



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Mennen Medical, Inc.

File: B-246764; B-246766.2; B-246769

Date: April 2, 1992

Charlotte Rothenberg, Esq., McGuire, Woods, Battle & Boothe, for the protester.

C. Dale Duvall, Department of Veterans Affairs, for the agency.

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

DIGEST

1. Where agency letter of rejection cited 15 bases for rejecting the protester's equipment as noncompliant with the specifications, and protest to General Accounting Office (GAO) contends that protester's equipment is functionally equivalent to that specified, challenging the agency's determination in only 10 of the 15 areas, later protest of additional areas of alleged noncompliance is untimely as the protest should have been filed, under GAO Bid Protest Regulations, at the latest within 10 working days of receipt of agency report.

2. Contention that agency should have conducted a life cycle cost evaluation for offers to replace existing equipment is without merit where solicitation failed to provide for such evaluation and is untimely to the extent that solicitation should have included such a preference.

DECISION

Mennen Medical, Inc. protests the rejection of its quotations under requests for quotations (RFQ) Nos. M6-Q17-91 (Q17) and M6-Q18-91 (Q18) and the award of a contract under RFQ No. M6-Q19-91 (Q19), issued by the Department of Veterans Affairs for physiological monitoring equipment. The protester alleges that the agency improperly evaluated its quotations in response to Q17 and Q18 and improperly accepted a quotation that did not meet the terms of Q19.

We dismiss the protests.

A. BACKGROUND

In August 1991, the agency issued RFQs for physiological monitoring equipment for hospitals in Baltimore, Maryland,

and Dayton, Ohio (Q17), San Juan, Puerto Rico (Q18), and Nashville, Tennessee (Q19), to eight schedule contractors, including the protester. For orders in excess of the contract maximum order limitation, these eight previously awarded fixed-price requirements contracts, among which was the protester's Contract No. V797P-6381A, provide for competition and award on the basis of the low quote satisfying the requirements of the requiring activity.

The protester submitted responses to all three RFQs. Agency evaluators found the responses to Q17 and Q18 did not meet specification requirements, and the response to Q19 was not low. As a result, the agency awarded contracts to Marquette Electronics, which submitted the only response determined to meet the requirements of Q17, to Spacelabs, Inc., which submitted the only response found to meet requirements under Q18, and to Hewlett-Packard Company, which submitted the low response under Q19.

On October 4, 1991, the protester filed a protest of all three awards with the agency, generally challenging the award of contracts to higher priced offerors under Q17 and Q18 and contending that its quotation under Q19 was "more responsive because all the equipment we offered is new." The protest generally objected to the specifications as describing "specific technological implementations, rather than clinical requirements" and being biased toward particular vendors. The protester also alleged, "[o]ur products are, in general terms, equivalent to the products from other firms with which we directly compete."

While this protest was pending, by letter of October 11, the agency provided the protester with a formal notification of the rejection of its offer under Q18, delineating specific areas in which it had determined that Mennen's quote did not meet the requirements of the San Juan hospital as set forth in the RFQ specifications; in that letter, the agency advised Mennen that it had not considered the protester's offer of its Horizon 2000XL monitor in its evaluation because the monitor was not the one on the protester's schedule contract. The protester did not respond to this letter. By letter dated November 6, the contracting officer denied the agency-level protest, specifically noting the untimeliness of that portion relating to the allegedly restrictive specifications, advising the protester that award had, in all instances, been made to the low offeror, in accordance with their contracts, and reiterating the agency's determination that Mennen's quote did not meet the requiring agency's needs as set forth in the specifications of Q17 and Q18 and that its quote was not low under Q19. This protest to our Office followed.

B. M6-Q18-91

By the letter of October 11, the agency provided the protester with the specific reasons for rejection of its offer, including the following findings:

1. No established service center in Puerto Rico.
2. Does not use Ethernet (with 64 nodes) for its communication system. (Item No. 12, Salient Characteristics/Specifications, "Connects via Ethernet LAN which is compatible with VA Central Computer System.")
3. Does not provide remote interaction with other bed's physiological parameters, arrhythmia detection, alarming, analysis, alarm limits, etc.
4. No multifunction, battery operated module capable of monitoring and detecting arrhythmia etc.
5. Offered Horizon 2000XL monitor not on contract.
6. Bedside monitor and central station monitor not interchangeable.
7. Use of video switching rather than Ethernet.
8. Maximum of 24 nodes on video network.
9. No portable module compatible with the bedside and transport monitors.
10. Cannot display color ultrasound, nuclear, and other images on bedside monitors or transmit them over the network.
11. Monitor color screen configuration not operator selectable.
12. No drug dose or titration table calculator at bedside or central station.
13. No "zoom" control of monitor.
14. No interactive control of bed to bed arrhythmia review, alarm adjustment, parameter limits, etc.
15. No flexport of intravenous pumps, etc., parameters to be displayed on monitor.

In its protest to our Office, Mennen specifically challenged 10 of the 15 areas where the agency found that its product did not meet the RFQ specifications, including the agency's failure to consider the capabilities of the Horizon 2000XL monitor. The protester contended that contract clause L-5 requires contractors to furnish software upgrades at no cost to the government and that Mennen was therefore obligated to provide the Horizon 2000XL monitor, which the protester describes as essentially a software upgrade from its Horizon 2000 monitor which is on contract in response to all orders issued under its contract. The protester also contended that its equipment was functionally equivalent to that required as regards Ethernet, which the protester described as "only one of many specific communication protocols," in that its system could interface with the existing system as well as support the hospital's needs. The protester initially contended that it could provide a storage disc to record bedside information for transport to the patient's new location, and that this system was functionally equivalent to the RFQ requirement for a module compatible with the transport monitor, since Mennen contended, transport monitors are unreliable and subject to breakdown. Beyond its general allegation that its equipment was functionally equivalent and compliant, the protester made no specific challenge to the other five grounds upon which the agency rejected its proposal--for example, it provided no explanation regarding how it met the characteristics cited in findings 6, 10, and 11, above.

First, to the extent that Mennen contends that the agency should have considered products not specifically identified on its schedule contract, its protest is clearly untimely. The agency's letter of October 11 advised Mennen that the agency had declined to consider its Horizon 2000XL monitor because it was not on Mennen's schedule; we view this as a completely separate and specific issue of protest that was not satisfied by the protester's general allegations, made before it received the agency's rejection letter, that its equipment was functionally equivalent to that required. Since it is clear that the Mennen equipment does not meet the specification without the use of the Horizon 2000XL, its protest filed with our Office, 6 weeks after learning that the evaluation was based on the Horizon 2000, is untimely under our Bid Protest Regulations which require that a protest of this kind must be filed within 10 working days of when the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1991).

In explaining its position in the report filed in response to the protest, the agency noted that regardless of the merit of the evaluation issues Mennen actually raised, Mennen never specifically explained why it met the requirements in the five areas that the protest did not

address--for example, the failure to provide an interchangeable bedside and central monitor, the failure to offer a color-selectable monitor, or the inability to display color ultrasound images.

In its comments on the agency report, the protester for the first time takes issue with the agency's determination in these areas as well, asserting that the agency unreasonably interpreted the specifications, which, for example, the protester contends one cannot read as requiring a color selectable monitor, and that the specifications themselves are ambiguous. The protester now alleges not that its storage disc is equivalent to a transport monitor, or that the requirement for a transport monitor exceeds the agency's actual needs, but that it actually can and did offer a "battery-operated transport monitor" in response to the RFQ. Regarding its inability to display ultrasound images, the protester for the first time contends that it could have "configured" its monitors to meet the specifications if the solicitation had been more precise in describing the sources for the images that the hospital wishes to display. To the extent that the protester asserts that the agency's determination was unreasonable as regards those areas not addressed in its initial protest, we find that its basis for protest differs substantially from the argument advanced in its original protest that its equipment was functionally equivalent to what was required. In its comments the protester for the first time explains in detail how its product allegedly complies in these areas, asserts that in some cases it believes the agency misinterpreted the specifications or argues that the specifications were ambiguous.

These allegations are untimely. Where a protester supplements its protest with new and independent allegations, those allegations must independently satisfy our timeliness requirements; our Bid Protest Regulations do not contemplate the unwarranted piecemeal presentation of protest issues. Berkshire Computer Prods., B-246337, Dec. 18, 1991, 91-2 CPD ¶ 564. The agency advised the protester of the precise reasons for rejecting its quotation by the letter of October 11, and the protester should have provided precise responses to the agency's position, including any assertion that the agency had misinterpreted the specifications, or that the agency was incorrect that Mennen had not offered bedside, central station, and transport monitors, within 10 working days of receiving that letter to be timely.

Presuming however that its general allegation in the agency-level protest--that its equipment was functionally equivalent--served as a protest of the specific grounds advanced for rejection on October 11, the protester should

have raised these issues within 10 working days of receipt of the agency's November 6 letter denying the agency-level protest. Even if we presume, however, that the protester had no basis for challenging the agency's evaluation until it received the agency report, under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2), Mennen was obligated to protest those issues at the latest within 10 working days of receiving the agency report, or no later than January 17. However, the grounds for protest were not set forth until its January 22 comments on the report, CH2M Hill Southeast, Inc., B-244707 et al., Oct. 31, 1991, 91-2 CPD ¶ 413.

Further, the protester has provided no information in rebuttal to the agency's position concerning the required Ethernet communications system. The contracting agency has the primary responsibility for determining its minimum needs and for determining whether an offered item will satisfy those needs, and we review such determinations only to insure that they are reasonable. Addsco Indus., Inc., B-233693, Mar. 28, 1989, 89-1 CPD ¶ 317. In this regard, the agency has denied the protester's allegations that its system is equal in functionality as regards the Ethernet requirements; the agency states that as the industry standard for serial data transmission of digital information within large communication networks, use of Ethernet allows a wider variety of devices to access the system. Further, the agency reports that the analog system offered by Mennen is not only slower but does not allow for storage of data without the use of analog recording tape; Ethernet allows direct transmission of digital data from one device to another. The agency notes that in speed and its access to other digital devices, it does not consider the Mennen system functionally equivalent to that specified. Absent any substantive response by the protester, even if the protest were otherwise timely, we would therefore have no basis to find the agency determination unreasonable.¹

¹Based on information contained in the report filed with our Office by the agency, Mennen alleges that the awardee, Spacelabs, Inc. also offered equipment not on its schedule contract. This issue, raised with our Office on January 22, 12 working days after Mennen received the report is untimely. While our Office granted the protester an extension of time in which to file its comments, such action does not alter the timeliness requirements of our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2), and the protester was obligated to identify any such new grounds of protest within 10 working days of receiving the report. CH2M Hill Southeast, Inc., supra.

C. M6-Q17-91

Mennen requests reconsideration of our decision, Mennen Medical, Inc., B-246766, Dec. 11, 1991, 91-2 CPD ¶ 533, dismissing its protest against the rejection of its quotation under Q17. We dismissed the protest as untimely because Mennen alleged that the solicitation requirements overstated the agency's minimum needs after the closing date for receipt of quotations. The protest was required to be filed prior to that time under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), to be timely. Mennen Medical, Inc., supra.

Mennen argues that its protest was timely as regards the RFQ for the Dayton, Ohio requirement, that the portions of its protest that our Office found to concern requirements alleged to be in excess of the agency's minimum needs applied only to the specifications for the equipment required for the hospital in Baltimore, Maryland. The protester argues that the agency report would have established the timeliness of its protest. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(b), it is the protester's obligation to include in its protest all the information needed to demonstrate its timeliness and protesters will not be permitted to introduce for the first time in a request for reconsideration the information upon which the timeliness of the protest relies.²

D. M6-Q19-91

In its original protest, Mennen alleged that offerors were required to supply new, complete systems, but that the awardee, Hewlett-Packard, had proposed used equipment. The protester contended that the Hewlett-Packard offer did not comply with solicitation requirements and should have been rejected or, at the least, the agency should have penalized Hewlett-Packard in the evaluation by adjusting its price upwards to reflect the advantages of furnishing a new system.

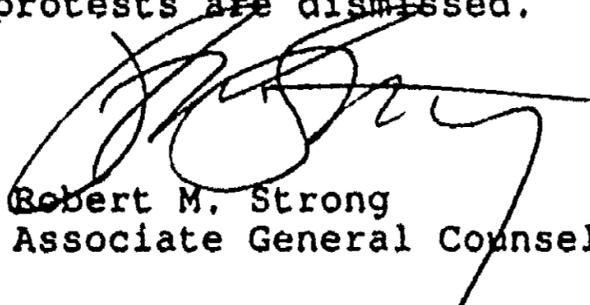
As the agency points out, this RFQ required offerors to provide monitors compatible with certain central station equipment, monitoring equipment, and system interface, which were to remain in use, or to "furnish a complete new system with all interconnections." Hewlett-Packard offered only the monitor, to interface with the existing equipment, while

²We note that Mennen's offer for the Dayton, Ohio, requirement lacked the Ethernet system required by the specifications. As discussed above, under Q18, we concluded that the agency reasonably rejected Mennen's quote for failing to meet this requirement.

Mennen offered new equipment with which its monitor could interface. The agency therefore found that Hewlett-Packard had offered equipment that met specifications.

In its response to the agency report, Mennen abandons its position that Hewlett-Packard's approach, of offering a new monitor to interface with the existing equipment, was not permitted by the RFQ. Mennen now contends that the agency should have conducted a meaningful evaluation of the life cycle cost of the two proposed systems--its system and the Hewlett-Packard system--including the cost of increased maintenance and the risk of failures in the existing, older equipment, an evaluation that Mennen contends would have demonstrated that its equipment offered the actual lowest overall cost to the government. The RFQ contained no provision for an evaluation of life cycle costs. The terms of the RFQ therefore precluded the agency from conducting such an evaluation and to the extent that the protester now contends that the solicitation should have provided for consideration of life cycle costs, its protest is untimely. See 4 C.F.R. § 21.2(a)(1); U.S. Defense Sys., Inc., B-245006.2, Dec. 13, 1991, 91-2 CPD ¶ 541.

The protests are dismissed.



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