



Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: FLIR Systems, Inc.

File: B-255083

Date: January 24, 1994

James A. Fitzhenry, Esq., for the protester.
Riggs L. Wilks, Jr., Esq., and Elizabeth DiVecchio Berrigan, Esq., Department of the Army, for the agency.
Daniel I. Gordon, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester is not an interested party for the purpose of filing a protest where its bid was found nonresponsive for reasons uncontested by the protester and unrelated to the basis of protest.

DECISION

FLIR Systems, Inc. protests the terms of invitation for bids (IFB) No. DAHA90-93-B-0009, issued by the Department of the Army, National Guard Bureau, for ground thermal imaging systems. FLIR contends that the specifications in the solicitation are vague and ambiguous, hence making it impossible for bidders to submit responsive bids.

We dismiss the protest.

The IFB was issued on July 30, 1993. Among the technical requirements set forth in the IFB statement of work (SOW), the first requirement listed was that the "ground thermal imagery system shall produce thermal imagery in the 8 to 12 micrometer portion of the spectrum."

In an August 16, 1993 letter to the agency, FLIR raised a number of areas in which it believed that the SOW was vague or ambiguous.¹ None of the areas raised involved the requirement that the system produce imagery in the 8 to 12 micrometer portion of the spectrum.

¹For example, it asked whether the requirement that the system be completely sealed against dust and moisture meant that the video monitor had to be so sealed.

On August 18, the agency issued a draft amendment No. 1 to the IFB. In the final form apparently issued on August 27, that amendment replaced the SOW with a revised version. The revised version maintained unchanged, as the first requirement listed, the specification that the "ground thermal system shall produce thermal imagery in the 8 to 12 micrometer portion of the spectrum." Some of the areas in which the revised SOW differed from the original one reflected the concerns raised by FLIR in its August 16 letter.

In an August 19 letter, FLIR again wrote to the agency, this time challenging the use of sealed bid procedures in this procurement. FLIR argued in its letter that the agency should request proposals and conduct discussions, due to the inherent complexity of the equipment needed and the lack of an off-the-shelf system which would satisfy the agency's requirements. FLIR's letter did not question the requirement that the system produce imagery in the 8 to 12 micrometer range.

A pre-bid conference was held on August 24. At that conference, one potential bidder challenged the requirement for a system producing imagery in the 8 to 12 micrometer range, and asked whether imagery in the 3 to 5 micrometer range would be acceptable. The agency responded that the agency's needs required a system producing imagery in the 8 to 12 micrometer range. This question and answer were distributed in written form to all companies which had expressed an interest in the procurement.²

In a September 1 letter to the agency, FLIR argued that significant discrepancies and ambiguities remained in the amended solicitation. Although several instances of such

²In the August 25 minutes of the pre-bid conference, which were sent to all attendees, the agency advised prospective bidders to request relaxation or alteration of any specifications they believed were unduly restrictive. The minutes stated that:

"If competition can be enhanced by relaxing technical requirements without adverse impact on mission requirements, the [agency] may grant such requests via Amendment to the solicitation. All requests for relaxation of technical requirements must be received in this office not later than 1 September 1993."

At no point did FLIR request that the agency relax the requirement for imagery in the 8 to 12 micrometer range.

alleged deficiencies were set forth, the letter included no reference (direct or indirect) to the requirement that the system produce imagery in the 8 to 12 micrometer range.

On September 3, the agency issued amendment No. 2. That amendment deleted the prior SOW and replaced it with a purchase description, and explicitly permitted bidders to offer a "brand name or equal" product. The first salient characteristic identified in the purchase description was that the "ground thermal imagery system shall produce thermal imagery in the 8 to 12 micrometer portion of the spectrum." The amendment identified a number of products, including one manufactured by FLIR, as acceptable brand name products.

On September 14, FLIR's counsel met with agency personnel to discuss FLIR's concerns. During that meeting, FLIR apparently did not question the agency's requirement that the system acquired produce imagery in the 8 to 12 micrometer range. In a September 15 letter, FLIR again contended that the IFB remained deficient despite the changes accomplished by amendment No. 2. That letter identified a series of alleged deficiencies in the solicitation; no reference was made to the 8 to 12 micrometer imagery requirement.

In a September 16 letter, the agency responded to the various concerns raised by FLIR. The agency pointed out in that letter that one of FLIR's systems had been identified as an acceptable system for the procurement. That letter effectively treated FLIR's earlier letters as agency-level protests which were being denied.

Bid opening was held on September 17. Inframetrics was identified as the low bidder. FLIR's bid, which was next low, was found nonresponsive because the system proposed produces imagery in the 3 to 5 micrometer range. FLIR did not bid the FLIR product which amendment No. 2 had identified as acceptable.

FLIR filed this protest with our Office within 10 days of receipt of the agency's September 16 letter denying its agency-level protests. FLIR contends that the IFB remains defective due to alleged vagueness and ambiguities, and that those deficiencies precluded the company from submitting a responsive bid.

Under the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56 (1988), and our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1993), a protester must be an interested party before we will consider its protest. An interested party is defined as an actual or prospective bidder whose economic interest would be directly affected by the award of a

contract or the failure to award a contract. Id. Normally, where the protester would not be in line for award even if its protest were sustained, it is not an interested party for the purpose of filing a protest. Advanced Health Sys.--Recon., B-246793.2, Feb. 21, 1992, 92-1 CPD ¶ 214.

The fact that the appropriate remedy--if a protest against an alleged solicitation defect were sustained--would be resolicitation may mean that a bidder could be an interested party even if its bid would not be in line for award under the challenged solicitation. See Teltara Inc., B-245806, Jan. 30, 1992, 92-1 CPD ¶ 128; Loral Fairchild Corp., B-242957, June 24, 1991, 91-1 CPD ¶ 594. That would be true, however, only where the protest ground directly affected the protester's bid price or its eligibility for award; in such circumstances, the protester's ineligibility or the low ranking of its bid could have been caused by the solicitation defect and thus could not properly be permitted to preclude consideration of the protest. See Teltara Inc., supra. On the other hand, where the protester's ineligibility or low ranking is unrelated to the issue raised in the protest, the protester is not an interested party, regardless of whether resolicitation might otherwise be an appropriate remedy.

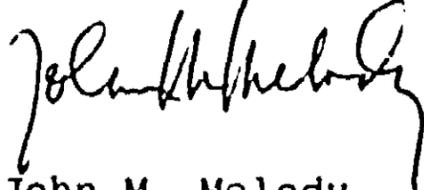
Here, the protester does not challenge the requirement for 8 to 12 micrometer imagery, and does not contend that this requirement was ambiguous or vague, or that the alleged defects in the IFBs somehow affected the protester's ability to satisfy this requirement.³ FLIR did not mention the requirement either in its filings with our Office or in any of its agency protests. On its face, the requirement is neither ambiguous nor vague; indeed, in the written answer responding to a potential bidder's question, the agency insisted on the need for imagery in the 8 to 12 micrometer range, and rejected the acceptability of a system producing imagery in the 3 to 5 micrometer range. FLIR does not deny receiving a copy of the agency's answer to the bidder's question. Despite having received that unambiguous guidance, FLIR bid a 3 to 5 micrometer range system, and the bid was properly rejected.

Since the protester's bid was found nonresponsive for a reason not challenged by the protester and unrelated to the alleged defects in the IFB, the protester would not be in

³FLIR has not explained how any ambiguities in the IFB could have precluded the company from bidding a system that complied with the unambiguous requirement for 8 to 12 micrometer imagery.

line for award, regardless of any merit in its challenge to other solicitation provisions. Accordingly, it is not an interested party for the purpose of filing this protest.

The protest is dismissed.



John M. Melody
Assistant General Counsel