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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Staveley Instruments, Inc.

File No. B-259548.3

Date: May 24, 1995

Richard L. Hames, Esq., Davis Wright Tremaine, for the protester.
K. Dieter Markert, for Seifert X-Ray Corporation, an interested party.
Gregory H. Petkoff, Esq., and Mark E. Frazier, Esq., Department of the Air Force, for the agency.
Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contention that specifications are improperly written around one company's product and thus that procurement constitutes de facto sole-source award is denied where there is no showing that the specifications overstate or otherwise exceed the agency's minimum needs.

2. Requirement that offerors submit samples for pre-award testing in a negotiated procurement is unobjectionable where requirement is reasonably necessary to ensure that the agency receives item that is fully compliant with each technical specification in the solicitation's commercial item description.

3. Protest challenging solicitation's sample submission time limit as unduly restrictive is denied where: (1) protester does not explain why it required 60 additional days to prepare and submit a sample; (2) record shows that item being acquired is of critical application and agency's need for it is urgent; and (3) record contains no evidence to suggest that agency is attempting to exclude protester or other offerors from competing.

DECISION

Staveley Instruments, Inc. protests the terms of request for proposals (RFP) No. F41608-94-R-20591, issued by the Department of the Air Force for portable x-ray units, which are used to detect structural cracks and foreign objects within missiles and aircraft. Staveley asserts that the specifications are improperly written around a product manufactured by one company, Lorad Industrial Imaging, and

thus that this procurement constitutes a de facto sole-source award to Lorad. Staveley also contends that the requirement in the RFP for submission of a sample violates Federal Acquisition Regulation (FAR) § 14.202-4, which provides that bid samples will not be required unless there are characteristics of the product that cannot be adequately described in the solicitation. Further, Staveley contends that the sample provision is unduly restrictive of competition because it fails to provide qualified competitors other than Lorad with sufficient time to prepare a sample.

We deny the protest.

BACKGROUND

On September 21, 1994, the Air Force issued the RFP to 32 prospective offerors; the RFP contemplated the award of a 3-year indefinite quantity contract for an estimated quantity of 428 x-ray units. The solicitation included a detailed Engineering Data List and Commercial Item Description (CID) setting forth the minimum performance requirements for the units. The record shows that the technical specifications for this type of x-ray machine have been under review and development by the Air Force since 1983. Prior to this procurement, the Air Force attempted to procure the desired unit by means of a negotiated procurement which included a first article testing requirement; however, no offeror--including Lorad, the awardee under that contract--has ever successfully completed first article testing for this item. Instead, the Air Force ultimately procured a "compromise" commercial version of its required x-ray machine from Lorad.

Together with their pricing schedules and technical literature, the RFP required offerors to prepare and submit two "bid samples". The first sample was to be tested for physical and operational compliance with the requirements in the RFP's CID, while the second sample was to be forwarded to Dyess Air Force Base for field testing. The RFP calls for award to be made to the lowest priced, technically acceptable offeror.

As issued, the RFP afforded offerors 45 days to submit the required technical literature and samples. The agency subsequently extended the due date by 30 days, for a total of 75 days, in response to a request for an extension of time from Staveley and another offeror. Specifically, by letter to the Air Force dated October 14, Staveley requested a 60-day extension of the original closing date for the purpose of "costing [its] newly developed x-ray system for the required quantity." Around that same date, another competitor also requested a 30-day extension of the closing

date to evaluate the Air Force's response, issued as amendment No. 0002 to the RFP, to that firm's technical questions about the required x-ray item.

In response, the contracting officer extended the closing date by 30 days. The contracting officer reports that while she determined that a 30-day extension was warranted to provide all potential offerors with an opportunity to evaluate the questions and answers set forth in amendment No. 0002, she did not extend the closing date for the full 60 days requested by Staveley because she did not "feel there was any basis for providing more time than [30 days] for costing what is supposed to be a commercial item with an established market price that requires only minor modifications to satisfy the CID."

On December 2, 2 days prior to the scheduled December 5 closing date, Staveley filed this protest with our Office.

PROTESTER'S CONTENTIONS

Staveley asserts that the specifications are improperly "written around" the Lorad product and thus that this procurement constitutes a de facto sole-source award to Lorad.

Staveley also maintains that the technical specifications enunciated in the RFP so fully and precisely define the agency's requirements that requiring submission of samples is improper under FAR § 14.202-4. Staveley further argues that the sample provision is unduly restrictive of competition because, due to the complexity of the specifications, any commercial x-ray manufacturer other than Lorad requires additional time to prepare the required samples.

ANALYSIS

Alleged Sole-Source Award

To the extent Staveley asserts that this procurement constitutes an improper sole-source award because the solicitation is written around a Lorad commercial x-ray machine design, we find the protest without merit. In preparing a solicitation for supplies or services, a contracting agency must specify its needs and solicit offers in a manner designed to achieve full and open competition, and include restrictive provisions only to the extent necessary to satisfy the agency's minimum needs. 10 U.S.C. §§ 2305(a)(1)(A)(i), (B)(ii) (1994); American Material Handling, Inc., B-250936, Mar. 1, 1993, 93-1 CPD ¶ 183. In seeking full and open competition, an agency is not required to construct its procurements in a manner that neutralizes

the competitive advantages some potential offerors may have over others by virtue of their own particular circumstances. CardioMetrix, B-234620, May 1, 1989, 89-1 CPD ¶ 415. Moreover, a specification is not improper merely because a potential offeror cannot meet its requirements. Gel Sys., Inc., B-234283, May 8, 1989, 89-1 CPD ¶ 433. Nor are specifications based on a particular product--such as this RFP's emphasis on an existing Lorad commercial design--improper in and of themselves; a protest that a specification was "written around" design features of a competitor's product fails to provide a valid basis for protest where the record establishes that the specification is reasonably related to the agency's minimum needs. Infection Control and Prevention Analysts, Inc., B-238964, July 3, 1990, 90-2 CPD ¶ 7.

In this case, Staveley does not challenge the technical specifications per se or otherwise assert that it cannot produce a machine in accordance with the solicitation requirements. Since Staveley does not assert that the technical specifications overstate or otherwise exceed the Air Force's actual needs, we fail to see how this RFP improperly favors Lorad. Consequently, we will not consider this aspect of Staveley's protest further.

Sample Testing Requirement

Staveley asserts that the requirement for submission of a sample is improper. We disagree.

To support its argument, Staveley relies on FAR § 14.202-4, which states generally that bid sample requirements should not be included in invitations for bids unless there are characteristics of the product to be acquired that cannot be described adequately in the specifications. Staveley's reliance on FAR § 14.202-4 is misplaced. FAR § 14.202-4 applies to bid sample requirements in procurements using sealed bidding; since the procurement here is being conducted using negotiated procedures, FAR § 14.202-4 is not controlling.

We recognize that the RFP here calls for "bid samples." Despite this terminology, however, we think the sample testing requirement here in effect constitutes a benchmark test, since the stated purpose of the requirement is to demonstrate that an offeror's equipment is capable of performing each of the desired functions specified in the CID. See AT&T Information Sys., Inc., B-216386, Mar. 20, 1985, 85-1 CPD ¶ 326. Where, as here, a performance demonstration or benchmark is an inherent part of the negotiation process, deficiencies which only come to light during the testing stage should be pointed out and offerors given the chance to correct them if possible. See Besserman

Corp., 69 Comp. Gen. 252 (1990), 90-1 CPD ¶ 191; CompuServe Data Sys., Inc., 60 Comp. Gen. 468 (1981), 81-1 CPD ¶ 374. Consistent with this view, this solicitation advises offerors that if any submitted sample fails any portion of the required testing, offerors will be allowed two site visits to correct the problem.

With respect to the need to test samples as part of the evaluation, the agency maintains that testing of every element of the x-ray machine is critical to ensure that performance, reliability, durability, and safety characteristics have not been adversely affected by required electrical modifications specified in the CID. The Air Force also reports that in many areas, such as weight and size, testing of a sample is required to precisely measure various equipment tolerances, as well as the x-ray machine's compliance with MIL-T-28800 electrical and electronic equipment tests. Under these circumstances, and given the past difficulties experienced by the agency in acquiring an x-ray machine that meets its needs, we find the testing requirement in this case to be unobjectionable. See Austin Telecommunications Elec., Inc., B-256251, May 31, 1994, 94-1 CPD ¶ 331 (pre-award testing requirements reasonably necessary to ensure required interoperability and compliance with computer hardware and software technical specifications).

Sample Preparation Time

Staveley argues that the agency's refusal to extend the solicitation closing date by 60 days prevents the firm from preparing a sample for this competition. Staveley contends that, without the closing date extension, the solicitation is unduly restrictive, since no offeror other than Lorad can prepare a sample in the allotted 75-day period.

With respect to solicitation closing deadlines, a contracting agency is required by statute to allow a minimum 30-day response period for all but a limited number of procurements. See 15 U.S.C. § 637(e)(3)(b) (Supp. V 1993); FAR § 5.203(b); Trilectron Indus., Inc., B-248475, Aug. 27, 1992, 92-2 CPD ¶ 130. In this case, since the Air Force permitted offerors 75 days to submit offers and samples, its actions were not per se improper. Under such circumstances, we review the agency's refusal to extend the due date to determine whether the agency had a reasonable basis for its established time frame. FRC International, Inc., B-255345, Feb. 18, 1994, 94-1 CPD ¶ 125; Trilectron Indus., Inc., supra. We also review the record to determine whether there was a deliberate attempt by the agency to exclude the potential offeror from the competition. Trilectron Indus., Inc., supra; Control Data Corp., B-235737, Oct. 4, 1989,

89-2 CPD ¶ 304. As explained below, in light of the circumstances of this procurement, we cannot say that the Air Force's 75-day time frame--or its subsequent refusal to extend this deadline--was unreasonable.

A presolicitation market survey conducted by the agency identified three existing commercial x-ray machine manufacturers which--by making minor modifications to their current commercial x-ray machine models--could become eligible competitors for this requirement. The minor modifications have been identified by the Air Force as: (1) the possible addition of circuit breakers; (2) the replacement of detachable fans with liquid coolers (usually advertised by manufacturers as an additional option for air-cooled x-ray machine units); and (3) the requirement for x-ray machine transit cases. Since the agency is not seeking a design effort, and since the modifications are not considered by the agency to constitute major technical adjustments, the Air Force asserts that 75 days should be more than adequate time to prepare and submit a compliant sample. The Air Force also explains that it has an immediate need for this particular x-ray machine as it is a critical application item, and currently the agency has a depleted inventory with a significant number of outstanding orders for this item.

Staveley has not rebutted the Air Force's position. In this regard, we think it significant that prior to filing its protest at this Office, Staveley did not advise the agency that it needed 60 additional days to prepare a sample; rather, as noted above, the protester maintained that it needed an additional 60 days to "cost" its proposal. Moreover, even after Staveley filed this protest with our Office, it never articulated why it required the additional time to prepare a sample; in response to a question for the record issued by our Office, Staveley answered that 60 additional days were necessary to allow the firm to "accommodate the production schedule for [another] customer and to assure compliance with other requirements of the RFP."[1]

The fact that Staveley's current production schedule will not accommodate the Air Force's otherwise reasonable sample preparation time frame does not render this solicitation unduly restrictive. Staveley has not shown that it cannot

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[1]While Staveley correctly notes that one other firm commented on its protest by stating that "the time period allotted does not offer manufacturers time" to prepare a bid sample, this firm, like Staveley, has failed to offer any support for this assertion.

compete; rather, Staveley has only shown that it is inconvenient for it to compete on the Air Force's terms. Where a firm fails to demonstrate how a time extension will enable it to compete--or why the allotted time is prejudicially insufficient--we do not think that the contracting agency is required to delay satisfying an immediate need solely to accommodate one firm's particular circumstances. See FRC International, Inc., supra; Trilectron Indus., Inc., supra. Finally, the record does not suggest--nor has the protester shown--that the Air Force is attempting to deliberately exclude Staveley from competing. Under these circumstances, where the protester has failed to establish why the allotted time frame is unduly restrictive or otherwise unreasonable, we will not object to the agency's decision not to extend the due date.

The protest is denied.

Michael R. Golden
for Robert P. Murphy
General Counsel