

L. Glass

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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Norden Systems, Inc.

File: B-245684

Date: January 7, 1992

Paul Shnitzer, Esq., and Dolly Hauck, Esq., Crowell & Moring, for the protester.

Kevin Scalia for Advanced Acoustic Concepts, an interested party.

Eric A. Lile, Esq., and L. James Gardner, Esq., Department of the Navy, for the agency.

Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where Commerce Business Daily (CBD) notice announcing agency's plans to make sole-source award contains footnote 22--giving other potential sources 45 days to submit expressions of interest showing their ability to meet agency's stated requirements--a potential source must first timely respond to the CBD notice and receive a negative agency response before it can protest the agency's sole-source decision at the General Accounting Office (GAO). GAO will dismiss protest where protester did not submit an expression of interest to the agency showing, at least minimally, its ability to meet the agency's needs and protester does not argue that allegedly restrictive specifications prevented it from submitting a preliminary proposal detailing its ability to satisfy the requirements.

DECISION

Norden Systems, Inc. protests the terms of request for proposals (RFP) No. N68836-91-R-0212, issued by the Naval Supply Center on a sole-source basis to Advanced Acoustic Concepts, Inc. (AAC) for the design, development, and delivery of an Acoustical Intercept System upgrade

modification kit for the carrier-based Fast Time Analyzer system.¹ Norden contends that the specifications are unduly restrictive of competition with respect to the chassis, the bus architecture, and the power supply.

We dismiss the protest.

Synopses of the proposed sole-source award to AAC was published in the Commerce Business Daily (CBD) on July 17, 1991. According to the Navy, the decision to proceed with a sole-source award was based on its belief that only AAC had sufficient knowledge of the specialized detection equipment and the technical expertise to provide the required modification kit within the necessary timeframe.² The CBD notice referenced footnote 22 which indicated offerors had 45 days to identify their interest and capability to respond to the requirement.

Norden requested a copy of the solicitation and one was sent to it on the August 14 date it was issued. The RFP requested the development of an Acoustic Intercept System upgrade modification kit prototype using non-development commercial off-the-shelf items and included options for the delivery of three more kits in accordance with the prototype kit. The RFP contained technical evaluation factors and provided for the evaluation of price. The RFP anticipated the award of a firm fixed-price contract. The RFP also included a closing date of September 3, which was later extended to 3 p.m. on September 16.

Norden submitted three letters, dated August 26, to the contracting officer which generally sought clarification of the solicitation requirements. For example, Norden

¹The Fast Time Analyzer is an acoustic signal processing sonar system used to perform compressed time (faster than real time) and real time replay/analysis of aircraft or sonobuoy underwater acoustic data (SONAR) in antisubmarine warfare modules on carriers. The Acoustical Intercept System is a subsystem of the Fast Time Analyzer System which detects acoustic emission and rejects interfering signals.

²The Navy executed a justification and approval (J&A) for other than full and open competition for the solicitation. The J&A stated that the "technology and design approach required to produce this AIS modification for the FTAS is unique to AAC." See 10 U.S.C. § 2304(c)(1) (Supp II 1991); Federal Acquisition Regulation (FAR) § 6.302-1(b)(1)(i) (FAC 90-5). The J&A recognized that Norden had sufficient knowledge and expertise to provide the necessary equipment but not without considerable development effort and not within the necessary time constraints.

expressed concern over the selection of contract type and the time allotted for responding to the solicitation. Norden complained about the alleged inconsistencies between this solicitation and a similar solicitation issued by the Navy Air Systems Command. Norden also complained that the RFP provided "considerable detail relative to specifying implementation approaches" with respect to the chassis, bus architecture and power supply, but failed to address potential system obsolescence issues such as compatibility with certain types of sonobuoy and capabilities for detection of special threat signals.

The Navy, by letter dated September 3, and distributed with Amendment No. 0003, responded to Norden by clarifying some of the requirements. The Navy, in that letter, maintained its belief that the requirement could only be provided by AAC, but also provided that it would consider and evaluate all offers in accordance with sections L and M of the solicitation.

AAC was the only offeror to submit a proposal in response to the RFP by the September 16 date for receipt of proposals. Norden filed a protest with our Office on September 16, but after the time set for receipt of proposals. Award of a contract to AAC has not been withheld based upon the agency's determination that urgent and compelling circumstances exist which would not permit awaiting our determination in the matter. 31 U.S.C. § 3553(d)(2) (1988); 4 C.F.R. § 21.4(a) (1991). Award was made to AAC on November 1.

In its protest to our Office, Norden argues that the specifications with respect to the chassis, the bus architecture and the power supply are unduly restrictive of competition. Norden maintains that these specifications call for a specific configuration that excludes many other architectures or formats fully capable of providing a superior solution for the requirements and were apparently designed to accommodate the technical approach of AAC.³

³The protester maintains that the acquisition was changed from a sole source to one permitting full and open competition and that the Navy, in violation of FAR § 5.203(a) (FAC 90-7), never published a CBD announcement to advise that the RFP was open to competition. However, the record shows that the RFP was always restricted to AAC, the named sole source, and that a J&A supporting the sole-source decision was properly executed. In our view, the fact that the Navy issued an RFP and provided for the receipt and evaluation of alternate proposals from other offerors did not change the nature of the RFP from a noncompetitive solicitation to one issued on a full and open basis.

The Competition in Contracting Act of 1984 (CICA) requires agencies to achieve full and open competition through the use of competitive procedures, 10 U.S.C. §§ 2301 and 2304(a)(1) (Supp II 1990). The law requires agencies, prior to making a sole-source acquisition, to publicize their intention to do so in order to provide those who believe they can satisfy agency requirements the opportunity to demonstrate to the agency that they can do so and that a sole-source procurement is not warranted, 10 U.S.C. § 2304(c)(1)(f) (Supp II 1991); FAR § 6.302-1 (FAC 90-8); see WSI Corp., B-220025, Dec. 4, 1985, 85-2 CPD ¶ 626.

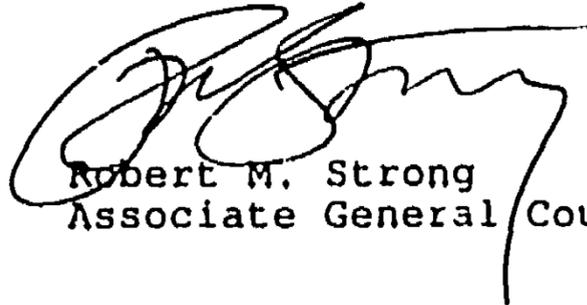
As previously stated, the Navy announced the proposed sole source in the CBD on July 17. The CBD synopsis referenced footnote 22 that gave potential sources 45 days to submit expressions of interest showing their ability to meet agency's stated requirements. We require a protester to submit a timely expression of interest in fulfilling the potentially sole-source requirement in responding to the CBD notice and to receive a negative agency response as a prerequisite to filing a protest challenging an agency's sole-source decision. Keco Indus., Inc., B-238301, May 21, 1990, 90-1 CPD ¶ 490; see also Mine Safety Appliances Co., B-233053, Feb. 8, 1989, 89-1 CPD ¶ 127. This procedure gives the agency an opportunity to reconsider its sole-source decision in light of a serious offeror's preliminary proposal, while limiting challenges to the agency's sole-source decision to diligent potential offerors. Fraser-Volpe Corp., B-240499 et al., Nov. 14, 1990, 90-2 CPD ¶ 397.

Norden's protest against the sole-source nature of the procurement is not for our consideration because Norden failed to submit an expression of interest to the Navy detailing, at least minimally, its ability to meet the agency's needs. While Norden's letters of August 26 showed its interest in the procurement, Norden merely sought clarification of certain solicitation provisions and expressed disagreement with others. It did not argue that the specifications prevented it from competing or were restrictive, as it argues in its protest to our Office.⁴ Norden did not submit information which could be construed as a preliminary proposal and which would provide the agency an opportunity to reconsider its sole-source decision. We

⁴Norden argues that these letters should be construed as an agency-level protest. However, none of this correspondence raises the issue of restrictive specifications or indicates in any detail why Norden could not respond to the RFP. Therefore, Norden's protest of the specifications in its protest to our Office filed after the solicitation closing date is untimely. 4 C.F.R. § 21.2(a) (1991), as amended by 56 Fed. Reg. 3759 (1991).

think the CBD synopsis and the agency letter of September 3, to recipients of the RFP clearly apprised potential competitors that although this was a sole-source procurement, technical responses would be considered and evaluated. Under these circumstances, we believe Norden should have at least submitted an expression of interest which detailed its ability to meet the requirement in response to the agency's repeated invitations to do so.

The protest is dismissed.



Robert M. Strong
Associate General Counsel