

Benejam,



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Dand Industries
File: B-244216; B-244255
Date: August 23, 1991

Dan D. Carson for the protester.
Maj. William R. Medsger, and Joseph M. Shemke, Esq.,
Department of the Army, for the agency.
Aldo A. Benejam, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

1. Protests filed more than 5 months after awards were made are dismissed as untimely under the General Accounting Office Bid Protest Regulation which requires that a protest be filed within 10 working days after the basis of protest is known or should have been known, where the record shows that following notification of awards, the protester failed to meet its obligation to diligently pursue the information necessary to determine whether a basis of protest existed.
2. Protests of awards for same items under invitation for bids (IFB) and request for proposals (RFP) on the basis that agency improperly waived a specification for awardee are dismissed based on lack of competitive prejudice, where record fails to show that the protester, who submitted the ninth low bid under the IFB and the third low price under the RFP, could have lowered its prices sufficiently to displace the awardee under either solicitation had it been afforded an opportunity to respond to the allegedly relaxed requirement.

DECISION

Dand Industries protests the award of two contracts to the Sealcraft Corporation under invitation for bids (IFB) No. DAAE07-90-B-S245 (S245) and under request for proposals (RFP) No. DAAE07-91-R-J030 (J030), issued by the Army Tank-Automotive Command for wheel chocks.^{1/} Dand alleges that the agency prevented it from competing on an equal basis with

^{1/} Wheel chocks are wedges or blocks used for holding stationary vehicles motionless by preventing the movement of their wheels.

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Sealcraft by effectively relaxing specifications contained in both solicitations for Sealcraft, but not for Dand, requiring the priming and painting of the chain assembly connected to each chock. The protester contends that, had it known that the Army would have accepted chocks with unprimed and unpainted chain assemblies, it would have submitted the low prices under both solicitations. As its remedy, the protester requests recovery of overhead and lost profits it would have received had it been awarded the contracts.

We dismiss the protests and claim.

BACKGROUND

IFB No. S245, issued on October 30, 1990, as a total small business set-aside, sought bids on 68,858 wheel chocks. The agency received 16 bids, with unit prices for 15 of the bids ranging from \$8.45 to \$23.15 for each chock, and one bid for \$42.65 for each item. After rejecting the low bid as non-responsive, the agency determined that Sealcraft submitted the low responsive bid of \$8.49 for each item, and awarded the contract to that firm on December 17. Dand's bid of \$9.992 for each wheel chock ranked ninth low.

The agency issued RFP No. J030 on November 16, for an additional 8,000 wheel chocks. Three firms, including Sealcraft and Dand, submitted proposals by the November 30 closing date. After evaluating the proposals, the agency determined that Sealcraft submitted the low-priced, technically acceptable proposal, and awarded the contract to that firm on December 6 at its proposed price of \$10.51 for each item. Dand proposed \$12.18 for each item and its proposal was ranked third low.

Common to both solicitations was the requirement that the chocks conform to "top drawing No. MS52127-3" dated July 27, 1990 (MIL-SPEC). Paragraph No. 1 of the MIL-SPEC notes specifies that the chocks may be made of laminated wood, rubber, or cast or extruded, non-ferrous, sparkproof metal. Regardless of the material used to manufacture the chocks, the MIL-SPEC requires that a chain assembly be attached to each chock.^{2/}

^{2/} It appears from the MIL-SPEC drawings provided to our Office, dated December 22, 1988, that each assembly consists primarily of a 92-inch long 3/16 inch chain attached to the chock by a link at one end, with a "snap hook" attached at the other end of the chain.

Regarding the chain assembly, paragraph No. 2 of the notes states in full:

- "a. CHAIN SHALL BE FABRICATED PER RR-C-271, TYPE 1, GRADE CLASS 4, STYLE 1, ZINC COATED.
- b. END LINKS SHALL BE 3/16 SIZE, PER RR-C-271, TYPE III, ZINC COATED.
- c. EYE BOLTS SHALL BE ZINC COATED IAW ASTM A153 OR ASTM A633." (Emphasis added.)

Regarding surface finishes, paragraph No. 3 of the notes states in part:

- "b. STEEL SURFACES (ALL SURFACES OF FERROUS PARTS). . . . PRIME PER MIL-P-52192, MIL-P-53030, OR MIL-P-53022. . . . TOPCOAT, COLOR GREEN 383, PER SPEC MIL-C-46168 OR MIL-C-53039. . . ."

Dand contends that the Army has improperly accepted from Sealcraft wheel chocks with unprimed and unpainted chain assemblies. According to the protester, since the chain assembly described in paragraph No. 2 of the MIL-SPEC notes is made of iron and is therefore a "ferrous part," and since on its face, paragraph No. 3 applies to the steel surfaces of all ferrous parts, then the chain assembly must be primed and topcoat painted green to conform with the specifications. The protester contends that, had it known that the agency would have accepted the chain assembly without the allegedly required priming and painting, it would have submitted the low prices under both solicitations.

The Army asserts that it did not waive or relax any of the contract requirements for Sealcraft. According to the agency, the "ferrous surfaces" mentioned in the MIL-SPEC refer primarily to steel bolts, washers and nuts, required to be used only in wood chocks. The agency states that since Sealcraft is delivering rubber chocks, which do not contain these steel components, the priming/painting requirement in the MIL-SPEC is not applicable to the wheel chocks provided by Sealcraft. In any case, the agency states that it never intended for the zinc-coated chain assemblies required by the MIL-SPEC to be primed or painted, and that the chocks provided by Sealcraft fully comply with the MIL-SPEC's technical requirements.^{3/}

^{3/} The agency informs us that Sealcraft has delivered approximately 30 percent of the items called for under the IFB and that all items required under the RFP have been delivered.

DISCUSSION

Timeliness

As a threshold matter, the Army maintains that Dand's protests, filed more than 10 days after the contracts awarded to Sealcraft became "a matter of public record," are untimely. The agency further asserts that where, as here, several months have elapsed since the contracts were awarded, the protester should be required to affirmatively demonstrate that its protest is timely.

Under our Bid Protest Regulations, a protest concerning other than an alleged solicitation impropriety must be filed within 10 working days after the basis of protest is known or should have been known. See 56 Fed. Reg. 3,759 (1991) (to be codified at 4 C.F.R. § 21.2(a)(2)). Contrary to the agency's position, this rule does not require a protest to be filed within 10 working days after award if the basis of protest is not known at that time.^{4/} It is incumbent upon potential protesters, however, to diligently pursue the information necessary to determine their basis of protest. Hugo Auchter GmbH, B-217400, July 22, 1985, 85-2 CPD ¶ 64. Protesters do not meet this obligation by simply waiting to file in our Office when they happen to learn of a basis for their objections. Air Inc., B-236334, Nov. 13, 1989, 89-2 CPD ¶ 455.

Here, had Dand diligently made any inquiries at all regarding Sealcraft's bid once it was advised that award had been made to Sealcraft, it could have discovered the basis for its protest. Sealcraft submitted a letter with its bid which, at least by Dand's understanding of the MIL-SPEC, essentially took exception to the solicitation's priming/painting

^{4/} The Army notified Dand of the awards to Sealcraft by letters dated December 6 and 18, 1990. We assume that mail is received within 1 calendar week from the date it was sent. Technology for Advancement, Inc., B-231058, May 12, 1988, 88-1 CPD ¶ 452. On that basis, Dand should have received notice of the award to Sealcraft as early as December 13.

requirements.^{5/} Since there is no evidence in the record that the protester met its obligation to ascertain whether a basis for its protests existed during the 5 months after it learned that the Army awarded the contracts to Sealcraft, its protests, separately filed in our Office on May 28 and 30, 1991, are dismissed as untimely. Air Inc., B-236334, supra.

Competitive Prejudice

Even if Dand's protests were timely filed, and the protester is correct that the Army relaxed the MIL-SPEC requirement by accepting unprimed and unpainted chain assemblies from Sealcraft, it is clear that Dand was not competitively prejudiced thereby. To show prejudice here, Dand must demonstrate that it would have altered its prices to its competitive advantage had it been given the opportunity to respond to an altered priming and painting requirement. Simulaser Corp., B-233850, Mar. 3, 1989, 89-1 CPD ¶ 236. Despite its repeated assertions that it would have submitted low prices based upon delivering unprimed and unpainted chain assemblies, the only evidence Dand submitted to support its position is a general bid worksheet with no reference to the cost of priming and painting. Dand thus has failed to make the requisite showing that it would have altered its prices sufficiently to offset Sealcraft's alleged advantage. Sterling Servs. Inc., B-242217, Apr. 9, 1991, 91-1 CPD ¶ 362.

^{5/} Sealcraft submitted a letter with its bid and proposal which stated in part:

"As specified by the [MIL-SPEC] . . . the chain, links, eyebolt, nut and washer are to be zinc plated per RR-C-271. These parts have a zinc surface (not ferrous) and therefore need not be painted

"The question of whether zinc surfaces on components of a Type I molded rubber chock should be painted was reviewed [in connection with a prior procurement]. It was determined that these components should not be painted." (Emphasis in original.)

Following an independent review of the solicitations and Sealcraft's letter, the agency's engineering office determined that the MIL-SPEC did not require the chain assembly to be painted.

The agency has provided un rebutted evidence that directly contradicts Dand's assertions that it would have submitted low prices as a result of the alleged relaxed requirement. In response to an amendment^{6/} to another recent solicitation for the same items, which Dand concedes "eliminated the painting for that solicitation," Dand lowered its unit price \$.30, from \$9.63 to \$9.33--a unit price reduction of only 3 percent. Given that Sealcraft's unit prices under the RFP were nearly 14 percent lower (15 percent lower under the IFB), there is no reason to conclude that Dand's high prices would have changed sufficiently to displace Sealcraft on either of the instant solicitations, had it been advised that the requirement for priming and painting the chain assemblies would be relaxed. Since Dand has failed to show how it was competitively prejudiced here, its protests are dismissed on this ground as well. DataVault Corp., B-223937; B-223937.2, Nov. 20, 1986, 86-2 CPD ¶ 594, aff'd, B-223937.3, Jan. 20, 1987, 87-1 CPD ¶ 69.

Finally, regarding Dand's claim for overhead and lost profits, even where a bidder has been wrongfully denied award of a contract, there is no legal basis for allowing such recovery. Introl Corp., 64 Comp. Gen. 672 (1985), 85-2 CPD ¶ 35.

The protests and claim are dismissed.

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6/ The amendment, issued in connection with IFB No. DAAE07-87-B-J662 for similar items, which also required that the chocks conform to the MIL-SPEC involved here, clarified the paint specifications in the IFB by directing bidders to change paragraph No. 3 of the MIL-SPEC quoted above by adding the following underlined portion:

"b. Steel Surfaces (all surfaces of ferrous parts) except chain assembly." (Emphasis in original.)