



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Amtech Systems Corporation

File: B-252414

Date: June 29, 1993

Rand L. Allen, Esq., and Paul F. Khoury, Esq., Wiley, Rein & Fielding, and R. Rand Brown, for the protester.
William H. Butterfield, Esq., and Charlotte Rothenberg Rosen, Esq., McGuire, Woods, Battle & Boothe, for Savi Technology, an interested party.
Gregory H. Petkoff, Esq., and Richard C. Phillips, Esq., Department of the Air Force, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that agency is conducting an improper sole-source procurement is untimely where the protester did not submit an expression of interest in response to either of two Commerce Business Daily notices announcing the agency's intent to procure on a sole-source basis, both of which contained footnote 22, giving other potential sources 45 days to submit expressions of interest in the procurement.

2. Proposed sole-source award under the authority of 10 U.S.C. § 2304(c)(1) (1988) is not objectionable where the agency reasonably determined that only one source was available to supply the required equipment, and protester, who submitted a technical package for review in response to an agency invitation--despite the expiration of the time for response indicated in two Commerce Business Daily notices--failed to establish that it had current equipment which could meet the agency's requirements.

DECISION

Amtech Systems Corporation protests the proposed award of a sole-source contract to Savi Technology under request for proposals (RFP) No. F33600-92-R-0038, issued by the Department of the Air Force for a microchip-based radio frequency transponder system. Amtech challenges this sole-source contract on the ground that the Air Force

improperly determined that Savi is the only responsible source capable of meeting the government's needs.

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

BACKGROUND

The issuance of this RFP on a sole-source basis to Savi is the culmination of a review of developing automatic identification technology (AIT) by the Department of Defense's (DOD) Microcircuit Technology in Logistics Applications program office. This technology uses a variety of media and methodologies to identify products or commodities, the most familiar of which is bar coding on commercial products read by laser identifiers, much like that used in most grocery stores. As part of this effort, the Air Force was selected to acquire for DOD the equipment and services necessary to install an AIT system which uses radio frequency (RF) as the identification medium in the world-wide shipping and receiving of material, including tracking material within large military warehouse environments, open-air storage areas, office and laboratory environments, combat areas, and military transportation facilities.

On February 14, 1992, the Air Force issued a draft solicitation seeking an RF-based identification system consisting of transponders and hand-held interrogators.¹ The draft RFP was provided to 87 companies. On March 12, the Air Force convened a presolicitation conference with interested potential offerors during which agency officials fielded questions about the procurement. This conference was attended by 43 representatives of 29 companies. During the conference, several of the participants noted that only one company, Savi, could meet the agency's needs as set forth in the draft solicitation.

Five days after the presolicitation conference, Amtech sent a March 17 letter to the Air Force to provide a summary of Amtech's comments on the draft solicitation. In this letter, Amtech suggested several changes in the draft solicitation to increase the likelihood of competition for the agency's needs. Amtech's letter acknowledged that without such changes, only Savi could provide the RF-based identification system.

¹A transponder is attached to an asset and stores information about that asset, while an interrogator sends out a radio signal that reads, or communicates with the transponder. Once the interrogator receives information from a transponder, it transfers the information to a computer system.

Based on the comments by Amtech and others, made during and after the presolicitation conference, the Air Force concluded that only Savi could meet its needs for an RF-based system, and that none of the other potential offerors would be able to participate in a competition for the system. As Air Force personnel began drafting a justification and approval (J&A) document to support a sole-source award, the agency published a notice of its intended course of action in the Commerce Business Daily (CBD) on May 22. The CBD notice advised that the agency would release the RFP to Savi on or about June 10, and included a footnote giving potential offerors 45 days to respond to the Air Force to identify their interest and capabilities. Nearly 6 months later, on December 18, the Air Force published a second CBD notice because the agency had yet to issue the promised RFP. The second notice referenced the May 22 notice, and advised that the RFP would be released on January 25, 1993. Amtech failed to respond to either CBD notice.²

On February 11, after receiving the RFP, Amtech wrote a letter to the Air Force setting forth 33 questions it requested the agency to answer to assist it in preparing a proposal. Amtech's letter also asked the agency to extend the response time in the RFP to 30 days from the date the Air Force responded to Amtech's questions.

By letter dated February 17, the contracting officer advised Amtech that it had misconstrued the nature of the RFP, and informed Amtech of the CBD notices announcing the agency's intent to procure the RF system with a sole-source contract to Savi. In addition, the contracting officer stated:

"You have alluded to the fact that you may have equipment which meets our specifications as outlined in the Statement of Work included as part of the solicitation. If that is the case, please forward a technical package for our review in accordance with Note 22 which was referenced in the CBD announcement. Your package should reach this office by the solicitation closing date of 2:30 P.M. on 24 Feb 93."

²The second 45-day period expired on February 1, 1993. Before the period expired, Amtech sent a 1-sentence January 28 facsimile transmission requesting a copy of the RFP, and a second January 29 facsimile asking if the agency would be holding a bidders' conference on the RFP. Neither communication rises to the level of a response to the CBD notice, and Amtech expressly states that the communications were not intended to be a response.

The next day, February 18, Amtech responded to the contracting officer's letter stating its intent to reply with a technical package by the February 24 deadline. The letter also stated that Amtech was unaware that any decision had been made to procure these items on a sole-source basis.

On February 24, Amtech made two filings: one with the Air Force outlining its technical capabilities with respect to an RF-based system; the other, a protest to our Office challenging the decision to procure this system on a sole-source basis.

Two other events relevant here took place after Amtech filed its protest. First, by letter dated March 2, the Air Force notified Amtech that its technical package "provided insufficient information to substantiate that your company has commercial equipment that will satisfy our stated requirements." Despite its conclusion about Amtech's technical submission, the Air Force invited Amtech to demonstrate its equipment on March 10 at a location in Fairborn, Ohio. By letter dated March 5, Amtech declined the Air Force's invitation on the basis that the proposed demonstration included inappropriate restrictions.

The Findings in the J&A

The J&A concludes that a sole-source award to Savi is justified under 10 U.S.C. § 2304(c)(1) (1988), which authorizes the use of other than competitive procedures when the supplies or services needed by the agency are available from only one responsible source, or from a limited number of responsible sources, and no other product will satisfy the agency's needs. The J&A recites the Air Force's experience with the draft solicitation and the presolicitation conference that followed. According to the J&A, the Air Force learned during the conference that: (1) only one manufacturer has commercial off-the-shelf equipment available to meet these requirements; and (2) other manufacturers will require a 12 to 18 month period to design and develop the system, followed by another 12 to 18 months to build, test and market a system.¹

Based on these facts the Air Force decided that: (1) it would procure the RF system on a sole-source basis from Savi; (2) some of the usual concerns about sole-source

¹During the conference the Air Force also learned that several companies would be able to compete for a portion of the work included in the draft solicitation known as the integration services. These services were pulled out of the draft solicitation and procured separately using full and open competition.

contractors charging excessive prices were not present here since Savi had already marketed its system commercially, and thus had commercial price lists for its product; and (3) future procurements of such a system would likely be conducted with full and open competition because other contractors would take note of the expanding market for these goods and take the necessary steps to add this equipment to their product lines. In addition, in several attachments to the J&A, the Air Force set forth the requirements for its RF system, interested sources for future competition, and a summary of RF vendors, including Amtech, who offer similar systems but whose systems do not meet the agency's minimum requirements.

TIMELINESS

Our review of the record in this case leads us to conclude that many of the arguments raised by Amtech are not timely.

A protester must respond to CBD notices with a timely expression of interest in fulfilling the potentially sole-source requirement and to receive a negative agency response as a prerequisite to filing a protest challenging an agency's sole-source decision. Norden Sys., Inc., B-245684, Jan. 7, 1992, 92-1 CPD ¶ 32. This procedure gives the agency an opportunity to reconsider its sole-source decision in light of a serious offeror's preliminary proposal, while limiting challenges to the agency's sole-source decision to diligent potential offerors. Fraser-Volpe Corp., B-240499 et al., Nov. 14, 1990, 90-2 CPD ¶ 397.

As explained above, the Air Force first released a draft solicitation and then held a presolicitation conference before concluding that only Savi could meet its stated needs. The Air Force then announced its intent to award a sole-source contract to Savi in its CBD notice of May 22, 1992, followed by a second notice published on December 18. These CBD synopses referenced footnote 22, giving potential sources 45 days to submit expressions of interest showing their ability to meet the agency's stated requirements. Amtech never responded to either of the two CBD notices.

Despite Amtech's attempts to assume the posture of a diligent potential offeror, the record shows that after attending the presolicitation conference and providing written comments in a letter dated March 17, Amtech took no further action to convince Air Force officials that the approach highlighted in the draft solicitation might overstate the agency's needs. Amtech's February 18, 1993, letter to the contracting officer admits that Amtech remained unaware of the agency's intent--published 9 months earlier, and reiterated in a later notice--to award a sole-source contract to Savi.

The only basis for any portion of Amtech's protest to be timely rests upon the action of the contracting officer in response to Amtech's letter of February 11 asking certain questions about the RFP's requirements. Still unaware of the agency's stated intention to procure this system on a sole-source basis, Amtech requested additional information and time to permit it to prepare its proposal. As quoted above, the contracting officer's February 17 letter advised Amtech that the RFP was issued for a sole-source procurement pursuant to the CBD notices. Nonetheless, the contracting officer noted Amtech's suggestion that it might have equipment meeting the RFP's specifications and requested Amtech to submit information to that effect by the solicitation closing time of 2:30 p.m. on February 24.

Despite Amtech's broad assertions, the contracting officer's invitation to Amtech to submit information showing that it could meet the "specifications as outlined in the Statement of Work included as part of the solicitation" was limited in scope--the contracting officer offered a review to determine whether Amtech might prove to be a competitive second source for the system specified in the RFP. Amtech, however, has used the contracting officer's letter as an opening to mount an otherwise untimely challenge to the agency's statement of its minimum needs, as set forth in the J&A and in the RFP.

In our view, permitting Amtech to challenge the minimum needs adopted in the J&A and the RFP at this late juncture would have a chilling effect on the willingness of agencies to attempt to increase competition as the Air Force has done here. The Air Force issued not one, but two, CBD synopses, announcing its conclusion that only Savi could meet its needs for a flexible RF-based system with off-the-shelf equipment. Upon receipt of Amtech's February 11 letter, the Air Force could have insisted that the response time indicated in the notices had passed. Its willingness to allow Amtech to submit information--and after rejecting the document package, to invite Amtech to demonstrate its equipment--should not result in having to defend an otherwise untimely challenge to the underlying decision to procure the system specified in the RFP.

Accordingly, in recognition of the fact that the time for responding to the CBD notices had passed, and in recognition of the limited nature of the contracting officer's invitation to Amtech to demonstrate its ability to meet the agency's needs as set forth in the J&A and in the RFP, we dismiss as untimely Amtech's challenge to the agency's minimum needs. We will consider, however, the portion of Amtech's protest alleging that the rejection of its technical package was unreasonable.

DISCUSSION

On the same day that Amtech filed its protest with our Office, it also filed materials with the contracting officer purporting to show that its equipment could meet the requirements set forth in the RFP's statement of work.⁴ The Air Force evaluated Amtech's technical package against 72 criteria spread across 6 general areas. Under several of the criteria, the Air Force evaluated Amtech as meeting the agency's requirements; however, under most of the criteria Amtech was evaluated as either not meeting the requirement or as not having presented sufficient evidence to show compliance with the requirement. In its letter of March 2 rejecting Amtech's contention that its products could satisfy the agency's needs, the Air Force also invited Amtech to demonstrate its equipment to agency officials. On March 5, Amtech declined the invitation.

In its comments on the agency report, Amtech argues that the Air Force improperly reviewed the February 24 technical data package. According to Amtech, the agency's approach of simply comparing Amtech's capabilities with a list of the specific criteria drawn from the RFP was an insufficient review of whether Amtech's products might be modified to meet the government's needs. At no point does Amtech challenge the specific findings of the Air Force review, or suggest that those findings are unreasonable.

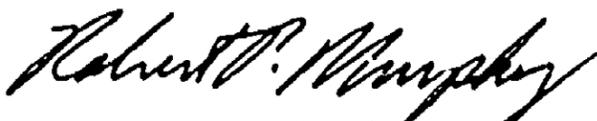
In our view--given the history of this procurement, Amtech's failure to mount a timely challenge of the agency's determination of its minimum needs, and its failure to counter any of the agency's specific findings made as part of its review of Amtech's technical package--there is no basis for our Office to question the specific findings of the Air Force officials who reviewed Amtech's technical proposal. See Atmospheric Research Sys., Inc., B-240187, Oct. 26, 1990, 90-2 CPD ¶ 338 (agency responses that appear reasonable should be accepted where protester fails to rebut the response, despite the opportunity to do so). In addition, given the posture of this procurement, we do not consider the agency's method of evaluating Amtech's proposal

⁴Although any challenge to the Air Force rejection of Amtech's technical package was premature at the time this protest was filed, see Dayton-Granger, Inc., B-246226, aff'd, B-246226.2, Feb. 28, 1992, 92-1 CPD ¶ 240, we have not dismissed the protest because subsequent events--i.e., the Air Force's rejection of the package on March 2--have occurred to make the protest ripe for review.

against the criteria in the RFP to be unreasonable. See Environmental Tectonics Corp., B-248611, Sept. 8, 1992, 92-2 CPD ¶ 160.⁵

Since Amtech has not shown that it has a currently available RF-based tracking system that meets the agency's current needs, we conclude that the Air Force reasonably concluded that the protester was not an available source capable of satisfying this requirement. Therefore, we find the proposed sole-source award to Savi to be proper. AGEMA Infrared Sys., B-240961, Dec. 28, 1990, 91-1 CPD ¶ 4.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel

⁵A review of the facts in our decision in Environmental Techtronics reveals several similarities to the instant procurement. There, the agency published three notices in the CBD, conducted two market surveys, and performed 3 years of testing and evaluation on the equipment to be procured on a sole-source basis. Nonetheless, when faced with a protester's challenge to the sole source award, the agency reviewed protester's equipment against a list of requirements in the sole-source RFP to reasonably conclude that while the protester might be able to design and manufacture the equipment, it did not have equipment currently available that would meet the agency's needs.