

Mrs. Melody



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: North Shore Strapping Company, Inc.

File: B-248003

Date: June 18, 1992

Patrick P. Leneghan, Esq., for the protester.
Michelle Harrell, Esq., and Nora Huey, Esq., General Services Administration, for the agency.
John M. Melody, Esq., and David Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that specification in current solicitation is unduly restrictive--because agency continuously and erroneously has rejected protester's bids under prior procurements for nonconformance with the specification--is dismissed (in accordance with Bid Protest Regulations, 4 C.F.R. § 21.3(m)(11) (1992)), where protester has filed suit in federal court on same grounds under prior procurement, the suit is still pending, and the court has not requested General Accounting Office's decision in the matter.

DECISION

North Shore Strapping Company, Inc. (NSS) protests the terms of General Services Administration (GSA) solicitation No. 2FYG-JK-92-0001S, for quantities of steel strapping. NSS maintains that the specification for the strapping unduly restricts competition.

We dismiss the protest.

The solicitation incorporated American Society for Testing and Materials (ASTM) Designation D 3953-87, "Standard Specification for Strapping, Flat Steel and Seals." Under paragraph 10.2.2 of this specification, zinc-coated strapping (in issue here) "shall have surfaces and edges coated with zinc by either the hot-dipped or electrodeposit process." GSA previously has rejected bids by NSS (based on nonresponsibility determinations which the Small Business Administration has affirmed by refusing to issue a

054716/146929

certificate of competency (COC)), on the ground that NSS' manufacturing method does not result in the edges of the strapping being coated by one of the two methods specified.

NSS asserts that the solicitation is:

"Restrictive of competition due to the fact that the contracting officer continually and erroneously refuses to accept [NSS'] offered steel strapping, claiming that it is not manufactured in accordance with the ASTM specification."

NSS acknowledges that "it does not challenge any of the particular requirements stated within ASTM D 3953-87." Rather, NSS believes rejection of its prior bids is the result of the agency's misinterpretation of the ASTM specification (although NSS does not indicate how it believes the specification should be interpreted). It has filed this prebid opening protest based on its anticipation that GSA again will reject its bid for the same reason.

GSA argues that NSS' protest should be dismissed on several grounds, including the fact that essentially the same arguments as those presented here were raised by NSS in a currently pending lawsuit it filed in federal court under the prior procurement for this requirement. In this regard, GSA cites our Bid Protest Regulations, 4 C.F.R. § 21.3(m)(11) (1992), in noting that our Office generally will not consider issues pending before a court of competent jurisdiction. We agree with this argument.

On August 20, 1991, NSS filed suit against GSA and the SBA in the U.S. District Court for the Northern District of Ohio, case No. 1:91CV 1635, concerning the rejection of its bid under solicitation No. 2FYS-AX-91-0002S. Although NSS' pending lawsuit is not per se founded on the protested solicitation, the issues of whether NSS' strapping conforms to the ASTM specification and whether GSA is correctly interpreting that specification, clearly are squarely before the court. In the complaint's first claim for relief, NSS requested that GSA be enjoined from making award to any other bidder on the basis that:

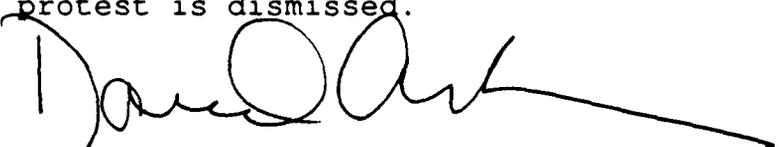
"The contracting officer has arbitrarily determined, according to his interpretation of the ASTM specification [D 3953-87], that the material [NSS, the apparent low bidder, intended to supply] is not manufactured according to the specification."

Under the third claim for relief, NSS requests a declaratory judgment as to "whether the zinc coated steel strapping offered by [NSS] is manufactured according to government specifications."

NSS argues that its lawsuit has nothing to do with its protest; according to the protester, the protest challenges the use of a restrictive specification, while its lawsuit is aimed at the "coercive tactics of certain government employees," and the improper actions of GSA and SBA in rejecting NSS' bid. NSS' characterization of its federal court arguments notwithstanding, as reflected in the claims for relief quoted above, those arguments are based on the same GSA actions and request the same relief as its protest. If the court agrees with NSS by determining that NSS' strapping does meet the specification, and enjoins GSA from rejecting the firm's bid under the prior solicitation (although the current status of that award is not evident from the record), it follows that the agency could not reasonably deny NSS the award on this ground under the current solicitation, the argument on which NSS' protest is based. Conversely, if the court rejects NSS' arguments that GSA improperly rejected its bid under the prior procurement, GSA properly could reject NSS' bid here.

We conclude that the substance of NSS' protest to our Office is at issue in NSS' lawsuit, and since the court has not requested our decision, we therefore will not review the matter. 4 C.F.R. §§ 21.3(m)(11) and 21.9(a); Solano Garbage Co., B-233876, Jan. 23, 1989, 89-1 CPD ¶ 62.

The protest is dismissed.



David Ashen
Acting Assistant General Counsel