Even if the protester first learned of its basis for protest during an inquiry concerning the contract award which it made 3-1/2 months after bid opening, the protester did not meet its obligation to diligently pursue the basis of its protest.

DECISION

Air Inc. protests the award of a contract for pneumatic ratchet sets to Snap-On Tools Corporation under invitation for bids (IFB) No. FCEP-BP-F8111-2S-2-7-89, issued by the General Services Administration (GSA), Federal Supply Service, Washington, D.C., for pneumatic, hydraulic, and swaging tools. Air Inc. contends that GSA improperly influenced it not to submit a bid for the ratchet sets by advising prior to bid opening that award would not be made for the item, and that future requirements would be solicited using a modified purchase description.

We dismiss the protest.

The IFB was issued on January 4, 1989, as a requirements contract for the period February 1, 1989, to January 31, 1990. Bid opening initially was scheduled for February 7, 1989. The tools were delineated under 20 line items and the IFB indicated that award would be made on an item-by-item basis. Line item No. 9 contained the technical description of pneumatic ratchet sets.

Prior to bid opening, by letter dated January 21, 1989, Air Inc. recommended several changes to the item purchase description for item No. 9. Specifically, Air Inc. pointed out a typographical error in the free speed maximum RPM requirement and recommended that GSA eliminate the

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requirement for a maximum RPM. Air Inc. also recommended not utilizing certain American National Standards Institute (ANSI) specifications governing hand tools to acquire a power tool, and questioned whether the specifications were up to date. In addition, Air Inc. asserted that the technical design criteria were overly restrictive and reflected design features unique to the Snap-on Tools' ratchet wrench. In this regard, Air Inc. recommended deleting the following requirements: (a) that the drive motor shaft be supported by two needle bearings and one thrust bearing; (b) that the tool have a serrated or patterned handle; (c) that the housing be chrome plated steel; and (d) that the ratchet head gear have a minimum of 40 teeth.

The contract specialist responded to Air Inc. on February 15, 1989, indicating that GSA would correct the typographical errors and clarify the cited ANSI specifications, but that no changes would be made to the technical design criteria. Amendment No. 1 was issued to make these changes by substituting a revised item purchase description, and extended the bid opening date until March 1, 1989. In response to the agency's action, on February 24, 1989, Air Inc. by letter again maintained that (a), (b), and (d) above were overly restrictive requirements representing proprietary features which only the Snap-On Tools' wrench could meet, and requested that GSA eliminate the maximum RPM requirement.

On February 27, GSA technical specialists determined that requirements (b), (d), and the maximum RPM limitation were necessary to meet the agency's minimum needs, but that the functional purpose underlying the requirement in (a) could be achieved with the design proposed by Air Inc. The technical office furnished the contracting officer with a revised item purchase description and recommended taking the item off the solicitation and purchasing the item through small purchases. By letter dated February 28, 1989, the contract specialist furnished the protester a copy of the revised specification and advised the protester that the item would not be awarded and that future procurements for the item would be procured under consolidated purchases.

At bid opening, GSA received one bid from Snap-On Tools for item No. 9. Award was made to Snap-On-Tools on April 24, 1989, after GSA determined it to be a responsive and responsible bidder and determined that the bid price was reasonable. During a telephone conversation in mid-July concerning the status of the consolidated purchases for line item No. 9, GSA advised Air Inc. that award had been made to

Snap-On-Tools in April, whereupon Air Inc. filed this protest.

GSA contends that Air Inc. knew or should have known of its basis of protest after receiving amendment No. 1 which made no change in the technical description, and GSA's February 15 letter in response to Air Inc.'s initial letter. Our Bid Protest Regulations require that protests be filed not later than 10 working days after the basis for protest is known or should have been known. See 4 C.F.R. § 21.2(a)(2) (1989). GSA also contends that Air Inc. did not diligently pursue the information that formed the basis of its protest because it did not attempt to ascertain the status of the award between April and mid-July.

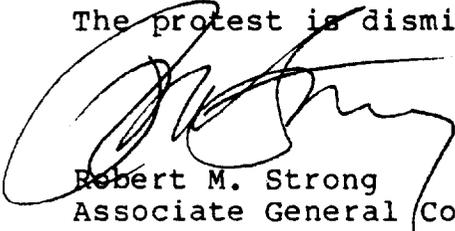
Air Inc. alleges that GSA telephonically advised it, prior to the date that it mailed its bid, that there would be no award made for line item No. 9, and that a revised purchase description would be issued. Air Inc. contends that this is the reason that it did not bid on the line item, and that the February 28 letter constitutes written confirmation of this conversation.

Air Inc.'s alleged reliance on GSA's oral advice in deciding not to submit a bid on item 9 was misplaced. The IFB expressly advised that only written interpretations would be binding on the government. Accordingly, where as here a bidder relies on oral advice to alter the written terms of the solicitation, it does so at its own risk; Record Press Inc., B-229570.2, Feb. 17, 1988, 88-1 CPD ¶ 161. Air Inc. does not allege that it received GSA's letter of February 28 prior to the March 1 bid opening and, as GSA correctly points out, in the normal course of business Air Inc. would not have received a letter sent by ordinary mail on the next day after mailing. Accordingly, if Air Inc. intended to protest the allegedly restrictive specifications to our Office, it was required to do so prior to bid opening. See 4 C.F.R. § 21.2(a)(1). If Air Inc.'s correspondence with GSA is considered as a protest, then Air Inc. was required to file its protest with our Office within 10 days of GSA's February 15 letter denying Air Inc.'s request. Air Inc.'s election to, in effect, request reconsideration by the agency does not toll our timeliness requirements. Rocky Mountain Helicopters, Inc.--Request for Reconsideration, B-231898.2, Aug. 22, 1988, 88-2 CPD ¶ 169. Once informed of initial adverse agency action, a protester may not delay filing a subsequent protest with our Office while it continues to pursue the protest with the agency. Id. Air Inc.'s protest to our Office, filed on July 26, 1989, is untimely under either standard.

We also note that in the protester's view it did not learn the basis of its protest until mid-July. However, it is incumbent on a protester to diligently pursue the information necessary to determine its basis of protest; the protester may not sit idly by simply awaiting notification of that information. John W. Gracey, B-232156.2, Jan. 23, 1989, 89-1 CPD ¶ 50. Here, by waiting almost 4 months after bid opening to inquire about the status of the award, Air Inc. failed to satisfy the requirement for diligent pursuit. Id.

In any event, we note that in its comments on the agency report the protester alleges for the first time that it is capable of modifying its current designs to satisfy the other features protested, once GSA modified the thrust bearing requirement. This is inconsistent with the protester's prior allegations to GSA that its product could not satisfy the other four protested requirements, which GSA has not changed. Under these circumstances, we agree with GSA that it does not reasonably appear that Air Inc. could have competed even under the proposed new product description, therefore, Air Inc. has not been prejudiced by GSA's actions here.

The protest is dismissed.



Robert M. Strong
Associate General Counsel