



Comptroller General
of the United States

Washington, D.C. 20548

149228

Decision

Matter of: Lenderking Metal Products

File: B-252035; B-252036

Date: May 18, 1993

Lynn Semenuk and Michael D. Semenuk for the protester. Michael Colvin, Esq., and Terrence J. Tychan, Esq., Department of Health & Human Services, for the agency. Sylvia Schatz, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that specifications (salient characteristics) of brand name or equal solicitation are unduly restrictive of competition is denied where the protester makes no showing that the specifications do not reflect the agency's needs.
2. Protest that delivery schedule is difficult for inexperienced companies to meet, and therefore unduly restricts competition, is denied where agency establishes that the delivery schedule is necessary to meet its minimum needs.

DECISION

Lenderking Metal Products protests the terms of invitation for bids (IFB) No. 263-93-B(GE)-0233, issued by the Department of Health and Human Services, National Institutes of Health (NIH), on a brand name or equal basis for primate caging systems and accessories to be used in a new animal research facility (building 49) at the NIH campus in Bethesda, Maryland. The protester contends that various portions of the IFB unduly restrict competition.

We deny the protest.

The IFB, issued on December 23, 1992, required bids on specific Allentown Caging Equipment Co., Inc. model number cages and accessories, or products which are "equal." The IFB included a detailed list of salient characteristics of the brand name product that were to be met by proposed equal products, and stated that delivery was to be made 90 days after contract award.

Three days prior to the January 25, 1993, bid opening, Lenderking filed identical protests with both the agency and our Office, requesting clarifications and changes to the specifications as well as an extension of the bid opening date. Although NIH issued an amendment extending the bid opening date to March 8, changing a few of the specifications and reiterating some of the IFB requirements that Lenderking questioned, it denied Lenderking's protest on February 5.

Lenderking alleges that several features of the caging systems are unduly restrictive because they are design specifications that mirror the specific features of the Allentown model, rather than functional specifications which would allow bidders to use different approaches to meeting the agency's actual needs. Lenderking specifically challenges the requirement for a suspension system consisting of two rollers that guide the squeeze back grid assembly (the vertical sliding wall located inside the cage that pushes an animal forward when it is to be removed from a cage) within two fixed internal channels located along the upper part of the cage; Lenderking asserts that there are other types of suspension systems that would meet the agency's needs, and that the specification should be drafted to describe the function of such a system rather than mirror the design features of the Allentown system.

Although agencies should use functional specifications when practicable, design specifications based upon a particular product are not improper in and of themselves. Federal Acquisition Regulation (FAR) § 10.002(b); Loral Fairchild Corp., B-242957, June 24, 1991, 91-1 CPD ¶ 594. Rather, an agency's use of design specifications provides a basis for determining that a solicitation restricts competition only where those specifications exceed the government's minimum needs. Lanier GmbH, B-216038, May 10, 1985, 85-1 CPD ¶ 523. Indeed, we will not object to specifications that are "written around" design features of a particular item where the agency establishes that the design specified is necessary to meet its minimum needs. Gel Sys., Inc., B-234283, May 8, 1989, 89-1 CPD ¶ 433, aff'd, B-234283.2, Aug. 22, 1989, 89-2 CPD ¶ 166.

Lenderking initially also protested the requirement that bidders provide a list of at least three locations where similar caging systems have been in use for at least 3 years as unduly restrictive. However, since the protester failed to comment on HHS's explanation for its need for this requirement, we deem the issue abandoned and will not address it. Vanguard Research, Inc., B-242633; B-242633.2, May 30, 1991, 91-1 CPD ¶ 517.

Thus, there is nothing inherently improper in NIH's use of design specifications incorporating features of the Allentown product that meet its needs. Rather, the specifications are objectionable only to the extent that they exceed the government's needs. The only specific requirement that Lenderking timely challenged is the one concerning the design of the required suspension system.²

Lenderking has not shown that the suspension system's design is unduly restrictive of competition. The agency states that, based on user experience with other designs for the suspension systems, it concluded that they would present tracking problems. Specifically, the agency explains that the previous suspension system design requiring the two rollers attached to the squeeze back grid assembly to be guided along two tubular bars was inadequate, because the rollers did not stay within the bars as the assembly was moved back and forth along the cage, thus making it difficult to manipulate the assembly. The agency maintains that it needs the design for the suspension system specified in the IFB because it requires the rollers to be enclosed inside two fixed internal channels such that they cannot become misaligned as the assembly is moved.

We think the agency's explanation of its needs, on its face, is reasonable; NIH has specified the suspension system requirement in terms that its experience indicates will meet its needs. Lenderking has not responded with any rebuttal

²In its comments on the agency report, Lenderking also argues for the first time that various other specific design requirements are unduly restrictive for the same reason. However, a protester must raise all available protest grounds in its initial protest filing; the protest system established by the Competition in Contracting Act of 1984 (CICA) and implemented by our Regulations cannot tolerate piecemeal protest filings that disrupt the procurement process which is designed to provide for expeditious resolution of protests. See 31 U.S.C. § 3554 (1988); AAA Eng'g & Drafting, Inc., B-236034.3, Apr. 6, 1993, 93-1 CPD ¶ _____. It was clear when Lenderking filed its initial protest on January 21 that these additional requirements were written as design rather than functional specifications. Yet, instead of protesting at that time that they were unduly restrictive, Lenderking only asked to be furnished specifications for these requirements. Even if the specifications were necessary to give rise to knowledge of this protest ground, the specifications were already listed in the IFB. Thus, there was no reason for Lenderking to delay its argument that these design requirements are unduly restrictive. Doing so rendered this an unwarranted piecemeal protest that we will not consider.

to the agency's stated need for the Allentown design of the suspension system but has simply restated its general argument that the requirement for a suspension system should not be written as a design specification. Lenderking, for example, does not dispute the agency's findings with regard to the problems associated with the previous suspension system design. Further, although it broadly asserts that other types of suspension systems are available that would meet the agency's needs, Lenderking does not suggest that it has available or could manufacture a suspension system which eliminates the alignment problem.

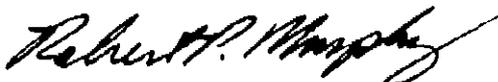
Beyond its failure to establish that it could meet NIH's needs in some other manner, Lenderking does not even assert that it cannot meet the suspension system requirement or any other requirement in the IFB. Based on the record here, there is no apparent reason why other firms should not be able to readily meet the Allentown specifications; the agency notes in this regard that under a similar previous procurement an award was made based on an item equal to the Allentown product. We conclude that since the protester has not made any showing that the specifications do not reflect the agency's needs, Gel Sys., Inc., supra, and indeed has not even shown that the nature of the specifications in some specific way prejudiced the firm, Lanier GmbH, supra, or precluded it from competing, Julie Research Lab., Inc., B-218598, Aug. 20, 1985, 85-2 CPD ¶ 194, there is no basis to conclude that the specifications are unduly restrictive.

Lenderking also contends that the required delivery schedule unduly restricts competition. The protester maintains that inexperienced companies would have difficulty completing delivery within 90 days after award on a contract of this magnitude. Lenderking suggests that extending delivery between 120 and 180 days after award would be reasonable.

Again, Lenderking does not state that it cannot meet the delivery schedule such that it would be precluded from competing. The fact that inexperienced companies might have difficulty meeting the schedule is irrelevant, since Lenderking characterizes itself as an experienced caging manufacturer. Thus, there is no basis for finding that the delivery requirements are restrictive of competition.

In any case, the agency reports that the delivery schedule is necessary to assure that a new Human Genetics Research program can begin as scheduled in the summer of 1993, and so that NIH's Intramural Research Program can undergo an accreditation site visit by the June 1, 1993, deadline established by the American Association for Accreditation of Laboratory Animal Care. Beyond these program concerns, the cost of any delay is estimated at between \$250,000 and \$300,000 per month for unutilized personnel and facilities. Lenderking responds only generally that a delay in the delivery schedule would not adversely interrupt current research programs. It does not argue that NIH's explanation in fact does not reflect the agency's minimum needs, and there is nothing in the record that would lead us to question that explanation.

The protest is denied.


for James F. Hinchman
General Counsel