



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: VG Instruments, Inc.

File: B-241484

Date: February 7, 1991

Chester A. Janiak, Esq., Burns & Levinson, for the protester.
D.K. Richmond, U.S. Environmental Protection Agency, for the agency.

Stephen J. Gary, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest filed after closing date for receipt of best and final offers alleging that agency failed to furnish evaluation criteria for sealed bid procurement converted to negotiated procedures, is untimely where absence of criteria was apparent on the face of letter issued to effectuate the conversion; protests of alleged solicitation improprieties apparent prior to the next closing date for receipt of proposals must be filed prior to closing.
2. Protest that agency failed to advise that request for revised offers was a request for best and final offers (BAFO) is untimely where protester was on actual notice prior to closing of its alleged failure to receive letter advising of negotiation procedures for sealed bid procurement converted to negotiated procedures, including statement that BAFOs were being requested, but protester failed to protest within 10 working days of closing.
3. Notice to offerors that negotiations were to close with the submission of revised proposals by a common date was adequate notice that best and final offers were being requested.
4. Protest that in brand name or equal procurement the agency improperly made award to firm whose proposed "equal" product did not meet the stated salient characteristics is denied where the agency relied on offeror's statements of compliance in conjunction with supporting descriptive literature after having verified the statements to maximum extent possible in light of the fact that the proposed product is new.

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DECISION

VG Instruments, Inc. protests the award of a contract to Perkin-Elmer Corporation (PE) under request for proposals (RFP) No. D000828P1, issued by the Environmental Protection Agency (EPA) on a brand name or equal basis for an inductively coupled plasma mass spectrometer. The protester alleges improprieties in the procurement process and asserts that the agency improperly based the award on an "equal" product that did not meet the stated salient characteristics.

We deny the protest.

EPA originally conducted this procurement on a sealed bid basis under invitation for bids (IFB) No. D000828P1. The solicitation specified VG's PlasmaQuad PQ2 Turbo-Plus spectrometer as the brand name product, listed the salient characteristics that had to be satisfied by any product offered as equal to the brand name item, and required that descriptive literature be submitted with the bid to demonstrate compliance with those characteristics. Of the three bids submitted in response to the IFB, two, including PE's, were offers of "equal" products. EPA found both to be nonresponsive to salient characteristics listed in the solicitation. The third bidder, VG, offered the brand name product. EPA found VG's bid nonresponsive as well, based on its finding that it included payment terms that differed from those set forth in the IFB.^{1/}

By letter dated September 5, 1990, EPA advised each bidder that because all bids had been found nonresponsive the agency was canceling the IFB and, without issuing a new solicitation, was proceeding with the procurement under negotiated procedures. The letter also advised that award would be made on the basis of the best responsive, responsible offer; and that negotiations would close with the submission of best and final offers (BAFO) by September 14. By letter dated September 6, EPA referenced the September 5 letter as indicating that the procurement had been converted to negotiated procedures, reiterated that negotiations would close with the submission of revised proposals by September 14, and advised each bidder of the deficiencies in their initial offer.

^{1/} The IFB provided that "payment will be made upon delivery and acceptance of all required items"; VG's quotation stated that payment will be made "90% on delivery, 10% on installation."

All three bidders submitted revised proposals by the September 14 closing date. PE revised its proposal to include additional descriptive literature and an explanation of how its product met or exceeded each of the salient characteristics noted in the deficiency letter. Based on the revised proposals, EPA awarded the contract to PE as the lowest priced, responsive offeror. VG thereupon filed this protest.

VG raises a number of untimely arguments. It asserts that EPA improperly rejected the bid that VG initially submitted in response to the IFB; according to the protester, the discrepancy in payment terms set forth in the bid was minor and should have been resolved by EPA through clarifications. VG also argues that the agency failed to provide it an opportunity to submit a BAFO under the resolicitation; VG states it did not receive the September 5 agency letter advising that any revised proposal would be considered the offeror's BAFO until after the closing date for receipt of proposals, and that it therefore did not realize that the revised proposal it submitted on September 14 would be its final offer. VG maintains that this also constituted a failure by the agency to comply with Federal Acquisition Regulation § 15.611(b)(2), which provides that requests for BAFOs shall include notice that the offeror is being provided with an opportunity to submit a BAFO. In addition, VG alleges that, since it did not receive the September 5 letter, it was never notified of the evaluation factors that would be used in the converted negotiated procurement.

Under our Bid Protest Regulations, protests of alleged improprieties in a solicitation must be filed by the next closing date for receipt of proposals. 4 C.F.R. § 21.2(a) (1990); all other protests must be filed within 10 working days of when the basis for protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2). VG submitted its revised proposal under the negotiated procurement without protesting by the September 14 closing date the alleged absence of evaluation criteria for a negotiated procurement; this allegation thus is untimely under the former rule. VG's protest of the determination that its bid was nonresponsive was not filed until October 4, more than 10 working days after it received notice of the determination in early or mid-September; this allegation is untimely under the latter rule.

As for VG's alleged failure to receive the September 5 letter before closing, the September 6 letter from EPA, which VG did receive before the September 14 closing date, referenced the September 5 letter as advising of the agency's intended use of negotiated procedures. This letter placed VG on notice that it may have lacked a necessary part of the solicitation

documents. The protester's failure to pursue this matter within 10 days after the closing date, the latest point at which any missing evaluation factor or factors should have been apparent, renders untimely the firm's protest based on the failure to receive evaluation information and notice that a "best and final offer" was being requested. See generally Korean Maintenance Co., B-231844, Aug. 1, 1988, 88-2 CPD ¶ 105; Aluminum Co. of Am., B-227139, July 21, 1987, 87-2 CPD ¶ 72.

In any case, the agency reports that a VG representative, when advised that the September 5 letter was forthcoming, requested that it be sent to the VG corporate offices rather than to the location specified in its bid; in this regard, the agency has furnished a copy of a facsimile log indicating that the letter was transmitted and received by facsimile at VG's corporate offices on September 6, 8 days before the closing date. Moreover, we believe that the notice in the September 6 letter that negotiations were to close with the submission of revised proposals was adequate notice that BAFOs were being requested. See Israel Aircraft Indus., Ltd., B-239211, July 30, 1990, 90-2 CPD ¶ 84.

Turning to the remaining issues, VG challenges the compliance of PE's "equal" spectrometer with the salient characteristics specified in the solicitation. VG primarily argues that PE's spectrometer, which is a new product, fails to comply with the requirement that "the instrument detector should consist of a Multi-Channel Analyzer in order to provide a real time display of the complete mass spectrum." VG asserts that while its own brand name multi-channel analyzer allows virtually instantaneous scanning, sorting, and storing of the entire atomic mass unit spectrum, PE's spectrometer, the ELAN 5000, lacks "true" multi-channel analyzer capabilities, thus resulting in slower performance. To support its contention, VG claims that the ELAN 5000's "dwell" time at each atomic mass unit is typically between 0.5 and 2 seconds per channel. (Dwell time is the time during which the instrument's scanner stops at each channel to take measurements; channels are the regions into which the atomic mass spectrum is divided). Based on a 2-second dwell time, VG claims a readout of the entire mass spectrum by PE's spectrometer would require much more time than its own brand name instrument. With regard to the other salient characteristics, VG states that, because "the new version of the instrument PE is now obligated to supply EPA has no track record," the protester "cannot at this time make a complete analysis of [its] capabilities in relation to the other bid specifications"

EPA responds that, in evaluating the new spectrometer proposed by PE, it contacted numerous scientists but could find none with first-hand knowledge of the ELAN 5000's capabilities.

The agency states that, consequently, it relied on the statements of compliance made by PE in its proposal, the descriptive literature the firm submitted to support those statements, and PE's statements in response to specific questions the agency posed as to the item's capabilities. On this basis, EPA concluded that the product complied with all of the salient characteristics. With regard to the multi-channel requirement, for example, the agency notes that PE's revised proposal explicitly stated that its proposed "ELAN 5000 is a multi-channel analyzer, providing a real time display of the complete mass spectrum," and that it included fairly extensive descriptive literature explaining the multi-channel scanning capability of the ELAN 5000.

Generally, in brand name or equal procurements, the contracting agency is responsible for evaluating the data submitted by an offeror and ascertaining if it provides sufficient information to determine the acceptability of the offeror's product as equal. See Phillips Med. Sys. N. Am. Co., B-237598.2; B-238599.2, Apr. 17, 1990, 90-1 ¶ 395. In making these determinations, the agency enjoys a degree of discretion which we will not disturb absent a showing that the determinations are unreasonable. Id. Here, we find that VG has failed to show that EPA's assessment of the ELAN 5000 was unreasonable.

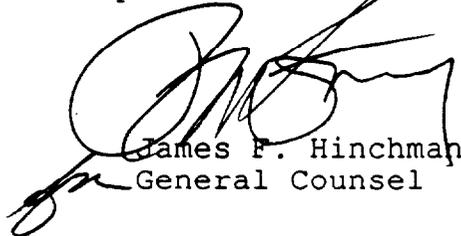
The commercial descriptive literature submitted by PE clearly states that for scanning and rapid data acquisition the ELAN 5000 relies on "multi-channel analysis," which is described as "a powerful technique for improving analytical precision" whereby spectral regions of interest are "scanned rapidly and repetitively." In our view, EPA reasonably construed these statements as indicating compliance with the specification requirement for a multi-channel analyzer. With regard to VG's argument concerning dwell time, the literature states that the ELAN 5000's dwell time is operator selectable and is typically set between 1 and 50 msec"--that is, between 1/1,000 and 50/1,000 seconds, a fraction of the 0.5 to 2 seconds claimed by VG to be inadequate. Moreover, even if, as VG asserts, PE's multi-channel analyzer is slower than VG's, that is not by itself a basis for finding PE's instrument noncompliant. An offeror is not required to furnish an exact duplicate of the brand name product either in design or performance; rather, an equal item need satisfy only those features and capabilities set forth in the solicitation as salient characteristics. See Autoquip Corp. B-226014, May 15, 1987, 87-1 CPD ¶ 520. Here, as the salient characteristics did not set forth a maximum dwell time, there was no basis for the agency to find PE's spectrometer noncompliant in this regard.

VG argues that EPA improperly relied on PE's assurances of compliance. As the protester itself acknowledges, because the instrument offered by PE is a new product, there is little conclusive technical information on which to base a technical evaluation. The solicitation did not call for proven performance, and in the absence of such a requirement there is no absolute requirement for the submission of test data proving proposed capabilities. See DEST Corp., B-221869, Apr. 7, 1986, 86-1 CPD ¶ 344 (protest of agency's acceptance of assurances that "equal" product was compliant was tantamount to insistence on actual demonstration of the product, which was not required for award); see generally Everpure, Inc., B-231732, Sept. 13, 1988, 88-2 CPD ¶ 235 (alternate products).

In these circumstances, where an offeror has categorically asserted that its new product is compliant, and has verified the statements to the maximum extent possible in light of the fact that the exact item proposed is not in operation, the agency properly can rely on the offeror's assertions. See Phillips Med. Sys. N. Am. Co., B-237598.2; B-238599.2, supra. Even where the product offered is not new, an agency may place considerable weight on an offeror's assurances that its "equal" product is compliant when to do so is reasonable under the circumstances. See, e.g., Panasonic Indus. Co., B-207852.2, Apr. 12, 1983, 83-1 CPD ¶ 379 (where initial descriptive literature failed to show compliance with salient characteristic, agency reasonably accepted offeror's subsequent explanation of how its product complied, even though additional descriptive literature was not supplied). We conclude that the agency's determination of PE's compliance with the multi-channel requirement was reasonable.

With regard to the remaining salient characteristics noted by VG, PE's revised proposal stated categorically, and in some detail, that each of those was satisfied as well. Based on such assertions and on the firm's literature, we find that EPA reasonably concluded that the product was compliant with all of the salient characteristics.

The protest is denied.



James F. Hinchman
General Counsel