



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Oktel
File: B-244956; B-244956.2
Date: December 4, 1991

Jon Miller for the protester.
Michael J. Farr, Esq., Department of the Air Force, for the agency.
M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that specification restricts competition is dismissed as academic where protester meets the protested specification.
2. Allegation that solicitation is restrictive because it does not include certain data is without merit where the government does not possess or have rights in the data, and thus is unable to release it; all offerors therefore are in the same position of having to obtain the data from its owner; and protester actually obtained the data, albeit not in the preferred format.
3. Protest that 5-day notice for proof-of-concept demonstration is insufficient to ensure full competition is denied where agency reasonably determined that offerors would need to develop a model in preparing their proposals, and that such a model would be available for the demonstration within the 5-day period.

DECISION

Oktel protests that certain requirements in request for proposals (RFP) No. F41622-90-R-0076, issued by the Department of the Air Force, as well as certain agency actions, improperly restrict competition. The RFP is for acquisition of data systems used to store signal data.

We dismiss the protest in part and deny it in part.

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The requirement was originally synopsisized in the Commerce Business Daily (CBD) as an intended sole-source award to American Systems Corporation (ASC). However, after receiving information indicating the likelihood of additional sources, the agency issued a competitive solicitation for the requirement on May 27, 1991, with a June 28 closing date for receipt of offers. The agency amended the solicitation a number of times and in the latest amendment extended the closing date indefinitely. Oktel filed its protest with our Office on July 26.

Oktel first protests that the RFP requirement for facility security clearance at the time of proposal submission improperly restricts competition. However, the agency amended the solicitation on August 12 to permit an interim facility security clearance at the time of proposal submission; the Air Force notified our Office that such a clearance was granted to Oktel effective October 1. This basis of protest therefore is academic and not for our consideration. See East West Research Inc., --Recon., B-233623.2, Apr. 14, 1989, 89-1 CPD ¶ 379.

Oktel alleges that the RFP is restrictive for failing to provide offerors with certain technical data regarding file format. Oktel states it obtained the information from SystemWare, Inc., identified in the RFP as the proprietary owner of the data, but believes the agency should provide it to ensure its accuracy and availability to all offerors. This allegation is without merit. The information in question is not available from the agency because, as the Air Force explains, the government does not possess or have rights in the data. See Rotek, Inc., B-240252, Oct. 26, 1990, 90-2 CPD ¶ 341. This being the case, all offerors are in the same position of having to obtain the data from the proprietary source.

Oktel next protests that the RFP requirement for a proof-of-concept demonstration, with only 5 days notice, improperly restricts competition. The protester believes a 90-day period is necessary to provide sufficient time to prepare a model for the demonstration. The agency explains that the 5-day requirement reflects its expectation that offerors would be expected to have developed a working model of their proposed configurations during proposal preparation to assure that their proposed systems operate as required; this working model would be available for demonstration within 5 days of notification. Oktel responds that it is impractical to require development of such models in advance of technical proposal submission, noting that models would not be produced in advance for procurements of items such as the B-1 aircraft.


There is no basis on this record to conclude that the 5-day period is unreasonable. We think the agency reasonably factored into the demonstration period the expectation that offerors will have developed a working model during the preparation of their proposals. Oktel has not rebutted the agency's position by explaining how it planned to prepare its proposal without a working model, or why it would be impracticable or unduly costly to assemble such a model. While Oktel is correct that offerors ordinarily could not reasonably be expected to develop prototype models in advance for highly sophisticated, extremely costly items such as the B-1 aircraft, that example has little relevance to this procurement, which encompasses modifications to off-the-shelf components. See GraphicData, Inc., B-244677, Oct. 30, 1991, 91-2 CPD ¶ _____. Oktel maintains that firms having prior experience with the SystemWare data will more easily be able to meet the 5-day requirement, and thus will have a competitive advantage over Oktel. While this may be the case, such a competitive advantage is permissible since it results from the firms' particular business circumstances and not from improper action by the agency. See Id.; Dynamic Instruments, Inc., 64 Comp. Gen. 553 (1985), 85-2 CPD ¶ 596.

Oktel further alleges that the Air Force restricted competition, prior to issuance of the solicitation, by failing to respond to requests for technical information (other than the SystemWare data), providing conflicting information as to whether the procurement would be held, and requesting that the firm not submit an offer on the requirement.

This is not a valid basis for protest. Prior to issuance of the RFP, the agency was under no obligation to provide detailed technical information to potential competitors. See Federal Acquisition Regulation § 5.401(b)(1). After issuance, Oktel received the same information as the other offerors upon which to base its proposal, i.e., the solicitation and all amendments and letters addressing offerors' questions. The agency denies that its personnel requested Oktel to refrain from submitting an offer, and in any case, the fact remains that Oktel has the same opportunity as any other offeror to compete under the RFP. Moreover, competitive prejudice is an essential element of a viable protest that a protester must establish if it is to prevail. IDG Architects, 68 Comp. Gen. 683 (1989), 89-2 CPD ¶ 236; Badger Elec. Prods., Inc., B-230087, Feb. 1, 1988, 88-1 CPD ¶ 97. There is no indication in the record that any of the alleged improper agency actions had any negative effect on Oktel's competitive position; Oktel has not cited any competitive harm, and it is not otherwise apparent that the firm was harmed. RG&B Contractors, Inc., B-225925.2, Mar. 10, 1987, 87-1 CPD ¶ 272.

Finally, Oktel contends that the Air Force has preselected ASC based on alleged "special treatment and access" given to the firm and suggests that we conduct an investigation concerning communications between ASC and the agency to determine the extent of the agency's bias in favor of ASC. When a protester contends that contracting officials were motivated by bias or bad faith, it must submit convincing proof that the agency directed its actions with the specific and malicious intent to hurt the protester. Infection Control and Prevention Analysts, Inc., B-238964, July 3, 1990, 90-2 CPD ¶ 7. Oktel's speculation does not constitute such proof, and we find nothing in the record that shows bias on the Air Force's part. See Canaveral Maritime, Inc., 69 Comp. Gen. 604 (1990), 90-2 CPD ¶ 41. We do not conduct investigations pursuant to our bid protest function for the purpose of establishing the validity of a protester's speculative statements. FRC Int'l., Inc., B-244299, Oct. 1, 1991, 91-2 CPD ¶ ____; Key Book Serv., Inc., B-226775, Apr. 29, 1987, 87-1 CPD ¶ 454.

The protest is dismissed in part and denied in part.


for James F. Hinchman
General Counsel