



Comptroller General
of the United States
Washington, D.C. 20548

1207277

Decision

Matter of: Monde Construction Co., Inc.

File: B-256808

Date: July 20, 1994

Gerald A. DeForest for the protester.
Billie Spencer, Esq., and Paul Fisher, Esq., Department of the Navy, for the agency.
Jacqueline Maeder, Esq., and John Van Schaik, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

An agency properly included in a solicitation for construction services a clause which requires the contractor to indemnify the government for patent infringement where the record shows that the agency has a reasonable basis for concluding that patent indemnity is needed and the indemnification clause is authorized by Federal Acquisition Regulation part 27.

DECISION

Monde Construction Co., Inc. protests the inclusion of a patent indemnity clause in invitation for bids (IFB) No. N62470-93-B-3161, issued by the Naval Facilities Engineering Command, Department of the Navy, for repairs to a bullet trap system--a type of indoor firing range. The protester contends that inclusion of the clause improperly limited competition and precluded it from bidding the project.

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

The IFB requires, among other things, replacement parts for and repairs to a Detroit Armor Corporation bullet trap system, which Monde installed under a previous contract. The solicitation, as amended, required that hanging lamellas needed to repair the bullet trap system are proprietary items which were required to be provided by

¹The lamellas are thin strips of conveyor belt rubber hung behind the target area of the firing range in a manner designed to stop ricocheting bullets.

Detroit Armor and that "[n]otwithstanding any other provisions of this solicitation, no other products will be acceptable."

Monde protested this specification, arguing that the lamellas are made of industrial grade conveyor belt rubber which "can be purchased from a number of different sources" and that the Navy's decision to use a proprietary source violates the requirement of full and open competition under the Competition in Contracting Act of 1984, 10 U.S.C. § 2305(a)(1)(B) (1988). Monde also alleged that Detroit Armor "will not supply rubber lamellas which conform to the requirements of the patent," and that Detroit Armor charges "unconscionable prices" for products it purchases from other sources which Monde could purchase directly from those sources at considerable savings.

In response to the protest, the Navy issued amendment No. 0007, which deleted the proprietary specification and permitted bidders to offer parts from other than Detroit Armor. The Navy also included in the amendment notice that Detroit Armor had advised the Navy that it would consider the use of other than Detroit Armor parts in the bullet trap system to be an infringement upon its patent. The amendment also incorporated into the IFB the Authorization and Consent clause set forth at Federal Acquisition Regulation (FAR) § 52.227-1 and the Patent Indemnify--Construction Contract clause set forth at FAR § 52.227-4. The first clause permits a contractor to manufacture or use in the contract inventions covered by a United States patent and prevents alleged patentees from delaying contract performance while patent rights are litigated. The second clause requires the contractor to indemnify the government against infringement of any patent arising from performance of the contract. Based on this action, which the Navy characterized as permitting a bidder to offer other than Detroit Armor parts so long as that bidder was willing to indemnify the government, the agency asked our Office to dismiss the protest.

Monde argues, however, that it has not been granted relief by amendment No. 0007 because, as a small business, it could "not afford to defend the United States Navy in litigation." Rather, Monde argues that the agency should incorporate into the solicitation FAR § 52.227-4, Alternate I(b)--which allows the government to exclude items from the indemnification provisions--and exclude the hanging lamellas.

We find the agency's actions to be reasonable. First, by issuing amendment No. 0007, the Navy permitted bidders to use other than Detroit Armor parts or to purchase parts from sources other than Detroit Armor. Since the agency expects

Detroit Armor to challenge the use of parts other than its own, it so notified bidders and informed them that, should they accept the risk of using other than Detroit Armor parts, they may be subject to indemnifying the government from any patent infringement claims.

While the protester objects to the indemnity clause because it places the financial risk of infringement on the bidders, bidders are expected to take the uncertainties or risks of such litigation into account in computing their prices. Barrier-Wear, B-240563, Nov. 23, 1990, 90-2 CPD ¶ 421; Cryo-Technologies Mktg. Group, B-207138, Oct. 27, 1982, 82-2 CPD ¶ 372. The fact that the solicitation imposes the risk on bidders does not make it improper. Id.

Concerning Monde's suggestion that the agency should incorporate the clause at FAR § 52.227-4, Alternate I(b) into the solicitation, thereby excluding hanging lamellas from indemnification, FAR § 27.104(d) provides that generally, the government should be indemnified against infringement of United States patents resulting from performing a contract when the supplies or services acquired under the contract normally are or have been sold or offered for sale by any supplier to the public in the commercial open market. Moreover, FAR § 27.203-5 provides that FAR § 52.227-4 should be inserted in solicitations and contracts for construction and that, if the construction will involve the use of structures, products, materials, equipment, processes or methods that are nonstandard, noncommercial or special, the contracting officer may exclude them from patent indemnification by using the basic clause with its Alternate I. Since this is a solicitation for construction work, inclusion of the basic clause was required, and since Monde itself argues that the materials used for the hanging lamellas can be easily obtained in the commercial market, the use of Alternate I to exclude the hanging lamellas from indemnification is inappropriate, inasmuch as the materials cannot be categorized as "nonstandard, noncommercial or special."

In its comments on the agency report, submitted to our Office on May 12, Monde argues for the first time that, rather than incorporating the patent indemnity clause into the solicitation, the Navy should purchase the patented item directly from Detroit Armor and furnish it to the awardee so that bidders could bid on the remaining work "on a fair and equal basis." This contention is untimely. The agency changed the specifications for the hanging lamellas in amendment No. 0007, which was issued on April 7 and extended bid opening to April 19. Although Monde received the amendment on April 11, it waited until May 12--after the bid opening date--to protest that the agency should purchase the lamellas and supply them to the awardee. Protests

challenging alleged improprieties in a solicitation must be filed prior to bid opening. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1994). Since Monde failed to raise this contention in a timely manner, this portion of its protest is dismissed.

Accordingly, the protest is dismissed in part and denied in part.

/s/ James A. Spangenberg
for Robert P. Murphy
Acting General Counsel