



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

Decision

Matter of: Advanced Seal Technology, Inc.
File: B-242361; B-242363; B-242364; B-242366
Date: March 29, 1991

James P. Rome, Esq., Rome & Associates Ltd., for the protester.
Terry E. Miller, Esq., and Joel R. Feidelman, Esq., Fried, Frank, Harris, Shriver & Jacobson, for John Crane, Inc., an interested party.
John P. Patkus, Esq., and Robert L. Mercadante, Esq., Defense Logistics Agency, for the agency.
Sabina K. Cooper, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where a protest was initially filed with a contracting agency, any subsequent protest to the General Accounting Office filed more than 10 working days after actual or constructive knowledge of initial adverse agency action is untimely.
2. Where a protester supplements a timely protest with new, independent grounds of protest based upon alleged improprieties in a solicitation apparent prior to the closing date for receipt of initial proposals, such grounds are untimely if filed after the solicitation's closing date.
3. Where an offeror proposes an alternate product, that offeror must provide sufficient documentation to reasonably demonstrate that its product will satisfy the government's requirements. An offer that contains a conflict in the drawings submitted to the agency for an alternate product may be rejected as technically unacceptable where the technical data package as submitted does not demonstrate the product's identity or its physical, mechanical, electrical, and functional interchangeability with the product cited in the procurement item description.

4. Approval by a flag officer or D-16 civilian of the justification for using the Small Business Competition regulations required for contracts not exceeding \$100,000 since regulations provide that the contracting officer's certification that the justification is accurate and complete shall be sufficient unless agency procedures provide otherwise, which is not the case with respect to the Defense Industrial Supply Center.

DECISION

Advanced Seal Technology, Inc. (AST) protests the rejection of its alternate offer as technically unacceptable under request for quotations (RFQ) Nos. DLA500-90-T-M672 (M672) and DLA500-90-Q-MV93 (MV93), and request for proposals (RFP) Nos. DLA500-90-R-A182 (A182) and DLA500-90-R-A204 (A204), issued by the Defense Logistics Agency, Defense Industrial Supply Center (DISC), for mechanical seal assemblies used on centrifugal pumps in submarine seawater systems. AST principally argues that DISC's rejection of its alternate offers as technically unacceptable was unreasonable.

We dismiss the protest with regard to RFQ No. MV93 and deny the other protests.

RFQ No. M672, issued June 18, 1990, as a small business, small purchase set-aside, requested submission of quotations by July 9 for the acquisition of 60 seal assemblies (National Stock Number [NSN] 5330-01-143-6145) described as "Seal, Mechanical, Crane Packing Co. Marine & Government Grp. . . . P/N [Part Number] FSD2056FIGICTY1, 1 1/2 BFMDM."

AST submitted a quotation by DISC Vendor Quotation Card (VQC) dated July 2, offering AST P/N CPS-1500-1 as the "exact product" called for by the RFQ. The VQC defined exact product in relevant part as follows:

"The product offered is one of the part numbers listed in the PID [Procurement Item Description] and is obtained, directly or indirectly, from a source cited in the PID. Offerors who are not one of the sources cited must submit evidence that they are authorized dealers of the OEM [original equipment manufacturer] or must submit evidence to establish that the product will be or has been acquired from one of the sources cited in the PID."

In its quotation, AST stated that the Naval Sea Systems Command (NAVSEA) had "reviewed and approved" AST's design "some time ago" and requested that AST's product be added to the PID for the RFQ. DISC notified AST by letter of

November 16 that its offer was technically unacceptable and that the item in question had never been approved by NAVSEA and that AST needed to provide detailed drawings of the constituent parts of the seal assembly showing configuration, dimensions and material, and an assembly drawing showing the final configuration of the seal. AST filed a pre-award protest with the contracting officer on November 21 and a protest in our Office on December 14, asserting that DISC's rejection of its alternate offer as technically unacceptable was unreasonable.

With respect to RFQ No. MV93, issued August 30, 1990, DISC requested submission of quotations by September 20, for 95 seal assemblies (NSN 5330-01-099-0390). The PID identified the approved sources as John Crane, Inc., P/N FSP-21393-1 XPM015M, and Geco Corp., Calnevar Seal Division, P/N LO-8510.

AST submitted a quotation by letter of September 14, offering AST P/N CPS-1625-6 as an item that "'meets' NAVSEA upgrade requirements." AST included an "expanded technical package" of 10 drawings with its submission. At the same time AST filed a protest with the contracting officer, asserting that DISC has consistently and unreasonably denied AST the right to compete in six prior procurements since 1986. DISC notified AST by letter of November 19 that its offer was not technically acceptable and that its protest was denied, explaining that AST's data package contained conflicting drawings, with some showing a secondary sealing element with a full convolute, while others showed a secondary sealing element with no convolute.^{1/} AST filed another agency-level protest on November 28, and then filed a pre-award protest in our Office on December 14.

RFP No. A182, issued August 22, 1990, requested submission of proposals by September 28 for the acquisition of 58 seal assemblies (NSN 5330-01-127-2911) described as "Seal Assembly, Shaft, Mechanical Seal, John Crane-Houdaille Inc. . . . P/N F-SD-3000 2 1/4 BFMDM," a critical application item. The RFP included the standard "Products Offered" clause that permitted firms to offer alternate products that were either "identical to or physically, mechanically, electronically and functionally interchangeable with" the named product. The products offered clause defined "exact product" as the identical product cited in the RFP's PID, manufactured either by the manufacturer cited in the PID, or by a firm that manufactures the product of the manufacturer. An "alternate product" was defined as any other product even if manufactured in

^{1/} NAVSEA requires a fully convoluted secondary sealing element for proper operation of the seal assembly during normal wear, pump vibration, and shaft misalignment.

accordance with the drawings and specifications of the manufacturer listed in the PID.

Offerors of alternate products were advised that they were required to submit legible copies of all drawings, specifications, or other data necessary to clearly describe the characteristics and features of the product being offered, as well as drawings and other data covering the design, materials, etc., of the exact product, to enable the government to determine whether the offeror's product is equal to the product cited in the PID. Offerors were cautioned that the failure to furnish the complete data necessary to establish acceptability of the product offered might preclude consideration of the offer.

AST submitted an offer that included an "expanded technical package" containing 10 drawings. DISC notified AST on November 15 that its offer was technically unacceptable because the data package contained conflicting data, with one assembly drawing showing a secondary seal (bellows) with a full convolute while another assembly drawing and a detailed drawing depicted a bellows with no convolute. DISC noted that AST's data package should be consistent with the item that it intended to supply and that the firm should delete one of the assembly drawings and provide detailed drawings consistent with the assembly that AST will actually supply. On November 28, AST asked DISC to reconsider its rejection of AST's offer, but did not address the conflict between the two assembly drawings submitted with respect to the full convolute versus the no convolute issue. Rather, AST stated that DISC had erroneously concluded that AST's general drawings were in conflict with the more specific drawing of one of the subcomponents of the assembly with the full convolute. AST filed a pre-award protest in our Office on December 14 challenging DISC's finding of technical unacceptability on the grounds of a conflict in AST's drawings.

RFP No. A204, issued September 24, 1990, requested submission of proposals by October 24 for the acquisition of 120, 160, or 240 seal assemblies (NSN 5330-00-468-2967) described as "Seal Mechanical, Critical Pump Part, Only Approved Sources, Crane Packing Co. . . . P/N FSP14734, Warren Pumps Inc. . . . P/N BM44." The RFP included the same standard "Products Offered" clause noted above.

AST submitted an offer that included the same "expanded technical package" of 10 drawings submitted for RFP No. A182. DISC notified AST on November 9 that its offer was technically unacceptable for the same reasons noted with respect to DISC's rejection of AST's offer of RFP No. A182. AST asked DISC to reconsider its rejection of AST's offer on November 16, using the same rationale that the firm supplied with respect to its

request for reconsideration of RFP No. A182. All files a pre-award protest in our Office on December 14.

We find AST's protest against the rejection of its offer under RFQ No. MV93 to be untimely. Where a protest initially has been filed with a contracting activity, any subsequent protest to our Office, to be considered timely, must be filed within 10 working days of actual or constructive knowledge of initial adverse agency action. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1991). DISC notified AST on November 19, 1990, that its agency-level protest was denied because its offer was not technically acceptable, and AST did not file its protest in our Office until December 14, more than 10 working days after AST learned of DISC's denial of its protest.

With respect to the remaining solicitations, the procuring agency is responsible for evaluating the data supplied by an offeror and ascertaining whether the data provide sufficient information for determining the acceptability of the offeror's product. HoseCo, Inc., B-225122, Mar. 6, 1987, 87-1 CPD ¶ 258. We will only disturb an agency's technical determination if it is unreasonable. East West Research, Inc., B-237843, Feb. 22, 1990, 90-1 CPD ¶ 204.

For RFQ No. M672, the record shows that in support of its July 2 offer, AST submitted a price quote accompanied by a note that its product design had been "[a]pproved by NAVSEA 56Y21 some time ago, and passed along to DISC for addition to the ITEM PID according to DISC requirements." When DISC inquired as to the status of AST's product, NAVSEA responded on July 23 that no approval had been given and no drawings had been submitted. Accordingly, on November 16, DISC properly informed AST that its quote was technically unacceptable because of a lack of supporting documentation and product approval.

The record shows that, in the meantime, AST had submitted its drawings to the laboratory responsible for doing product evaluation for NAVSEA on August 10. However, at the time DISC was evaluating AST's July 2 offer on RFQ No. M672, no AST drawings had been approved by NAVSEA, the agency with engineering cognizance for this item, and AST's product number had not been added to the PID for the RFQ. Accordingly, the fact that AST's submission was under evaluation at the time does not vitiate DISC's conclusion that AST's offer was not acceptable.

With respect to RFP Nos. A182 and A204, the solicitations provided that offers of alternate products, i.e., nonidentical products, must be physically, mechanically, electrically, and functionally interchangeable with the product cited in the item description. Where an offeror proposes an alternate

product, it must provide sufficient documentation to reasonably demonstrate that its product will satisfy the government's requirements. See Rotair Indus., Inc., B-219994, Dec. 18, 1988, 88-2 CPD ¶ 683.

AST's submission to DISC in response to both RFPs contained two different assembly drawings, one with a bellows with a full convolute and one with a bellows with no convolute. AST also submitted a detailed drawing for the bellows showing no convolute. DISC concluded from these conflicting drawings that AST was actually making two alternate offers: one for an assembly with a fully convoluted bellows that was unacceptable because it lacked a detailed drawing, and another for an assembly with no convolute, for which a detailed drawing was provided, that was also unacceptable because the bellows did not have the required convolute. In its rejection letters to AST, DISC explained in detail that AST must clarify its offer and state whether or not it was offering an item with or without a fully convoluted bellows in order for DISC to proceed with an evaluation of AST's product for application to future procurements.

We find DISC's decision and efforts with respect to AST's submissions to be reasonable. An offer of an alternate product that does not provide a technical data package demonstrating the product's identity with, or physical, mechanical, electrical, and functional interchangeability with, the product cited in the PID, may be rejected as technically unacceptable. Id; Rotair Indus., Inc., B-219994, supra. Here, AST submitted inconsistent drawings in support of its offers on the two RFPs. Moreover, even in its protest, AST fails to adequately clarify its offer, arguing that "the specific prevails over the general," thereby suggesting that AST intended the detailed drawing of the technically unacceptable assembly with no convolute to apply; and, in its response to the agency report, AST asserts for the first time that its assembly drawing with a full convolute is a "control drawing" intended to inform DISC that AST has the capability to provide a product that meets DISC's needs, an argument that does not address the fundamental problem of the conflict in AST's submitted drawings. See Sabre Communications Corp., 68 Comp. Gen. 279 (1989), 89-1 CPD ¶ 224, aff'd, B-233439.2, June 30, 1989, 89-1 CPD ¶ 14.

AST also raises for the first time, in its February 8, 1991, response to the agency report, the issue of whether DISC's Justification For Other Than Full And Open Competition, which authorized limiting the competition to sources on the PID, was adequate, arguing that DISC failed to use advanced planning for the seal assembly; that DISC's justification was not signed by the proper authorizing official; that DISC failed to solicit AST for the procurement; and that AST was prejudiced

by DISC's failure to provide AST with detailed information in qualification requirements.

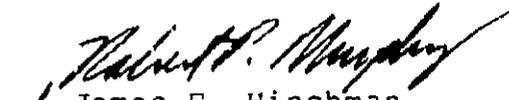
We find AST's challenge to DISC's compliance with the requirements for full and open competition to be untimely, with the exception of the issue of the signature on the justification. When a protester supplements a timely protest with new, independent grounds of protest, these new grounds must independently satisfy the timeliness requirements under our Bid Protest Regulations. Allied-Signal Aerospace Co., B-240938.2, Jan. 18, 1991, 91-1 CPD ¶ 58. Both RFPs clearly indicated that other than full and open competition methods were being employed. The PID in RFP No. A182 listed the acceptable source and its part number; the PID in RFP No. A204 noted "only approved sources" and listed their part numbers. Moreover, both RFPs contained the products offered clause discussed above.

Our Bid Protest Regulations provide that protests based upon alleged improprieties in a solicitation that are apparent prior to the closing date for receipt of initial proposals shall be filed prior to that closing date. 4 C.F.R. § 21.2(a)(1). Here, AST was aware of DISC's intention to use other than full and open competition from the solicitations themselves, and all issues related to improprieties in the RFPs with respect to that issue should have been raised prior to the September 28, 1990, and October 24, 1990, closing dates.

Finally, AST's contention that agency regulations require the Justification For Other Than Full And Open Competition for the RFP to be signed by a general or flag officer, or a civilian rated GS-16 or higher, is incorrect. Defense Federal Acquisition Regulation Supplement § 206.304(a)(4)(70) does provide for delegation of signature authority to flag officers or civilians at the GS-16 level or higher in connection with contracts not exceeding \$50 million. That provision, however, implements Federal Acquisition Regulation (FAR) § 6.304(a)(4), which deals only with contracts exceeding \$10 million. Both provisions implement the Armed Services Procurement Act, as amended, 10 U.S.C.A. § 2304(f)(1)(B) (West Supp. 1990), which establishes various signature levels for justification approvals for contracts of more than \$100,000. There is nothing in the law, in this regard, concerning contracts not exceeding \$100,000. FAR provides that for such contracts the contracting officer's certification that the justification is accurate and complete is sufficient, unless agency procedures provide otherwise. FAR § 6.304(a)(1). Here, the estimated value of the acquisition was \$45,310.40 for RFP No. A204, and \$50,521.77 for RFP No. A182, and neither Department of Defense, the Defense Logistics Agency, nor DISC regulations provide otherwise. Accordingly, AST's objection

to the propriety of the signature authority on the
justifications at issue is not valid.

The protest of RFQ No. MV93 is dismissed and the remaining
three protests are denied.


for James F. Hinchman
General Counsel