



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Foerster Instruments, Inc.

File: B-241685.4

Date: November 18, 1991

Donald P. Young, Esq., and Sean P. Morgan, Esq., Saul, Ewing, Remick & Saul, for the protester.

Jeffrey I. Kessler, Esq., Department of the Army, for the agency.

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

DIGEST

1. Allegation that solicitation for mine detectors failed to define the term "affordability," resulting in a flawed evaluation of protester's proposal, is dismissed as untimely; the alleged defect was apparent on the face of the solicitation and therefore should have been protested prior to the submission of proposals.
2. Assertion that contracting agency improperly departed from stated evaluation criteria by evaluating cost of proposed mine detector on the basis of highest possible cost to the government is dismissed as untimely; the allegation should have been raised within 10 days of the time the agency advised the protester that the criterion would be applied in the manner objected to, several months earlier.
3. Protest that agency improperly rejected proposal due to high cost despite solicitation provision stating that cost would not be an award consideration under certain circumstances is untimely where allegation is based on "information and belief" that the specified circumstances existed, and there is no indication why the same allegation could not have been raised at time of an earlier protest based on the same unspecified information and belief.

DECISION

Foerster Instruments, Inc. protests the rejection of a mine detector model it offered in response to request for proposals (RFP) No. DAAK01-90-R-0107, issued by the Department of the Army. Foerster asserts that the Army improperly departed from the solicitation's stated evaluation criteria

in eliminating its proposed item from further consideration on the basis of cost.

We dismiss the protest.

Under the solicitation, up to five offerors were to receive contracts for the first article testing (FAT) of nine mine detectors, with options for full production quantities of the item; the RFP stated that the agency thereafter would exercise the production quantity option under one of the contracts. The solicitation provided that proposed cost would be evaluated on the basis of both the FAT and production quantities, and advised offerors that, "regardless of the superiority of any particular technical proposal, an offeror's price proposal must be deemed fair and reasonable and affordable in order to be considered for award."

Foerster submitted proposals for two models of mine detector, the Metex and the Minex. In February 1991, the firm was advised by the Army that both models had been eliminated from consideration on the ground that "the costs submitted as part of your two proposals were . . . determined to be unaffordable." On February 5, Foerster protested the rejection of its proposals to our Office. In that protest, Foerster stated that "in all conversations with . . . the government relative to this [procurement] we were assured the decision would be based on technical qualification primarily and price secondarily."

In response to Foerster's protest, the Army sent a letter to our Office (with a copy to Foerster) on February 25, reporting a conversation with an official of the firm. The Army reported it advised Foerster that the reason its proposals had been eliminated from consideration was that Foerster's prices were:

" . . . very high, so high as to . . . be considered unaffordable. . . . This was the reason that they had been removed from the competition [The Army] further advised [Foerster] that even their lowest prices were high, but that in accordance with the solicitation they were being evaluated based upon their highest unit prices for each year of the contract. Based upon the fact that the estimated quantity for this buy is 29,000 units, they might wish to reevaluate their pricing structure accordingly. [The agency] further told [Foerster] that based upon their protest [the Army] was willing to enter negotiations with the firm, with the realization of the above facts concerning their pricing."

The Army concluded by asking our Office to dismiss Foerster's protest as academic, based on its offer to undertake further negotiations with the firm. Foerster did not dispute the accuracy of the reported conversation and on February 28, we dismissed the protest as academic.

Foerster accepted the Army's offer to engage in price negotiations, and subsequently submitted new best and final offers (BAFO) for both of its models on July 1. The BAFO unit price for the Metex was \$2,425, and for the Minex, \$3,940. On July 19, Foerster was advised by the Army that the firm had been awarded a contract for the lower-priced model, the Metex, but that the higher-priced Minex had been eliminated from consideration on the same basis as before, that is, as "unaffordable and outside the competitive range." This protest followed.

Foerster argues that the Army improperly rejected the Minex based on unaffordability, since that term was not defined in the RFP, and that, in any case, the Army applied the affordability criterion to its proposal in a way that was arbitrary and capricious. These arguments are untimely.

Under our Bid Protest Regulations, protests based upon alleged improprieties apparent on the face of a solicitation must be filed by the time designated for the submission of initial proposals. 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991). Foerster's first objection is founded on the solicitation's failure to provide a definition of the term "affordable," an alleged defect on the face of the RFP. Since Foerster did not raise this argument prior to the closing time for receipt of initial proposals, it is untimely. Id.¹

Foerster maintains that the definition of affordability is a matter that, even if untimely raised, should be considered under the significant issue exception to our timeliness

¹This aspect of Foerster's protest also is untimely because, as noted above, Foerster was specifically advised in February that it had been eliminated from consideration because its prices were "very high, so high as to . . . be considered unaffordable. . . ." Under our Regulations, allegations, other than alleged solicitation defects, must be raised not later than 10 working days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1991). Foerster was aware the agency had applied the allegedly improper criterion far more than 10 days before it filed this protest.

requirements, 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.2(c)). The significant issue exception is strictly construed and sparingly used to prevent the timeliness rules from being meaningless; we will invoke it only where the protest raises issues of widespread interest to the procurement community which have not been considered on the merits in prior decisions. Cherokee Elecs. Corp., B-240659, Dec. 10, 1990, 90-2 CPD ¶ 467. There is no basis for applying the exception here. Foerster's allegation essentially is that the term, as used in this procurement, is ambiguous. Such a dispute over an allegedly ambiguous evaluation criterion in a particular solicitation does not satisfy the "widespread interest" prerequisite to invoking the significant issue exception. See Crouse-Hinds Joy Molded Prods., Inc.--Recon., B-242237.2; B-242238.2, Jan. 30, 1991, 91-1 CPD ¶ 96.

Foerster's second argument--that the Army's application of the affordability criterion to its proposal was arbitrary and capricious--is based on its view that the Army improperly evaluated the firm's proposed prices by considering only the highest unit price for each order period to obtain the total evaluated contract price. Foerster asserts that this evaluation of its prices was contrary to the provision of the RFP stating that the government would evaluate offers based upon "unit prices multiplied by the maximum quantity for each ordering period."

This allegation is untimely because it was not raised within 10 working days after Foerster knew of the protest basis. 4 C.F.R. § 21.2(a)(2). The RFP provides, in the same section cited by Foerster, that "depending on quantity ordered or time of the order within an ordering period, the prices offered shall be evaluated at the highest possible cost to the Government based on these prices. . . ." As indicated above, in connection with Foerster's prior protest, the Army advised Foerster that "even [its] lowest prices were [considered] high, but that in accordance with the solicitation [it] was being evaluated based upon [its] highest unit prices for each year of the contract." That is, Foerster first learned of the agency's interpretation of these price evaluation provisions and how they would be applied to its proposals in February. As Foerster did not protest this evaluation method at the time--that is, within 10 working days after the basis of protest was known--Foerster waited until after its proposal was rejected in July. The allegations are therefore untimely. Id.; J&J Maintenance, Inc., B-223355.2, Aug. 24, 1987, 87-2 CPD ¶ 197.

Finally, Foerster asserts that, in considering cost as a factor in the award of these contracts, the Army acted contrary to RFP ¶ M.4.2.2.1(a) (hereafter paragraph (a)), which provided that "should five or fewer of the top rated

offerors have the same rating, with no more than two of the offerors having the same design characteristics . . . , cost will not be used as a basis for selection." According to Foerster, since the Army found fewer than five of the top rated proposals (both of its models were found acceptable) technically acceptable, and no more than two of the products offered had the same design characteristics, this provision barred Foerster's exclusion on the basis of cost.

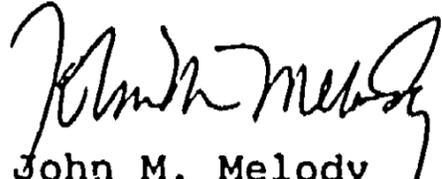
This aspect of the protest also is untimely. Foerster raised this argument for the first time in its July 26 protest letter, based on "information and belief" that more than five offers were received; Foerster stated that it already was aware in February that the offerors in the competitive range were rated fairly equal, the other precondition to applicability of the quoted provision. Foerster did not indicate that it had specific information supporting its belief and the agency had not yet disclosed this competition sensitive information.² It thus is apparent that Foerster's argument was based on its speculation as to the number of offerors. This being the case, the protest on this point could have been raised in Foerster's February 5 protest; there was no legitimate reason for Foerster to delay filing this speculative protest ground until more than 5 months after it initially protested the rejection of its proposal. 4 C.F.R. § 21.2(a)(2).

In any event, the record shows that Foerster did not attach much significance to paragraph (a) prior to this protest and, in particular, did not rely on it in structuring its proposals. In this regard, when Foerster's proposals were first rejected on the basis of excessive cost in February, Foerster expressed its belief, as previously noted, that the award "decision would be based on technical qualification primarily and price secondarily." It is clear from this statement that, as of the time Foerster was involved in price negotiations with the agency, it was fully aware that the agency was considering cost. Indeed, since there was no way for offerors to know in advance whether the conditions under paragraph (a) would occur, they would have had to assume that cost would come into play in the evaluation.

²We note that our Regulations require protesters to include in their protests "all the information needed to demonstrate its timeliness." 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.2(b)).

Since Foerster in no way relied on paragraph (a) in preparing its proposal, it was not prejudiced by the agency's alleged improper failure to abide by it. See Wyle Laboratories, B-239671, Sept. 19, 1990, 90-2 CPD ¶ 231.

The protest is dismissed.



John M. Melody
Assistant General Counsel