



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: A-Com, Inc.
File: B-245246.2
Date: February 13, 1992

Charles D. Ossola, Esq., Hunton & Williams, for the protester.
Judith Mostyn White, Esq., Department of the Army, for the agency.
Mary G. Curcio, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester has not demonstrated that the procuring agency determination--that awardee's equipment complied with specifications stated in the request for proposals--is unreasonable where protester is alleging that the awardee's equipment should comply with requirements that were not part of the specifications, and where the record clearly shows that the awardee's offered equipment does comply with the specifications as stated.

2. Protest alleging agency bias is denied where allegation is based on (1) the agency's decision to permit awardee to demonstrate its equipment after best and final offers were submitted and (2) the agency's decision to relax the specifications so that the awardee and another firm could qualify for award where the awardee was the low technically acceptable offer and award decision had been made and the specifications were relaxed to conform to the agency's minimum needs.

DECISION

A-Com, Inc. protests the award of a contract to American Amplifier and Television Corporation (AATC) under request for proposals (RFP) No. DADA15-91-R-0118, issued by the Department of the Army, Walter Reed Army Medical Center, for an audio visual nurse call system. A-Com asserts that the product offered by AATC does not meet all the requirements of the solicitation. A-Com also complains that the award to AATC was tainted by Army bias in favor of that firm.

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

The RFP was issued on July 19, 1991, on a brand name or equal basis and specified the Rauland Responder III system as the brand name item. The solicitation contained the salient characteristics that a product other than the named item would have to meet to be considered equal to the specified brand name product. The solicitation required the contractor to provide all equipment, accessories, and materials in strict accordance with listed system specifications, and provided for award to the low, technically acceptable offeror. Technically acceptable was defined as the ability of an offeror to meet all minimum requirements.

After offerors participated in a site visit and the agency responded to questions which the offerors posed, the agency issued amendment No. 3 to revise the salient characteristics, essentially relaxing them to enhance competition. Four offerors responded to the amended solicitation by the September 9 closing date for the receipt of initial offers. The protester offered to provide the brand name item specified in the RFP. AATC, the awardee, offered to provide equal items manufactured by Fischer-Berkeley. After the initial evaluation, three of these offerors, including the protester and the awardee, were included in the competitive range. On September 13, the Army sent each competitive range offeror amendment No. 6 to the solicitation, which again relaxed the specifications. At the same time, the Army pointed out to each offeror deficiencies that the evaluators found in its proposal which had to be addressed, and requested a best and final offer (BAFO) by September 19.

After reviewing the BAFOs, the Army found that the proposals submitted by both the protester and the awardee were technically acceptable. Concerning cost, A-Com proposed to provide its system for \$2,300,898 while AATC offered the Fischer-Berkeley equipment at \$1,621,121. Accordingly, the Army determined to award the contract to AATC as the low, technically acceptable offeror. This protest followed alleging the equipment offered by AATC did not meet a number of the salient characteristics listed in the solicitation.

In a brand name or equal procurement, the procuring agency is responsible for evaluating the required descriptive literature submitted by offerors of equal items and ascertaining if it provides sufficient information to determine whether the offered items are in fact equal to the brand name products. Gasser Chair Co., Inc., B-236189.2, Jan. 8, 1990, 90-1 CPD ¶ 31. We will not disturb such agency determinations unless they are shown to be unreasonable. Id. We have reviewed A-Com's specific contentions, the offer submitted by AATC, and the Army's evaluation record and responses to A-Com's assertions. Based on this review and for the reasons that follow, we find that the Army properly

determined that the equipment offered by AATC complied with the salient characteristics as listed in the solicitation.

A-Com first argues that the product offered by AATC does not comply with section C, paragraph 3.4, "System Operation," which provides in pertinent part that "[w]hen calls from patients and staff stations are activated individual annunciation shall be displayed at the Floor Control Stations and identified by room number and priority." According to A-Com, AATC does not meet this requirement because, when using the Fischer-Berkeley system, if no one responds to a patient's call, the patient is cut off from the system and cannot make a second call.

In response, the Army asserts, and our review confirms, that there is nothing in the specifications which requires that patients be able to make a second call while the first call remains open. Accordingly, since A-Com does not otherwise suggest that the equipment proposed by AATC does not meet this provision, and the proposal submitted by AATC specifically describes how the specification is met, we find that the Army reasonably determined that the Fischer-Berkeley system offered by AATC complies with paragraph 3.4. ■

Second, A-Com states that paragraph 3.3 of section C requires that the system provide single button communication with registered staff and single touchpoint operation of all system functions. A-Com asserts that because the Fischer-Berkeley system is menu driven it takes several steps to complete each subsequent operation.

The Army asserts, and our review of the record again confirms, that the Fischer-Berkeley system offered by AATC does meet the requirement for single button communication with registered staff and single touchpoint operation of system functions. In this regard, we note that the specifications do not preclude the use of a menu driven system. Our review of the descriptive literature of the AATC offered system shows that the user of the system accesses the menu and then uses the function keys on the menu to perform the desired function. In our view, the fact that the user must access a menu before performing any function does not provide a basis to conclude that the system does not provide single button communications and single touchpoint operation. Insofar as A-Com complains that this is possible with only the first three locations, the fact is that the system has single button communication with these stations and there is no requirement in the solicitation that the system be capable of communicating with or accessing every location in the hospital at one time.

Third, A-Com notes that section C, paragraph 3.3 requires that the system be capable of setting two colors for required service. A-Com acknowledges that the Fischer-Berkeley system has two possible colors for service. A-Com asserts, however, that the system offered by AATC does not meet this requirement because both colors cannot be activated at the same time. Our review of the record shows, however, that the solicitation does not require that the system be capable of activating both colors at the same time. Nevertheless, the agency advises that AATC's system does in fact display two colors simultaneously. Accordingly, since it is clear that the system offered by AATC is in fact capable of two color service, we find that the Army properly found AATC compliant with this requirement.

Fourth, A-Com contends that AATC fails to comply with section C, paragraph 3.6.2(m) which requires that the system occupy no more than 189 square inches of counter space. A-Com asserts that the Fischer-Berkeley system does not meet this requirement. The documentation provided by the Army, however, demonstrates that the Fischer-Berkeley system in fact is 10-1/2 inches by 9 inches or 94.5 square inches and thus clearly meets this requirement.

Finally, A-Com asserts that the Fischer-Berkeley system does not have a code indicator light at duty stations as required by section C, paragraph 3.6.6(b), but instead, only has a code sound. Paragraph 3.6.6(b) does require that duty stations have a code indicator. The specification, however, does not require that the indicator be a light. Accordingly, a sound indicator is sufficient to meet this specification. In any case, the Army states that at a test of the Fischer-Berkeley system, it was observed that the system provides both a light and a sound indicator when a code call is received at a duty station.¹

A-Com next protests that the award to AATC was improper because it was based on Army bias in favor of AATC. A-Com reaches this conclusion because AATC was permitted to

¹In its initial protest, A-Com pointed to areas of AATC's proposal other than those we have discussed here that allegedly did not meet the salient characteristics of the name brand system specified in the solicitation. In its agency report, the Army disputed each area and explained how the Fischer-Berkeley system met the requirements of the RFP. Since A-Com did not dispute the Army's position in the comments it submitted on the report, we find that A-Com has abandoned its protest insofar as these areas are concerned and accordingly we have not addressed them in our decision. See Ross Aviation, Inc., B-236952, Jan. 22, 1990, 90-1 CPD ¶ 83.

demonstrate the capabilities of its software after BAFOs had been submitted and because the Army relaxed the specifications so that AATC and another firm could qualify for award even though, according to A-Com, the requirements as stated in the original solicitation were necessary to meet the government's minimum needs.²

A protester alleging bias in the award selection process must present evidence that the agency acted with intent to harm the protester, Watson Indus., Inc., B-238309, Apr. 5, 1990, 90-1 CPD ¶ 371. Here, A-Com has not met this burden. First, the fact that AATC, the low, technically acceptable offeror, was requested to demonstrate its software after the award decision had been made did not affect the competitive standing of A-Com who was judged technically acceptable but did not submit the lowest-priced proposal. In addition, the Army acknowledges that it relaxed the specifications so that AATC and another offeror could qualify for award. The Army asserts, however, that it did so because the equipment offered by these two offerors met the agency's minimum needs. A-Com argues that the Army's needs did not change and essentially that the Army is compromising its needs to permit AATC to qualify for award. A-Com, however, has presented only a general allegation without any substantiating evidence that the relaxed specifications do not meet the agency's needs. Accordingly, we find no basis on which to conclude that the agency's decision to relax the specifications demonstrates that it was biased in favor of AATC. We also note that procuring agencies are required to meet their needs with the least restrictive requirements. Moreover, our Office generally will not review a protest that specifications should be more restrictive. See Cryptek, Inc., B-240369, Nov. 1, 1990, 90-2 CPD ¶ 357.


Finally, in the comments it submitted after the agency filed its protest report, A-Com protests that the award to AATC is improper because the agency did not perform a proper technical evaluation. Specifically, the protester argues

²A-Com also suggests that a member of the technical evaluation team who is a former employee of AATC was biased in favor of AATC. In response, the Army reported that this person was an employee of AATC 14 years ago, but has since been employed by Walter Reed. The employee also submitted an affidavit that he was not in any way influenced in the evaluation and award process by his former employment. A-Com has provided only a bare assertion that bias is a result of the former employment, and there is nothing in the record to show that this employee acted to the benefit of AATC or the detriment of A-Com. We find no basis to support the bias allegation. See Research Analysis and Maint., Inc., B-239223, Aug. 10, 1990, 90-2 CPD ¶ 129.

that the technical evaluation documents do not reveal how the agency determined that the equipment proposed by AATC met the agency's needs.

We find that this protest basis is untimely. Under our Bid Protest Regulation, 4 C.F.R. § 21.2(a)(2) (1991), protests not based upon alleged improprieties in a solicitation must be filed no later than 10 working days after the protester knew or should have known of the basis for protest, whichever is earlier. When a protester supplements a timely protest with new and independent grounds of protest, the later raised allegations must independently satisfy the timeliness requirements. John Short & Assocs., Inc., B-239358, Aug. 23, 1990, 90-2 CPD ¶ 150. Here, A-Com's protest that the Army failed to perform a proper technical evaluation of AATC's proposal is based on the documents A-Com received with the Army's report on November 14, 1991. A-Com was therefore required to file its protest on this ground no later than November 29, 10 working days later. Since A-Com did not file its comments or raise the issue until December 6, the issue is untimely.³

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel

³We note that our Office granted A-Com an extension of time in which to file its comments. This extension, however, did not operate to extend the timeliness requirements for filing protests. See Arthur D. Little, Inc., B-243450.3, June 19, 1991, 91-1 CPD ¶ 583.