



Comptroller General  
of the United States

121282

Washington, D.C. 20548

## Decision

**Matter of:** BST Systems, Inc.  
**File:** B-260325; B-260325.2  
**Date:** February 28, 1995

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### DECISION

BST Systems, Inc. protests the award of a contract to Yardney Technical Products, Inc. under request for proposals (RFP) No. N00024-94-R-4159, issued by the Department of the Navy, Naval Sea Systems Command, for silver-zinc batteries and battery cells for rescue and research vehicles. BST primarily argues that Yardney is ineligible for award because it is not a qualified source for these batteries.

We dismiss the protest.

The solicitation, issued on July 14, 1994, contemplates award of a fixed-price contract for four lots of various silver-zinc batteries for the Deep Submergence Vehicle (DSV), the Deep Submergence Rescue Vehicle (DSRV), and the Nuclear Research 1 Vehicle (NR-1). All of these are small rescue and research vehicles powered by the batteries at issue. Both the basic and option requirements for each lot include items associated with the batteries, such as spares, sample cells, activation and acceptance testing, data, storage and services.

Section M of the RFP states that award will be made, by individual lot, to the responsible offeror whose offer, conforming to the solicitation, is most advantageous to the government, price and other factors considered.<sup>1</sup> However, section M also notifies offerors that multiple awards are possible, and includes the clause at Federal Acquisition Regulation (FAR) § 252.215-34, "Evaluation of Offers for Multiple Awards." That clause requires that offers be evaluated on the basis of advantages and disadvantages to the government that might result from making more than one award. The clause states that for the purpose of the multiple award evaluation, \$500 is assumed to be the

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<sup>1</sup>While section M states that "other factors" will include the evaluation factors described in the section, no such factors are described, and offerors are not required to submit any technical information.

administrative cost to the government for issuing and administering each contract awarded under a solicitation, and that individual awards shall be made for the items or combinations of items that result in the lowest aggregate cost to the government, including the assumed administrative cost.

Two offers were submitted by the September 15 closing day, one from BST and one from Yardney. BST submitted the low-priced offer overall, and the Navy conducted a preaward survey of the firm. On November 29, amendment No. 0002<sup>2</sup> was issued to clarify the Navy's interpretation of the clause at FAR § 52.246-16, "Responsibility for Supplies," which had been incorporated by reference in the solicitation as issued, and the amendment's cover letter notified offerors that discussions would be conducted. Both offerors submitted revised proposals on December 14, followed by best and final offers with revised pricing, on January 4, 1995. Yardney was the low-priced offeror on three of the lots by between \$1,000 and nearly \$30,000 per lot, and BST was the low-priced offeror on the remaining lot by \$451. After the offers were evaluated in accordance with FAR § 252.215-34, and the \$500 in estimated administrative costs was considered, Yardney's offer represented the lowest aggregate cost to the government. On January 25, the Navy notified both offerors that Yardney was the apparent successful offeror for all lots, and, on January 31, Yardney was awarded the contract. This protest was filed on February 6, and the Navy has suspended performance of the contract pending resolution of the protest.

BST primarily argues that Yardney is ineligible for award of this contract. BST asserts that Yardney, unlike itself, has not passed first article testing requirements for the batteries in previous procurements, and, as a result, is not a qualified source for the items. BST is incorrect.

A qualification requirement is a government requirement for testing or other quality assurance demonstration that must be completed before award of a contract. 10 U.S.C. § 2319(a) (1988); FAR § 9.201. Both 10 U.S.C. § 2319(b) and FAR subpart 9.2 contain specific responsibilities for agencies imposing qualification requirements. Among other things, they must prepare a written justification for the qualification requirement, FAR § 9.202(a)(1); provide offerors all requirements they must satisfy to become qualified, FAR § 9.202(a)(2); and provide an opportunity for qualification before award by publishing a notice in the

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<sup>2</sup>Amendment No. 0001, issued on August 29, is not at issue here.

Commerce Business Daily. FAR § 9.205; see ABA Indus., Inc., B-250186, Jan. 13, 1993, 93-1 CPD ¶ 38. In addition, FAR § 9.206-2 requires contracting officers to insert the "Qualification Requirements" provision at FAR § 52.209-1 when the acquisition is subject to a qualification requirement.

This solicitation did not contain the clause at FAR § 52.209-1, or any other provisions referencing qualification requirements. Further, the Navy did not undertake any of the administrative steps it must take in order for a qualification requirement to be enforced, FAR § 9.206-1(a). Finally, the Navy states that it does not maintain a list of qualified sources or a qualified products list for these batteries.<sup>3</sup> In such cases, an offeror is not required to be a qualified source, or to offer a preapproved item, in order to be eligible for award. See Warren Pumps, Inc., B-258710, Feb. 13, 1995, 95-1 CPD ¶ \_\_\_\_.

A qualification requirement, which applies prior to the award of a contract, is not the same as a first article test requirement, which applies after the award of a contract. First article testing involves testing and evaluating the first article produced under a contract to ensure that it conforms with specified contract requirements, either before or in the initial stage of production. FAR § 9.301. Passage of first article testing requirements under previous procurements does not necessarily make an offeror a qualified source,<sup>4</sup> and whether or not Yardney has previously passed first article testing requirements for

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<sup>3</sup>A qualification requirement is often associated with a qualified bidders list (a list of bidders who have had their products examined and tested and who have satisfied all applicable qualification requirements for that product or have otherwise satisfied all applicable qualification requirements), a qualified manufacturers list (a list of manufacturers who have had their products examined and tested and who have satisfied all applicable qualification requirements for that product), or a qualified products list (a list of products which have been examined, tested, and have satisfied all applicable qualification requirements). FAR § 9.201.

<sup>4</sup>In a given procurement, a contracting agency may define a qualified source as one that has previously submitted first articles for testing. See, e.g., Vega Precision Labs., Inc., B-252586, July 9, 1993, 93-2 CPD ¶ 12. The agency did not do so here.

these batteries is not relevant to this procurement.<sup>5</sup> Since nothing in this solicitation prohibits award to Yardney, BST's allegation is dismissed because it lacks a valid basis. 4 C.F.R. § 21.3(m) (1994).

BST also argues that the Navy's award of a single contract to Yardney on the "sole basis" of FAR § 52.215-34 is not in the best interest of the government, as Yardney is not a qualified source. Again, neither of these two offerors is or was required to be a qualified source for these batteries. Moreover, since this solicitation did not contemplate a "tradeoff" between technical and cost factors, as no technical factors were included, see United Int'l Eng'g, Inc.; Morrison Knudsen-Dynamics Research; PRC Inc.; and Science Applications Int'l Corp., 71 Comp. Gen. 177 (1992), 92-1 CPD ¶ 122, the Navy's required application of FAR § 52.215-34 properly resulted in the award of the contract on the basis of the lowest aggregate cost.

BST finally argues that the alterations made to FAR § 52.246-16 by amendment No. 0002 were intentionally punitive to BST, and were intended to force upon the firm an "erroneous" interpretation of the clause, which interpretation is currently in dispute on a separate procurement.<sup>6</sup>

Our Bid Protest Regulations contain strict rules requiring timely submission of protests. These rules specify that protests based upon alleged improprieties in a solicitation which are apparent from the face of the solicitation must be filed prior to the closing time set for receipt of proposals. 4 C.F.R. § 21.2(a)(1). This rule includes

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<sup>5</sup>While BST implies that Yardney's offer did not include the costs of first article testing, this solicitation does not contain the clause at FAR § 52.209-3, required for contracts requiring first article testing conducted by contractors, or any other requirements for first article testing. The RFP passages cited by BST are not first article testing requirements, but, inspection and acceptance requirements.

<sup>6</sup>BST also argues that the Navy's decision to conduct a preaward survey of it, but to waive a preaward survey of Yardney, was improper. However, a preaward survey is not a legal prerequisite to an affirmative determination of responsibility. Accordingly, it is within the contracting officer's discretion not to conduct a preaward survey, and we will not review such a decision absent a showing that the contracting officer has acted fraudulently or in bad faith. Polaris, Inc., B-220066, Dec. 16, 1985, 85-2 CPD ¶ 669. No such showing has been made here.

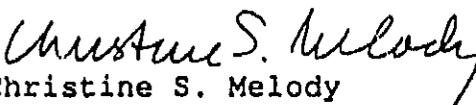
challenges to alleged improprieties which did not exist in the initial solicitation but which are subsequently incorporated into the solicitation by amendment, ATAP, Inc., B-245909, Jan. 8, 1992, 92-1 CPD ¶ 42; Servicio Internacional de Proteccion Baker, S.A., B-241670, Jan. 22, 1991, 91-1 CPD ¶ 64. In such cases, the solicitation must be protested not later than the next closing time set for receipt of proposals following the incorporation.

In this case, the Navy's interpretation of FAR § 52.246-16 was apparent from the face of amendment No. 0002. Although BST chose to wait until after award to protest the terms of this amendment, BST should have filed this ground of protest prior to the January 4, 1995 BAFO closing date to be timely. Id.

While BST requests that we consider this matter under the exceptions in our regulations, see 4 C.F.R. § 21.2(c), we decline to do so. Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without disrupting or delaying the procurement process. Industrial Acoustics Co., Inc.--Recon., B-246260.2, Jan. 28, 1992, 92-1 CPD ¶ 120. In order to prevent these rules from becoming meaningless, exceptions are strictly construed and rarely used. The only exceptions to the timeliness requirements are where there was good cause for the untimely filing (some compelling reason beyond the protester's control prevented the protester from filing a timely protest) or a significant issue (one of widespread interest to the procurement community or one that has not been considered before) is involved. 4 C.F.R. § 21.2(c); Industrial Acoustics Co., Inc. Recon., supra.

BST has not explained why it could not have filed a timely protest of this matter. Further, while we realize the importance of this issue to the protester, it is not one which is of widespread interest to the procurement community. It primarily concerns a discrete contractual dispute between the protester and the Navy, and is a provision that has been interpreted, as a matter of contract administration, by various boards of contract appeals. See, e.g., Delta Indus., Inc., Docket Nos. 2602, 2676, 2677, et al., Apr. 18, 1994, 94-2 BCA ¶ 26,864.

We dismiss the protest.

  
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