



Ms. Glass



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Herley Industries, Inc.

File: B-242903

Date: May 8, 1991

Jacob H. Fishman, Esq., for the protester.
George D. Huddleston for HT Systems, Inc., an interested party.
Gregory H. Petkoff, Esq., and K. Lisa Guillory, Esq., Department of the Air Force, for the agency.
Linda C. Glass, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where protester initially alleges that awardee's "equal" product in a brand name or equal sealed bid solicitation does not meet solicitation salient characteristics without specifying the salient characteristics to which it does not conform, and then specifies for the first time in its comments on the agency report that the awardee's equal product does not meet solicitation requirement for transponder delay, the specific argument is untimely and will not be considered.

DECISION

Herley Industries, Inc. protests the award of a contract to HT Systems, Inc. under invitation for bids (IFB) No. F08651-91-B-0052, issued by Eglin Air Force Base, Florida, for G-band radar transponders. Herley asserts that the award to HT is improper because HT's transponder is not equal to the brand name product which is manufactured by the protester.

We dismiss the protest.

The IFB, as amended, was issued as a total small business set-aside and solicited bids, on a "brand name or equal" basis, for eight each Herley Microwave Systems, Inc., G-Band Radar Transponder, part number (P/N) 500003-5, or equal (contract line item number (CLIN) 0001), and two each Herley Microwave Systems, Inc. P/N 50002-5, or equal (CLIN 0002). The IFB also identified Vega Precision Lab P/N 321C and P/N 302C-26 as acceptable brand name products. The IFB listed several salient characteristics for the transponders. The IFB

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also contained the brand name or equal clause which appears at Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 252.210-7000 (1988 ed.). The clause provides that the determination of equality of an offered product will be based "on information furnished by the bidder or identified in its bid, as well as other information reasonably available to the purchasing activity." The clause also calls for submission of all descriptive materials necessary for the agency to determine whether the product offered meets the IFB's salient characteristics.

Of 23 firms solicited, three bidders submitted bids by the December 10 bid opening date. The bids were as follows:

	CLIN 0001 (8 ea.)	CLIN 0002 (2 ea.)	TOTAL
Herley	\$63,600	\$12,700	\$76,300
HT Systems	\$34,792	\$ 8,698	\$43,490
Vega Labs	\$89,272	\$15,956	\$105,228

After bid opening, the agency performed a technical evaluation based on the descriptive literature furnished by the bidders with their bids to determine if the G-band radar transponder offered by each bidder met the salient characteristics listed in the IFB.

As a result of the technical evaluation, the agency determined that HT Systems, the apparent low bidder for both items, had provided descriptive literature describing a transponder for CLIN 0001 that was not responsive to the listed salient characteristics. However, the agency determined the descriptive literature for HT Systems' transponder offered for CLIN 0002 demonstrated that it was "equal" to the brand name product and, therefore, technically acceptable and responsive to the specification. Both units offered by Herley for CLINs 0001 and 0002 were determined to be technically acceptable and responsive. Vega was determined to be nonresponsive because it failed to submit descriptive literature as required by the RFP.

By letter dated December 11, Herley protested to the agency and argued that HT Systems should not receive award because it has never built a transponder and could not be considered a responsive or responsible bidder.

On January 16, 1991, the contracting officer determined that HT was responsible. Multiple awards were made to Herley and HT Systems on February 4. Herley received the award for CLIN 0001 as the lowest priced, responsive, and responsible bidder and HT System received the award for CLIN 0002. Also

on February 4, the agency denied Herley's agency-level protest. Herley timely filed this protest with our Office on February 8.

In its initial protest submission, Herley generally contended that HT Systems was offering a product that did not meet the salient characteristics listed in the solicitation and therefore should have been rejected as nonresponsive. Herley did not indicate which of the salient characteristics HT Systems failed to comply with. In its comments on the agency report, Herley specifically argues for the first time that HT Systems failed to meet the IFB requirement that "transponder delay is adjustable from 2.5 to 4.3 microseconds (set to 2 microseconds)." Herley maintains that HT Systems' descriptive literature supplied at the time of bid opening did not demonstrate that its product was responsive to this salient characteristic.

Herley's argument is untimely raised. A bid protest must set forth a detailed statement of the legal and factual grounds of protest. Bid Protest Regulations, 4 C.F.R. § 21.1(c)(4) (1991). Where a protester, in its initial protest submission, presents arguments in general terms and then, in its comments on the agency's report, for the first time details alleged procurement deficiencies, the detailed arguments will not be considered unless they independently satisfy the timeliness requirements under our Regulations. See Sach Sinha and Associates, Inc., B-241056.3, Jan. 7, 1991, 70 Comp. Gen. ____, 91-1 CPD 15. Protests of alleged procurement deficiencies other than apparent solicitation defects must be filed within 10 days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2). Nowhere in its initial protest filing did Herley assert the specific salient characteristics HT Systems allegedly failed to meet. Rather, Herley in general argued that HT Systems' transponders did not meet the solicitation requirements. Herley's specific detailed protest, filed almost 3 months after it filed its initial protest concerning the unacceptability of HT Systems' bid, is clearly untimely.

Herley in its initial protest also challenged the legal status of HT Systems as a regular dealer or manufacturer within the meaning of the Walsh-Healey Act, 41 U.S.C. §§ 34-45 (1988) and also maintained that HT Systems was nonresponsive. Our Office does not consider the legal status of a firm as a regular dealer or manufacturer under the Walsh-Healey Act. 4 C.F.R. § 21.3(m)(9). Further, we will not review affirmative determinations of responsibility absent a showing of possible fraud or bad faith on the part of the contracting officials or that definitive responsibility criteria in the

solicitation have not been met. 4 C.F.R. § 21.3(m) (5);
Standard Mfg. Co., Inc., B-236814, Jan. 4, 1990, 90-1 CPD
¶ 14. Herley has not alleged any of these exceptions, and our
Office therefore will not review the responsibility
determination.

The protest is dismissed.

Michael R. Golden

Michael R. Golden
Assistant General Counsel