

Curcio



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Security Defense Systems Corp.

File: B-237826

Date: February 26, 1990

Donna L. Korkala, for the protester.
Jonathan H. Kosarin, Esq., Department of the Navy, for the agency.
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DIGEST

1. Protest that agency overstated its minimum needs is dismissed as untimely when not filed before the closing date for proposals following the incorporation of the allegedly restrictive specification in the solicitation.
2. Protest that agency should have requested that protester submit a best and final offer is denied where the protester took explicit exception to the RFP's stated requirements after being notified of a proposal deficiency, since an agency is not required to hold successive rounds of discussions so that an unacceptable offeror might become acceptable.
3. Protest that awardee's product failed to meet the specifications is dismissed as untimely where the protester did not diligently pursue the information concerning the awardee's product which forms the basis of protest.
4. Where awardee's x-ray scanning equipment is 1 inch larger than size specified in solicitation, agency properly waived deviation as inconsequential since the equipment would meet its minimum needs and other bidder was not prejudiced by the waiver.

DECISION

Security Defense Systems Corp. (SDS) protests the rejection of the proposal it submitted in response to request for proposals (RFP) No. N00189-89-R-0133, issued by the Department of the Navy for four baggage x-ray devices. SDS

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also protests the award of a contract under the RFP to EG&G Astrophysics Research Corporation.

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

The RFP was issued on March 23, 1989, on a brand name or equal basis for four baggage x-ray devices to be used aboard aircraft carriers. The RFP specified the EG&G Linescan Systems Four as the desired brand name and listed salient characteristics of the Linescan Four that an equal product would have to have to be acceptable. Four offerors, including SDS and EG&G, responded by the April 24 closing date for the receipt of initial proposals. After reviewing the proposals, the Navy determined that the EG&G proposal was technically acceptable and the other three proposals were unacceptable but susceptible to being made acceptable. Subsequently, on July 14 the Navy issued amendment No. 1, which set out additional requirements, including a requirement that the tunnel dimensions of the scanner be 17"-19" x 25"-29". In a letter dated July 18, the Navy enclosed the amendment and notified SDS of the deficiencies "which must be resolved in order for [its] proposal to be considered technically acceptable." Specifically, SDS was informed that its proposal for the Heimann Hi-Scan model 2416 was deficient with respect to power requirements, x-ray sensors, color display and tunnel dimensions. Regarding the tunnel dimensions, SDS' tunnel, which measured 16" x 24", was smaller than the minimum 17" x 25" tunnel specified. The letter requested submission of a revised proposal by July 28.

SDS submitted a revised proposal which responded to the Navy's concerns with respect to the power requirements, x-ray sensors and color display. Regarding the tunnel dimensions, however, SDS replied:

" . . . we must take exception to [the dimensions] as our production model as bid has a 24" x 16" tunnel opening not the minimum 25" x 17" as specified. Although slightly smaller than specified, the 2416-TS does offer one pass 100% screening with no corner cut-off for any item which can fit in the inspection chamber. Considering our other superior technical advantages, we feel this exception is minor and will not adversely affect the using agency's mission."

The Navy evaluated the revised proposals and found that EG&G was still the only technically acceptable offeror and on September 27 awarded the contract to EG&G. On September 29,

SDS protested to the Navy the decision to reject its proposal, in a letter which reserved to SDS the right to submit details after SDS learned the reasons for the Navy's rejection of the firm's proposal. On October 12, the Navy telefaxed a letter to SDS which explained that the SDS proposal was rejected because it failed to comply with the specifications concerning power requirements, x-ray sensors, color display and tunnel dimensions. The Navy also held debriefings with SDS on October 13 and November 3.

Following the second debriefing, the Navy agreed that SDS met all the specifications with the exception of the tunnel dimensions. SDS, however, maintained that its 16" x 24" tunnel would meet the Navy's needs. Sometime following the second debriefing, SDS also complained orally to the Navy that the tunnel dimensions of the EG&G system were 20" x 28" and thus exceeded the requirement for tunnel dimensions of 17"-19" x 25"-29". Following notification from the Navy on November 13 that it planned to proceed with the award to EG&G, SDS filed its protest in our Office.

SDS essentially argues that in responding to the deficiencies in its proposal identified by the Navy, it did not intend to indicate that it would not comply with the tunnel dimension requirements. Rather, it expected that the Navy would comment on SDS' position that the smaller dimensions would meet the agency's needs, and, if the Navy disagreed, it would then permit SDS to correct the deficiency in its best and final offer (BAFO). In this regard, SDS complains that the Navy did not request that it submit a BAFO. SDS further complains that at the second debriefing it agreed to comply with the specification for tunnel dimensions, but that the Navy nevertheless improperly refused to award SDS the contract. Finally, SDS argues that the Navy improperly accepted the EG&G scanner because its tunnel dimensions exceeded the required dimensions.

The Navy replies that it rejected SDS' proposal because SDS specifically took exception to the tunnel dimension requirements in its proposal revision. The Navy explains that it requires a scanner with a tunnel that is at least 17" x 25" to accommodate bulky seabags which are routinely brought on ship by Navy personnel. The Navy further explains that these seabags are generally packed to capacity because they are the only baggage permitted on board.

Concerning EG&G's failure to comply with the specified tunnel dimensions, the Navy responds that the offered EG&G model is the brand name requested and that it erroneously set forth the tunnel dimensions in the RFP. The Navy argues

that in any event the deviation in the tunnel offered by EG&G is immaterial because there is sufficient space on board to accommodate the 1-inch larger tunnel, and the larger tunnel will meet the Navy's needs. In fact, the Navy asserts, the larger tunnel is better because it will more easily screen large items.

To the extent SDS is arguing that its scanner, with tunnel dimensions smaller than those specified in the RFP, will meet the Navy's needs, it is challenging the Navy's determination of its minimum needs. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1989), a protest based on an alleged impropriety in a solicitation that is incorporated into the solicitation must be filed before the next due date for offers. Recon Optical, Inc., B-232125, Dec. 1, 1988, 88-2 CPD ¶ 544. Here, since amendment No. 1 clearly specified the minimum tunnel dimensions, SDS was required to challenge the requirement before July 28, the due date for revised proposals. Since SDS did not raise the issue until November 20, when it protested to our Office, the issue is untimely.

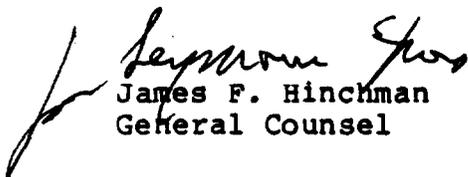
Further, since SDS knew from discussions with the Navy that its offered dimensions were unacceptable, but nevertheless submitted a revised offer which clearly took exception to the required dimensions, a salient characteristic listed in the RFP, the Navy properly found the proposal unacceptable. Ross Cook, Inc., B-231686, Sept. 7, 1988, 88-2 CPD ¶ 216. The fact that SDS could have or would have changed its offer to comply with the required tunnel dimensions, if it had been given the chance to do so, does not change this result, since an agency is not required to help an offeror by conducting successive rounds of discussions until all deficiencies are corrected. Raytheon Support Servs. Co., 68 Comp. Gen. 566 (1989), 89-2 CPD ¶ 84.

With regard to SDS' contention that during the second debriefing it offered to comply with the tunnel dimensions specification, the purpose of a debriefing is not to give an unsuccessful offeror an opportunity to cure the deficiencies which led to the elimination of its proposal from the competition; rather, when a contract is awarded on a basis other than price alone, unsuccessful offerors, after award and upon their written request, are provided a debriefing at which they are furnished with the basis for the selection decision and an explanation of the significant weaknesses or deficient factors in their proposal. Federal Acquisition Regulation § 15.1003. Accordingly, the Navy properly refused to consider SDS' offer to comply with the tunnel dimensions specification during the second debriefing.

Concerning SDS' contention that the scanner offered by EG&G fails to meet the specifications, a protester must diligently pursue the information forming the basis for a protest, and if it fails to do so within a reasonable time, we will dismiss the protest as untimely. Tioga Pipe Supply Co., Inc., B-230040, Feb. 24, 1988, 88-1 CPD ¶ 190. Here, SDS knew that the contract had been awarded to EG&G for the brand name item on September 29. There is no indication that SDS attempted to obtain any information regarding EG&G's scanner, and SDS did not raise its challenge regarding EG&G's tunnel dimensions until the protest filed with our Office on November 20. Accordingly, the protest is untimely to the extent it challenges the awardee's tunnel dimensions, because SDS did not diligently pursue this basis of its protest. Id.

In any case, the general rule that in a brand name or equal procurement an offered product must comply precisely with specified size requirements does not apply where a deviation is minor and immaterial, does not render the offered product functionally inferior to the brand name product, and where no other bidder is prejudiced by the agency's waiver of the defect. Astrophysics Research Corp., 66 Comp. Gen. 211 (1987), 87-1 CPD ¶ 65. A defect is immaterial when its significance as to quality, quantity, delivery or price is trivial or negligible when compared with the total cost or scope of the supplies or work to be furnished. Id. Here, the 1-inch larger size of EG&G's offered tunnel does not affect the Navy's ability to utilize the scanner; in fact, the Navy states that the larger size is desirable. In contrast, SDS' offer was not rejected for offering a scanner that was too large, but because it was smaller than the minimum size the Navy had determined was necessary to accommodate bulky seabags. Further, SDS does not contend that it could have offered a scanner that was larger than the required dimensions. Accordingly, we see no basis to conclude that SDS was prejudiced by the Navy's decision to waive the deviation in EG&G's proposal.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel