



Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Automated Power Systems, Inc.

File: B-257178; B-257178.2

Date: September 2, 1994

Mark Moorman for the protester.
Isaac Johnson, Jr., Esq., Department of Transportation, for
the agency.
Henry J. Gorczycki, Esq., and Guy R. Pietrovito, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Inclusion in a solicitation of the standard first article testing clause, which sets forth standards as to when the first article requirement can be waived, does not introduce legally objectionable risk in a procurement.
2. A protest that merely lists allegedly ambiguous specifications without details or explanations is not legally sufficient.

DECISION

Automated Power Systems, Inc. protests the terms of invitation for bids (IFB) No. DTCG23-94-B-E43004 issued by the United States Coast Guard, Department of Transportation, for high wattage, solid state maritime flashers.

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

The IFB, issued March 25, 1994, sought bids for the manufacture of first articles and base and option quantities of various models of flashers. Detailed design, performance, and functional specifications for the flashers were stated, including over seven pages of specifications describing the first article tests to be performed. The IFB

¹The flashers control the flashing of navigation beacon lamps on buoys and fixed structures in and around navigable waters.

also contained the standard "First Article Approval-- Contractor Testing" clause for contractor-provided first article testing, as set forth at Federal Acquisition Regulation (FAR) § 52.209-3; this clause permits a contractor to request a waiver of the testing requirement "where supplies identical or similar to those called for in the schedule have been previously furnished by the offeror/contractor and have been accepted by the Government."

The IFB was twice amended to provide historical acquisition and pricing information for low wattage flashers, which were identified as previously procured "similar" items. This information was provided at the request of prospective bidders because production quantities of the high wattage flashers had not been previously procured and thus such information was not available for the flashers solicited by the IFB. Both amendments specifically cautioned offerors that the information provided was "for informational purposes only" and was not representative of, or directly related to, the agency's current requirements for high wattage flashers.

Automated Power protested the terms of the IFB prior to bid opening.² Automated Power argues that the IFB is defective because the IFB clause permitting waiver of first article testing does not define the meaning of a "similar" product eligible for waiver and potentially allows some bidders to obtain waivers while others may not be so eligible; the IFB requires first article testing of models of flashers that are only an option requirement; the IFB does not test flashers for exposure to saltwater; and a number of specifications are allegedly ambiguous.

The Competition in Contracting Act of 1984, 41 U.S.C. § 253a(a) (1988), provides for a contracting agency to specify its needs and develop specifications and purchase descriptions in a manner designed to promote full and open competition with due regard for the goods or services to be acquired. See FAR § 10.002(a). A solicitation "must contain sufficient information to allow offerors to compete intelligently on an equal basis. A&C Bldg. and Indus. Maintenance Corp., B-230270, May 12, 1988, 88-1 CPD ¶ 451. There is no requirement that a competition be based on specifications drafted in such detail as to eliminate completely any risk or remove every uncertainty from the mind of every prospective offeror. RMS Indus., B-248678, Aug. 14, 1992, 92-2 CPD ¶ 109; A&C Bldg. and Indus. Maintenance Corp., supra.

²Eight bids were submitted. Automated Power did not submit a bid.

From our review, the IFB states the specifications in plain and easily understandable language providing sufficient information to define the agency's minimum requirements for prospective bidders to enable them to compete intelligently on an equal basis.

First, we find the standard FAR § 52.209-3, first article testing clause, which permits contractors to request a waiver, does not introduce legally objectionable competitive risk into the procurement. The purpose of the testing requirement is to ensure that the contractor can furnish a product that conforms to all contract requirements for acceptance, FAR § 9.302. The standard first article testing clause is required by FAR § 9.308-1(a) to ensure that this purpose is met. The clause does not confer any right to a waiver upon any bidder, Comdyne I, Inc., B-232574, Dec. 21, 1988, 88-2 CPD ¶ 611; nor is the inherent advantage gained by a bidder, which properly receives a waiver for the first article testing requirement, objectionable. See Nebraska Aluminum Castings, Inc., B-223928, Oct. 17, 1986, 86-2 CPD ¶ 463.

We also find that the use of the term "similar" in the standard clause is not objectionable.³ The use of the term in the waiver clause occurs in the phrase "identical or similar to [the solicited product]," which is sufficiently specific to ensure that the contracting agency reasonably exercises its discretion to grant or deny waiver requests based on whether the purpose of the testing requirement would be satisfied. Compare Comdyne I, Inc., *supra* (reasonable exercise of discretion) with Airline Instruments, Inc., B-223742, Nov. 17, 1986, 86-2 CPD ¶ 564 (unreasonable exercise of discretion).

There is no merit to Automated Power's argument that the agency's use of the term "similar" in the IFB amendments that provided bidders with the information concerning the agency's prior procurements of low wattage flashers gives the agency unfettered discretion in handling requests for waivers from prior low wattage flasher contractors. The language in the amendments clearly advises prospective bidders that the information on low wattage flashers was provided for informational purposes only, and that the low wattage flashers were not related to and did not satisfy the

³In a prior protest involving Automated Power, we found that use of the term "similar" in the protested specifications was not ambiguous. Automated Power Sys., Inc., B-256242, May 31, 1994, 94-1 CPD ¶ 329; see generally 45 Comp. Gen. 462, 466 (1966) (determination of an acceptable similar product); see also Scott-Griffin, ASBCA No. 28590, 84-1 BCA ¶ 17,110.

requirements of the IFB. In any event, the protester's allegation merely speculates that the agency will act arbitrarily or in bad faith. We will not attribute improper motives to government officials on the basis of inference or supposition. Source AV, Inc., B-234521, June 20, 1989, 89-1 CPD ¶ 578.

Automated Power also argues that the agency should not require first article testing of flasher models which are only solicited as option quantities. The agency states that the models solicited as option quantities will likely be needed. It is not uncommon or improper for an agency to solicit first articles as the base requirement and production quantities as options. See Delco Elecs. Corp., B-244559, Oct. 29, 1991, 91-2 CPD ¶ 391. The protester has cited no authority, nor are we aware of any, that suggests that the requirement for first article tests of items that are only a solicitation option if the first article is acceptable would be improper. We thus find no basis to challenge this requirement.

Automated Power also argues that the IFB improperly did not provide a test for product compliance with specification 3.2.3, which requires that flashers be resistant to corrosion from continuous exposure to a saltwater environment. However, the IFB does provide such a test at specification 4.5, "Corrosion Resistance," which provides for testing of four randomly selected first article flashers by exposing them to a 5-percent salt solution for 48 hours.

Automated Power's remaining challenges to the IFB fail to state a basis for protest. Although the protester listed 28 specifications, which it alleges are ambiguous, it has provided no details or explanation as to why any of these specifications are ambiguous. Rather, the protester argues that it is the agency's responsibility to provide an explanation as to why these specifications are not ambiguous. It is a protester's responsibility to provide a sufficiently detailed statement of the legal and factual grounds for its protest allegations, such that, at a minimum, there is a likelihood the protester would prevail on its claim of improper agency action if its allegations

⁴The agency states that since it has not previously procured commercial production quantities of the high wattage flashers, there has been no prior procurements sufficiently similar to warrant waiver of the first article testing requirement, and that the agency was unaware of any prospective offeror which likely could be granted a waiver. Bid opening was held subsequent to the filing of this protest, and the agency has not granted any waivers.

were uncontradicted.⁵ See 4 C.F.R. § 21.1(c)(4) (1994); Universal Technologies Inc.; Spacecraft, Inc., B-248808.2 et al., Sept. 28, 1992, 92-2 CPD ¶ 212. This standard is not met here by the protester's general, unsupported assertions that the named specifications are ambiguous.

In sum, the protester has not shown the IFB to be defective in any way. Our Office will reject allegations of solicitation defects where, as here, such allegations are unreasonable or dubious characterizations of clearly stated specifications. A&C Bldg. and Indus. Maintenance Corp., supra.

The protest is denied in part and dismissed in part.

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

⁵We previously dismissed a protest by Automated Power of another solicitation for this very reason and advised the protester that absent a detailed basis for protest, the contracting agency does not have sufficient information to respond to the protest.