GAO

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: ATA Defense Industries, Inc.

File: B-282511.8

Date: May 18, 2000

Claude P. Goddard, Jr., Esq., and Hal J. Perloff, Esq., Wickwire Gavin, for the protester.
Jeffrey I. Kessler, Esq., and Caridad Ramos, Esq., Department of the Army, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's contention that a solicitation improperly requires submission of proprietary technical data for evaluation of a commercial item in violation of the regulations governing commercial item acquisitions is rendered academic when the agency waives the application of the regulation, and the protester fails to raise a timely objection to the waiver.

DECISION

ATA Defense Industries, Inc. protests the terms of amendment 0009 to request for proposals (RFP) No. DAAE20-98-R-0215, issued by the Department of the Army's Tank-Automotive Armaments Command for the purchase of the Intermediate New Generation Army Targetry System (INGATS). ATA argues that the revised solicitation improperly requires submission of proprietary data explaining the operation of each offeror's INGATS system in violation of the regulations governing commercial acquisitions set forth in Federal Acquisition Regulation (FAR) Part 12. In addition, ATA argues that the solicitation fails to accurately state the agency's minimum needs, that the Army's intended testing plan for the system is inadequate, and that the solicitation--which is restricted to participation by small and small disadvantaged businesses--improperly requires the submission of small business utilization plans.

We deny the protest.

BACKGROUND

This protest challenges the second attempt by the Army to complete its procurement of the INGATS system following our decision in ATA Defense Indus., Inc., B-282511, B-282511.2, July 21, 1999, 99-2 CPD ¶ 33, which sustained ATA's protest of a contract award to Caswell International Corporation.[1] As explained therein, the INGATS procurement calls for the installation of complete live-fire training ranges, including training in range operations, at various Army facilities throughout the world. Id. at 2. Then, as now, the training ranges purchased under the INGATS contract will be composed of commercially available targetry equipment, and the procurement is therefore being conducted pursuant to the commercial item procedures in FAR Part 12. Id.

The major subsystems that are assembled into INGATS training ranges are identified in our initial decision. Id. One of these subsystems is the hit detector device (HDD), of which there are two types: one detects the presence of a hit by the vibrations caused when a projectile actually strikes the target; the other detects a hit, and extrapolates the virtual position of the hit on the target, by measuring the acoustic waves (or other types of footprints) the projectile makes as it passes through the plane of the target. Id. at 5. The latter, more sophisticated, type of HDD is called a non-contact HDD.

On February 9, 2000, the Army issued amendment 0009 to the INGATS solicitation, which, among other things, requested submission of revised technical proposals by February 22. Amend. 0009 at 1. The revised solicitation required that proposals include significant detail about the workings of an offeror's non-contact HDD to aid the agency in its evaluation. Id. at 25. This detail included, but was not limited to, an explanation of the device's theoretical principals of operation including its expected accuracy, and an assessment of the sensitivity of the device to the approach angle of the projectile including an error analysis. Id. On February 17, ATA filed this challenge to the revised solicitation.

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[1] ATA's challenge to the Army's earlier attempt to reopen this procurement resulted in an alternative dispute resolution meeting between representatives of our Office, the Army, ATA, and Caswell. At the conclusion of this meeting, the Army took corrective action, ATA agreed that its protest was effectively resolved, and our Office closed the matter without further action. At the same time, however, ATA requested reimbursement for the costs of pursuing its challenge to the Army's proposed reopening. A recitation of the issues raised by ATA regarding the earlier reopening is set forth in our decision ATA Defense Indus., Inc., B-282511.6, Mar. 14, 2000, 2000 CPD ¶ ___ at 2-3, denying ATA's request for reimbursement of its protest costs.

DISCUSSION

The Federal Acquisition Streamlining Act of 1994 (FASA), 10 U.S.C. § 2377 (1994), established a preference, and specific requirements, for acquiring commercial items that meet the needs of an agency. In general terms, the Act, and the regulations that implement it, are intended to steer government agencies clear of the more traditional, and intrusive, government contracting practices that have evolved when agencies are buying products that have no counterpart in the commercial marketplace. Thus, FAR Part 12 implements this policy by allowing agencies to use solicitation terms--and to make other adjustments in the areas of acquisition planning, evaluation, and award--that more closely resemble the commercial marketplace when procuring commercial items. See generally Aalco Forwarding, Inc., et al., B-277241.8, B-277241.9, Oct. 21, 1997, 97-2 CPD ¶ 110 at 9-22. Consistent with this policy, FAR § 12.302(c) bars the tailoring of solicitations for commercial items in a manner inconsistent with customary commercial practice "unless a waiver is approved in accordance with agency procedures."

In its initial protest, ATA argued that the requirement for submission of a detailed explanation of the workings of an offeror's non-contact HDD is contrary to customary commercial practice for targetry systems, and therefore is improper.[2] On March 24, the Army provided our Office, and the protester, a report in response to the protest. In its report on the protest, the Army essentially conceded that the solicitation sought information not customarily provided to the public with a commercial item or process. The report also advised, however, that, one day prior to submission of the report, the Army had exercised its authority under FAR § 12.302(c) to waive the general bar on tailoring solicitations in a manner inconsistent with customary commercial practice. The report included a copy of the waiver.

On March 30, ATA telephonically requested a 4-day extension to its deadline for filing comments, which we granted. This extension was confirmed by ATA's letter to our Office of the same date. Thus, ATA filed its comments on April 7. In its

[2] ATA's argument is premised upon the assumption that this explanation will include proprietary technical data. We think ATA's assumption is valid. FAR § 27.401 defines technical data as "data other than computer software, which are of a scientific and technical nature." The detailed explanation of the workings of an offeror's non-contact HDD sought by the Army here will likely constitute technical data, as that term is defined in FAR Part 27. In addition, the Army essentially concedes that it is not customary to provide such data to the public when selling a commercial item. Affidavit of Competition Advocate, Apr. 19, 2000, at 2.

comments, ATA argued that the Army had no authority to exercise a waiver here,[3] and that the Army did not follow established procedures in seeking the waiver.

On April 11, the Army requested dismissal of ATA's initial challenge to the solicitation's request for information about the non-contact HDD on the basis that the challenge had been rendered academic by the agency's waiver under FAR § 12.302(c). In addition, the Army requested dismissal of the issues raised in ATA's comments regarding the Army's authority to exercise a waiver, and the procedural adequacy of the waiver, because these issues were not raised within 10 days after the Army provided notice and a copy of the waiver in its agency report.

With respect to the arguments first raised in ATA's comments--i.e., that the Army lacks authority to exercise the waiver here, and that the waiver obtained is procedurally insufficient--there is no dispute in the record that ATA received the Army's report on March 24, or that the report provided ATA notice and a copy of the waiver. Under our Bid Protest Regulations, a protest must be filed within 10 days after the basis of the protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (2000). Where a protester initially files a timely protest and later supplements it with new and independent grounds of protest, the later-raised allegations must also independently satisfy the timeliness requirements. Keci Corp.--Recon., B-255193.2, May 25, 1994, 94-1 CPD ¶ 323 at 4.

Here, although ATA appropriately requested an extension of time to file its comments under our rules, see 4 C.F.R. § 21.3(i), an extension of time to file comments does not, and cannot, waive the timeliness requirements for filing new bid protest issues. Keci Corp.--Recon., supra; Unitor Ships Serv., Inc., B-245642, Jan. 27, 1992, 92-1 CPD ¶ 110 at 10; see CH2M Hill Southeast, Inc., B-244707; B-244707.2, Oct. 31, 1991, 91-2 CPD ¶ 413 at 8. Since the issues raised in the comments--ATA's challenges to the Army's authority to execute a waiver and to the procedural sufficiency of the waiver--constitute new and independent grounds of protest, they were required to be filed within 10 days of the time ATA received the agency report including the claimed waiver. Since ATA failed to satisfy this requirement, these grounds of protest are untimely.

In addition, since the Army elected to waive the general bar on tailoring solicitations in a manner inconsistent with customary commercial practice, the issue ATA raised in the initial protest--that the requirement in the RFP for submission of technical data is inconsistent with commercial practice--is academic at this juncture. See Canadian

[3] In support of this argument, ATA points to FAR § 12.211, which states, in relevant part, that "the Government shall acquire only the technical data and the rights in the data customarily provided to the public with a commercial item or process." In essence, ATA argues that the Army may not use the waiver authority in FAR §12.302 (c) to avoid the prohibition on acquiring technical data set out in FAR § 12.211.

Commercial Corp./Liftking Indus., Inc., B-282334 et al., June 30, 1999, 99-2 CPD ¶ 11 at 14.

With respect to the remaining issues raised by ATA's initial protest, we turn first to ATA's complaint that the solicitation does not match requirements in the Army's Operational Requirements Document for the New Generation Army Targetry System (the "ORD"). The ORD is an internal Army document prepared for planning purposes. ATA points out several areas where ATA concludes the solicitation has not specified an INGATS system that will meet all of the goals established by the ORD, and complains specifically that the solicitation has relaxed requirements found in the document.

As a starting point, we note that the Army has not incorporated the ORD into the solicitation here, nor are we aware of any requirement that it do so. In addition, ATA's interest here appears to be to force the Army to adopt more restrictive specifications than found in the current solicitation to meet ATA's perception of the Army's minimum needs--a matter we will not consider in this forum. Loral Fairchild Corp.--Recon., B-242957.3, Dec. 9, 1991, 91-2 CPD ¶ 524 at 3. Similarly, we will not consider ATA's complaint that the Army's intended testing plan is not sufficiently stringent, as it does not test for all of the requirements in the ORD. See id.

Finally, ATA argues that the solicitation improperly requires small business offerors to submit a small business utilization plan. In this regard, the Army denies that the solicitation requires small businesses to submit a small business utilization plan but acknowledges that it intends to evaluate each offeror's intent to utilize small businesses in performing the required effort. See Amend. 0009 at 28, 31-32. In our view, there is nothing improper about evaluating a potential offeror's commitment to utilizing small businesses to meet the requirements of this contract--especially given that the estimated value of this contract exceeds $100 million. In addition, the fact that the awardee will be a small business as well (or will have been prior to receiving this contract) does not lead us to the conclusion that the requirement is improper or illogical.

The protest is denied.

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