



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Pulse Electronics, Inc.

File: B-244764; B-244765

Date: November 18, 1991

Edward C. DeSaussure for the protester.
Jonathan H. Kosarin, Esq., Department of the Navy, for the agency.
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DIGEST

1. Where solicitation references military specifications and standards, the Federal Acquisition Regulation requires applicable revisions and dates of the specifications to be indicated; solicitation that merely provides that revision in effect as of the date set for receipt of proposals shall apply is inadequate and therefore defective.
2. Agency reasonably determined that warranty provision should be included in solicitation calling for the manufacture of complex circuit card assemblies used in the testing of critical aircraft systems.

DECISION

Pulse Electronics, Inc. protests the terms of request for proposals (RFP) Nos. N00383-91-R-1622 (RFP-1622) and N00383-91-R-1676 (RFP-1676), issued by the Department of the Navy for circuit card assemblies. Pulse argues that the solicitations are defective for failing to specify the applicable revisions to the military specifications (MIL-SPECS) and the military standards (MIL-STDs) cited in the RFPs. Pulse also claims that the solicitations improperly contain a warranty requirement.

We sustain the protests in part and deny them in part.

The RFPs call for the submission of firm-fixed-price offers for specified quantities of circuit card assemblies; RFP-1622 requires the fabrication of a quantity of national stock number (NSN) 7RH-5998-00-166-7170 circuit cards, and RFP-1676 calls for the fabrication of quantities of NSN 7R-5998-00-172-6699 and NSN 7R-5998-00-166-7596 circuit cards. Each of the three circuit card assemblies must be fabricated

in accordance with its own drawing package. The three applicable drawing packages are included with the solicitations, and each drawing within the packages specifies the applicable revision of the drawing and the date of the revision. The drawings also reference a number of MIL-SPECS and MIL-STDs describing the manufacturing or fabrication processes and standards that must be adhered to in producing the circuit card assemblies. The references to these MIL-SPECS and MIL-STDs, however, do not indicate the versions, i.e., the dates of the revisions applicable to this procurement; rather, the solicitations provide that those revisions in effect on the date set for receipt of offers shall govern the production of the circuit cards.

Pulse maintains that the RFPs are defective due to their failure to indicate the applicable revisions of the MIL-SPECS and MIL-STDs referenced in the drawings. Federal Acquisition Regulation (FAR) § 10.008 provides, in pertinent part, that:

"(a) Solicitations citing specifications listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions, DODISS, or other agency index shall identify each specification's approval date and the dates of any applicable amendments and revisions. . . .

"(b) Solicitations shall not contain general identification references such as 'the issue in effect on the date of the solicitation.'"

It is Pulse's position that the agency's failure to provide applicable revision dates for the MIL-SPECS and MIL-STDs referenced in the drawings violates the plain language of these provisions and imposes an impossible burden on offerors to determine whether the MIL-STDs and MIL-SPECS have been changed up until the deadline for proposal submission.

The Navy maintains that there is nothing improper in the manner in which it has described the MIL-SPECS and MIL-STDs in the RFP. The agency interprets the FAR language cited by Pulse as requiring applicable revisions and dates only where MIL-SPECS and MIL-STDs "describe the end item being procured," and not where, as here, the MIL-SPECS and MIL-STDs are merely referenced in the solicitation or drawing package. The Navy cites FAR § 10.008(e) as supporting this interpretation. That provision states:

"When specifications refer to other specifications, such references shall (1) be restricted to documents, or appropriate portions of the documents, that shall apply in the acquisition;

(2) cite the extent of their applicability;
(3) not conflict with other specifications and provisions of the solicitation; and (4) identify all applicable first tier references."

The agency argues that, since this provision establishes specific requirements where "specifications refer to other specifications," the case here, it supersedes the requirements under § 10.008(a) and (b) which, it reasons, must be limited to specifications that describe the end item being procured. The Navy contends that paragraph (e) does not call for the very specific identification required under paragraphs (a) and (b). The Navy notes that this interpretation is consistent with the fact that the FAR provisions dealing with quality requirements, such as military inspection system (MIL-I) 45208, one of the references in the RFP here that Pulse challenges, specifically permits identification of specifications using the general language "in effect on the contract date." FAR §§ 46.202-3 and 52.246-11.

We find that Pulse's interpretation of the FAR is the correct one, and that the solicitations therefore were inconsistent with the FAR and did not furnish offerors sufficient detail with respect to the applicable specifications to enable them to intelligently prepare their proposals.

FAR § 10.008(a) establishes, without exception, an affirmative responsibility on agencies' part, when solicitations cite specifications, to "identify each specification's approval date and the dates of any applicable amendments and revisions." FAR § 10.008(b) then goes on to expressly, unqualifiedly prohibit agencies from using general specification identification references such as "the issue in effect on the date of the solicitation." By their plain terms, these provisions apply to all solicitations and to all specifications cited in a solicitation and, absent some indication elsewhere in the FAR that the references in the drawings in issue here were intended to be subjected to some lesser standard, clearly required the specified detail in describing those MIL-SPECS and MIL-STDs.

We find nothing in FAR § 10.008(e), or elsewhere, that limits the scope of paragraphs (a) and (b) of that section. Paragraph (e) does not reference paragraph (a) or (b), or establish requirements for specifications which refer to other specifications that are inherently inconsistent with paragraphs (a) and (b). In fact, it appears that (e)(1) through (e)(4) are designed merely to highlight areas where confusion might arise, and should be avoided, when specifications reference other specifications; for example,

(e) (1) states that references shall be limited to documents that apply to the current acquisition, presumably to avoid confusion from extraneous references.

We agree with the agency that certain FAR provisions dealing with high-level quality requirements, such as the reference to MIL-I-45208 and MIL-Q-9858 in the specifications, provide for the use of general identifying language for certain specifications. See FAR § 52.246-11; see also Department of Defense Federal Acquisition Regulation Supplement § 217.7301-3 (requirement to comply with current specifications for fresh dairy foods). We do not agree with the agency, however, that the FAR's authorization of general specification identifications in specific instances somehow evidences an intent to relax the general requirement in other instances. Rather, we think that, absent specific exception, the requirements under FAR § 10.008(a) and (b) apply. With the exception of the provision dealing with the solicitations' references to MIL-I-45208 and MIL-Q-9858, the Navy has cited no FAR provision authorizing a deviation from the identification requirements in FAR § 10.008(a) and (b).

Pulse is correct about the burden that would fall on contractors if they were bound by specification changes made up to the date of proposal submission where there is no practical way to learn of and take those changes into account in their proposals. There is also a burden on an agency to identify and communicate material specification changes up to the hour specified for submission of offers. The FAR provision at issue here allocates responsibility to agencies, which are in the best position to learn of changes in government specifications relevant to their needs. Other military contracting activities, such as the Navy Ships Parts Control Center, issue solicitations with a separate list of the applicable specification revisions and dates. According to the Navy, the Center does so to "improve the quality of the products delivered under the contracts."

Since the Navy's failure to specify the applicable revision and date of the referenced specifications may preclude competition on a common basis, we find that the solicitations were defective, and sustain Pulse's protests on this basis. See generally Uffner Textile Corp., B-204358, Feb. 8, 1982, 82-1 CPD ¶ 106.

Pulse also argues that a requirement in the RFPs for the contractors to furnish a warranty is unnecessary and unreasonable. The warranty clause in the solicitation requires the contractor: (1) to warrant its product for a period of 1 year from the date of delivery; (2) where necessary, to screen nonconforming supplies at a government-designated depot within the continental United States; and (3) to bear the reasonable costs of disassembling and reassembling

larger pieces of equipment in which defective circuit card assemblies have been installed. In addition, the solicitations impose a contract quality requirement which provides that supplies furnished shall be inspected in accordance with MIL-I-45208 and Military Quality System 9858. According to Pulse, the agency's quality deficiency reports for these computer card assemblies show that no cards have failed. In these circumstances, Pulse maintains that the RFPs' requirements for quality inspections, first article inspection and government testing afford the agency more than adequate protection. Pulse concludes that the benefits of the warranty provision do not justify the cost associated with the warranty.

Protesters are required to clearly show that an agency's decision regarding the best method of accommodating its needs is arbitrary or otherwise unreasonable. Cleaver Brooks Div. of Aqua-Chem, Inc., B-213323, June 12, 1984, 84-1 CPD ¶ 620 (protest against inclusion of warranty provision denied where protester failed to demonstrate that agency determination was unreasonable). In this regard, FAR § 46.703 requires the contracting officer to consider various factors in determining whether to use a warranty provision, including the nature and use of the supplies or services, the cost of a warranty, the agency's ability to administer and enforce the warranty, trade practice with respect to warranting the product in question and the possibility of reducing inspection and testing requirements. In addition, FAR § 46.704 requires the contracting officer to obtain approval for the use of a warranty "in accordance with agency procedures."

In our view, the Navy's decision to include the warranty provisions, including the warranty period, screening equipment and disassembly and reassembly obligation, in the RFPs was reasonable. The record shows that the determination to require a warranty was made in accordance with the general agency policy to require a warranty when procuring aviation spare parts. We think this satisfies FAR § 46.707. With reference to the specific parts at issue here, the items are relatively complex products that will be used in connection with a critical application; the card assemblies are used in stations that test many of the airborne weapons systems of the Navy's front-line aircraft, including the A-6, E-2, F-14 and F/A-18 airplanes, and failure of these card assemblies would make these stations inoperable, resulting in serious disruption to aircraft readiness. The agency has determined that use of a warranty clause would promote higher overall quality in the manufacturing process, resulting in fewer parts failures during the warranty period. The agency has also examined the pricing history for these items in concluding that the warranty would not unreasonably increase prices. We

conclude that in view of the complex nature of the circuit card assemblies, the critical nature of their use and the likely minimal cost impact of requiring a warranty, the agency acted reasonably in requiring a warranty even though it may have experienced no early failures of these circuit card assemblies. We therefore deny Pulse's protests of the warranty requirement.

By separate letter of today to the Secretary of the Navy, we are recommending that the RFPs be amended to specify the applicable revisions and dates of the MIL-SPECs and MIL-STDs referenced therein. Since the agency has proceeded with acceptance of initial proposals, we further recommend that negotiations be reopened to afford offerors a chance to respond to the amendment. We find that the protester is entitled to reimbursement of the cost of filing and pursuing its protests. 4 C.F.R. § 21.6(d)(1) (1991).

The protests are sustained in part and denied in part.


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