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

91-1 CPD 165

Decision

PR

Matter of: Rix Industries, Inc.

File: B-241498

Date: February 13, 1991

Patrick J. Martell, Esq., Pettit & Martin, for the protester.
James D. Gauthier, Esq., Hurwitz & Fine, P.C. for Aurora Technology Corporation, an interested party.
Douglas P. Larsen, Jr., Esq., Department of the Navy, for the agency.
Scott H. Riback, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency, after receipt of offers, determines that an alternate approach not contemplated under the request for proposals (RFP) and involving a significant change to the RFP requirement is acceptable, the agency is required to either amend the RFP or engage in appropriate discussions with the offerors to allow all competitive range firms an opportunity to compete on a common basis.

DECISION

Rix Industries, Inc. protests the award of a contract to Aurora Technology Corp., under request for proposals (RFP) No. N00228-90-R-2132, issued by the Department of the Navy for the acquisition of a quantity of single-screw, low-pressure air compressors (LPACs) along with related spare parts and technical manuals. Rix argues that the Navy impermissibly accepted a technically nonconforming offer from Aurora or, alternatively, permitted submission of an alternate approach not contemplated under the RFP without affording other offerors the same opportunity.

We sustain the protest.

The RFP called for the submission of firm, fixed-price offers for a quantity of nine LPACs and related spare parts and technical manuals and provided that award would be made to the firm submitting the technically conforming proposal which was determined to be the most advantageous to the government.

From a technical standpoint, the solicitation, in the statement of work, provided that the LPACs were to be built "in strict accordance with NAVSEA drawing 802-6336137 Rev. E" with certain specified deviations not germane to the protest. The referenced NAVSEA drawing is actually a drawing package of approximately 500 pages. Within the drawing package are some eight drawings relating to two critical parts of the LPACs, the "main rotor" and "gate rotors." These two parts are apparently crucial to the device's ability to perform its function and must be manufactured to extremely precise dimensions and/or critical tolerances. The eight drawings all have this data removed and provide as follows: "These dimensions and/or critical tolerances have been removed. This data is available under license from Monovis, Inc. . . ." Another drawing states "for machining of rotor, Contact Single Screw, Inc., Norwalk Conn."1/ In addition, the RFP contains the standard Federal Acquisition Regulation (FAR) clause found at § 52.215-13, providing in pertinent part that "offers for supplies or services other than those specified will not be considered unless authorized by the solicitation."

In response to the RFP, the Navy received three initial offers which, after evaluation, were all determined to be within the competitive range. Rix's offer was deemed technically acceptable as submitted and the offers of Aurora and the third offeror were deemed susceptible of being made acceptable. With respect to the Aurora offer, the agency evaluators found that the firm did not intend to seek a license from Monovis, Inc. for the dimensions and/or critical tolerances discussed above and did not intend to utilize Monovis-manufactured main rotors and gate rotors in manufacturing its LPACs. Rather, Aurora proposed to fabricate the parts in question and to utilize standard commercial dimensions and/or tolerances arrived at by the firm's engineers. The agency's technical evaluators therefore concluded that the Navy would have to require first article testing of the Aurora-manufactured LPACs in order to ensure that they met all of the requirements imposed upon the previously-approved Monovis parts. The agency found the Rix offer technically acceptable, in part because the firm had entered into a licensing agreement with Monovis for the data.

The agency then conducted discussions with and solicited best and final offers (BAFOs) from the competitive range offerors. The agency's first article testing requirements and the effect

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1/ Single Screw, Inc. is a manufacturing firm apparently owned by a Mr. Bernard Zimmern who holds all the rights to the patents, etc. relating to the LPACs at issue. Monovis, Inc. is Mr. Zimmern's exclusive licensee in the United States for the various critical dimensions and tolerances.

of those requirements upon Aurora's capability to meet the Navy's delivery schedule were the primary subject of the agency's discussions with Aurora.

Upon the receipt and evaluation of BAFOs, the Navy concluded that all three offerors were technically acceptable. Aurora agreed to conduct the required testing at its own expense. The Navy made award to Aurora as the lowest priced, technically acceptable offeror. This protest followed.

Rix argues that the agency impermissibly accepted the offer of an alternate product from Aurora contrary to the terms of the RFP. In this regard, Rix argues that the RFP essentially called for a "build-to-print" effort on the part of the offerors that required all firms to enter into a licensing agreement with Monovis in order to acquire the information necessary to complete the manufacture of the LPACs. According to Rix, the RFP did not contemplate the offer of products based on standard commercial tolerances and fits, since it required that the LPACs be manufactured in "strict accordance with" a drawing package that required firms to acquire a license for the dimensions and/or critical tolerances. Rix points out that the RFP did not otherwise provide for the submission of alternate products and that firms were precluded from offering alternative products by virtue of the language contained in FAR § 52.215-13. It also notes that the only other offeror interpreted the solicitation as requiring a license agreement for the data. Rix argues that it was materially prejudiced because it was required to bear the substantial cost of a license from Monovis while Aurora was permitted to manufacture the product through an alternate approach without the use of the dimensions and critical tolerances. The firm alleges that it would have taken a substantially different approach in terms of preparing its offer had it known that it could have offered an alternate approach to manufacturing the product.

As an initial matter, the Navy argues that we should dismiss this case pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.3(m)(11) (1990), which preclude our consideration of matters which are the subject of judicial proceedings before a court of competent jurisdiction. The Navy reports that Monovis and Aurora are currently involved in a suit before the United States District Court for the Western District of New York2/ in which Monovis is seeking injunctive relief and money damages for, among other things, the wrongful appropriation of its trade secret information. According to the agency, Rix's

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2/ The case is docketed as Monovis, Inc. and Bernard Zimmern v. Giovanni Aquino and Aurora Technology Corporation, No. 89-0316C (W.D.N.Y. filed March 10, 1989).

allegation amounts to an allegation that Aurora cannot manufacture the LPACs without a license from Monovis and this matter is the subject of concurrent litigation.

We disagree. Our Office will, as a general rule, dismiss a protest where the issues involved and the possible remedy are the same as those being decided in court, even where the protester is not a party to the action before the court. See e.g., Snowblast-Sicard, Inc., B-230983.2, Aug. 30, 1989, 89-2 CPD ¶ 190. Here, however, the issues before our Office and the District Court are clearly distinct. The District Court has before it the questions of whether the alleged trade secret information of Monovis is legally protected informatio and whether Aurora has improperly appropriated and/or used that information. Our Office need not decide these questions but, rather, must decide whether the agency may accept the offer by Aurora of what is alleged to be an alternate design or approach not contemplated under the terms of the solicitation. We therefore see no basis to dismiss the protest on th jurisdictional ground advanced by the Navy.

As to the merits of the protest, the Navy argues that the note appearing on the various drawings stating that the dimensions and/or critical tolerances have been removed and are available from Monovis under license was permissive in nature and did not require firms to utilize Monovis parts or acquire a license from Monovis in order to bring their offers into technical compliance with the RFP. The agency argues that the record shows that Aurora intends to use standard commercial tolerances and fits in the manufacture of the LPAC and that reasonably competent engineers could deduce the information necessary to produce the LPACs in accordance with the RFP. The Navy also argues that the protester was not prejudiced by the agency's acceptance of the Aurora offer because Rix entered into its licensing agreement with Monovis prior to the time the RFP was issued.

Where, as here, a dispute exists as to the actual meaning of solicitation requirement, our Office will read the solicitation as a whole which gives effect to all of its provisions. See generally Collington Assocs., B-231788, Oct. 18, 1988, 88-2 CPD ¶ 363. We conclude that the solicitation as written was reasonably interpreted by the protester (and the third offeror) as requiring the use of Monovis-licensed information and/or parts to furnish a product that met the dimensions and critical tolerances for the product. The RFP required that the LPACs be manufactured "in strict accordance with NAVSEA drawing 802-6336137" and provided further in the instructions to offerors that offers for supplies other than those specified will not be considered "unless authorized by the solicitation." The solicitation does not provide for source approval of alternate products or contemplate alternate means

of producing the item without the Monovis technical data since it calls for the product to be manufactured in strict accordance with the drawings. Regarding the language contained in the drawings, we fail to understand the agency's position that the language is permissive in nature. In particular, the drawings clearly state that the various dimensions and/or critical tolerances were removed and that the data "is available under license from Monovis, Inc." It is clear that the solicitation sought a product which met all proprietary dimensions and critical tolerances contained in the original drawing. The legend on the drawings informed all offerors where to obtain this data. There is no suggestion in this language or any other language found on the drawings or in the solicitation that alternate means of acquiring the data are either available or acceptable to the agency.

Based upon the above language, we think that the RFP clearly contemplated the employment of the technical data licensed by Monovis and did not reasonably notify offerors that alternate means to manufacture the LPACs would be considered acceptable by the agency.

Our view of the solicitation is reinforced by the agency's own evaluation of offers. The Navy record shows that the evaluators were also of the view that the RFP as written did not contemplate products manufactured without the data under license. Specifically, the written statement executed by the Navy's technical evaluator after examining the initial offers provided in pertinent part:

> "A problem has come to my attention concerning Aurora Technology. The critical components of this compressor . . . along with some dimensional tolerances must be obtained from Single Screw, Inc., Norwalk, Connecticut. To buy these parts and get the tolerances, each compressor manufacturer must obtain a licensing agreement from Single Screw Inc. . . . It has come to my attention that Aurora Technology believes they can manufacture this compressor without using the parts or information that must be obtained from Single Screw Inc."

In addition, the evaluation, and subsequent memorandum leading to the award to Aurora, conditioned acceptance of Aurora's product on first article testing, which was not required by the solicitation, since the lesser testing requirements under the solicitation as issued assumed use of the parts called out by the drawing package. The initial evaluation memorandum specifically states that "because of the technical risk involved, I cannot extend qualification tests . . . passed using the Single Screw Inc. parts to parts manufactured by a different concern to different drawings." The evaluation

memorandum states that vendors who opt not to use the Single Screw Inc. technology must subject their machines to first article testing at their own expense. The record further shows that, as part of the Navy's acceptance of the Aurora alternate product, the firm will be required to subject its LPAC to first article testing including a 2,000 hour endurance test, in order to qualify its product.

Since this first article requirement, coupled with the agency's determination to accept a product manufactured without the proprietary dimensions and tolerances, represented a significant change to the RFP as originally issued, we think that the agency was required under FAR § 15.606 to issue a written amendment in order to provide all competitive range offerors an opportunity to propose alternate products and engage in first article testing in order to achieve agency qualification of their products. In this connection, we have previously found that where an agency, after the receipt of offers, determines that an alternate approach not contemplated under the RFP is as acceptable as or more desirable than the approach called for under the RFP, the agency must either amend the RFP or engage in appropriate discussions with the offerors in order to allow all competitive range firms an opportunity to compete on a common basis. See Loral Terracom; Marconi Italiana, 66 Comp. Gen. 272 (1987), 87-1 CPD ¶ 182, aff'd. The Aydin Corp.; Department of the Army--Recon., B-224908.3; B-224908.4, May 19, 1987, 87-1 CPD ¶ 527. Such action on the part of the agency would not constitute either technical leveling or technical transfusion within the meaning of the FAR, since the agency is not providing information to the firms regarding the particular nature of the alternate solution, but only permitting the submission of an alternate approach. Id.

In our view, the protester was prejudiced by the agency's action here. Specifically, we think that the firm was competitively prejudiced by virtue of the fact that it was led to believe that it needed Monovis/Single Screw licensing and could not satisfy the requirements using a less expensive alternate approach to manufacturing the product. The license required payment of up-front costs and royalties on all sales. See Logitek, Inc.--Recon., B-238773.2; B-238773.3, Nov. 19, 1990, 90-2 CPD ¶ 401.

In light of the foregoing, we are by separate letter of today to the Secretary of the Navy recommending that, if alternate products will meet the agency's needs, the RFP be amended to allow for the submission of offers for alternate products which can be qualified by the conduct of appropriate first article testing, and that all competitive range offerors be afforded an opportunity to submit revised proposals. We further recommend that the contract awarded to Aurora be

terminated for the convenience of the government if either the agency decides that an alternate product is unacceptable or, after amendment of the RFP and evaluation of revised offers, the Navy determines that a firm other than Aurora is properly entitled to award. We also find Rix to be entitled to costs of filing and pursuing its protest, including attorney fees. 4 C.F.R. § 21.6(d)(1).

The protest is sustained.

Milton J. Socolar

for Comptroller General
of the United States