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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Phenix Research Products

File: B-292184.2

Date: August 8, 2003

Gregory Schulz for the protester.
Hiram Reinhart for Para Scientific Company, an intervenor.
Warren D. Leishman, Esq., Agency for International Development, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency accepted equipment not meeting material solicitation requirements, agency properly took corrective action of terminating awardee's contract.

DECISION

Phenix Research Products protests the Agency for International Development's decision to terminate its contract under request for quotations (RFQ) No. CDC115-03-001. The agency terminated Phenix's contract in response to a protest by Para Scientific Company, a competitor under the RFQ, which argued that several of the items awarded to Phenix did not comply with solicitation specifications. The agency undertook the corrective action after determining that more restrictive specifications may have been communicated to Para than were conveyed to other competitors. Phenix contends that its equipment complies with the RFQ's written specifications and that it is irrelevant that more restrictive specifications may have been communicated to Para.

We deny the protest.

The RFQ, which was issued as a combined synopsis/solicitation, sought quotations for 27 sets of virology laboratory equipment to be furnished to medical laboratories in the Central Asian countries of Kazakhstan, Tajikistan, Kyrgyzstan, Turkmenistan, and Uzbekistan. The synopsis/solicitation, which was amended twice prior to the quotation due date, set forth detailed technical specifications for the various items of equipment sought, and provided for evaluation of quotations on the basis of price,

technical compliance and quality, past performance, and warranty, in descending order of importance.

Of particular relevance to Phenix's protest are the specifications in the RFQ pertaining to incubators and water purification systems, one of each of which was to be furnished to each laboratory. The synopsis/solicitation, as amended, set forth the following requirements regarding the incubators:

> Low-Temp Incubator (22-45C) with shaker capability for 96-well EIA plates; This could be: (1) a standard 96-well microplate incubator, specially designed for incubation of 2-4 microplates, with shaking regimen, or (2) a standard lab incubator capable to maintain interior temperature between 22 and 45C with a built-in interior outlet to place a microplate shaker inside.

Modification 01 to Synopsis/Solicitation, Nov. 29, 2002, at 2.

After receiving quotations from several vendors, the agency sought clarifying information regarding the equipment proposed by each. As part of this process, each vendor was notified of, and requested to confirm compliance with, the following additional requirements pertaining to the water purification systems:

> **Water purification system. Please clarify i[f] the proposed item meet the below standards:** In order to ensure proper water quality that would fit the needs of ELISA testing in Central Asia the water purification system has to meet the following requirements: it has to include a two-step water purification system with the 1st step based on Water Distillation (WD) or Reverse Osmosis (RO) and the second step based on filter deionization (a filter cartridge-based system) with the water output of Type 1 B-pure or Type 1 E-pure quality. Eight spare cartridges should be included in the package.
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> The average water quality situation in Central Asia could be described as follows: Water hardness: 1,5 mg/L (however in some areas of Central Asia the water hardness could be as high as 20 mg/L). Total Dissolved Solids: 181 mg/L (could be as high as 1500 mg/L); chlorides 30,5 mg/L, sulfates - 36,0 mg/L.

Agency E-mail, Jan. 21, 2003. In preparing its response to the agency's questions regarding its quotation, Para sought clarification regarding requirements pertaining to the shakers. In response to Para's inquiry, the agency notified Para (via e-mail) that it required an orbital shaker with a variable speed of 500-1,500 rpm. This information was not conveyed to other vendors.

In its quotation, Phenix furnished pricing for an incubator with a temperature range of 5C above ambient temperature to 65C; an orbital shaker with a speed of 80-200

rpm; and alternative water purification systems, one including a first step based on reverse osmosis and the other not including a reverse osmosis or water distillation step. The price quoted for the latter water purification system was less than half the price quoted for the former.

After evaluating the quotations, the evaluators concluded that Phenix's quotation was stronger than the others technically and that it was reasonably priced; consequently, AID awarded Phenix a contract. The contract was based on provision of the lower-priced water purification system.

On April 7, the agency notified Para of the award to Phenix, whereupon Para filed a protest with our Office. Para complained that the incubators offered by Phenix did not comply with the solicitation requirement regarding temperature range; that the shakers offered by Phenix did not operate at the required range of speeds; and that the water purification systems offered by Phenix did not include a first step based on water distillation or reverse osmosis, as required.

Prior to the due date for submission of its report responding to Para's protest, the agency notified us that it had concluded that "more restrictive specifications may have been accidentally communicated to the protester than were given to other competitors," and that, accordingly, it was taking the corrective action of terminating Phenix's contract and resoliciting. Letter from Agency to GAO, May 5, 2003. Upon receipt of the agency's letter, we dismissed Para's protest as academic.

On May 12, Phenix protested the termination of its contract to our Office, arguing that its equipment complied with the specifications set forth in the written solicitation, and that to the extent that Para was notified of, and chose to offer equipment complying with, more restrictive specifications not included in the written solicitation, Para exceeded the RFQ's requirements at its own competitive risk.

Generally, we decline to review the termination of contracts for the convenience of the government because such actions are matters of contract administration. We will review the propriety of the termination where the termination flows from a defect the contracting agency perceived in the award process. In such cases, we examine the award procedures that underlie the termination action for the limited purpose of determining whether the initial award may have been improper and, if so, whether the corrective action taken was appropriate to protect the integrity of the competitive procurement system. We will not object to an agency's proposed corrective action where the agency concludes that the award, because of perceived flaws in the procurement process, was not necessarily made on the basis most advantageous to the government, so long as the corrective action taken is appropriate to remedy the impropriety. Fisher-Cal Indus., Inc., B-285150.2, July 6, 2000, 2000 CPD ¶ 115 at 3.

In responding to Phenix's protest, the agency explains that termination of the award to Phenix was justified not simply on its originally articulated basis, i.e., that it had communicated more stringent specifications to Para than to other vendors, but also on the basis that the evaluators had erred in finding that the equipment proposed by Phenix--in particular, the incubators and water purification systems--met the required specifications.

With regard to the incubators, the agency notes that while the RFQ required an incubator capable of maintaining an interior temperature of 22-45C, Phenix proposed a unit with a temperature range of 5C above ambient temperature to 65C, which means that Phenix's incubators will be capable of attaining the required low of 22C only if the ambient temperature is 17C or lower. An ambient temperature in this range cannot be assumed, according to AID. In this regard, the contracting officer observes that the protester itself has maintained that "[f]rom [its] experience and discussions with the manufacturer, the ambient temperature of laboratories generally varies from about 15-21C," Letter from Phenix to Contracting Officer, Apr. 25, 2003, at 2, meaning that "for most of the typical temperature range of a laboratory (probably in the U.S., air conditioned, and with a reliable supply of electricity), the Phenix incubator could not meet the low end of the temperature specification." Contracting Officer's Statement at 6. Moreover, the contracting officer further notes, "[i]n the Central Asia environment, the ambient temperatures might be much higher and more variable." Id.

In response, the protester argues that where the ambient temperature is 22C (or lower), an incubation temperature of 22C can be achieved by turning the incubator off or by placing it in a "cold room." Phenix further argues that "it is important to recognize . . . that the incubator is to be used solely in HIV ELISA testing laboratories," and that "[t]he working temperature of nearly all HIV ELISA assays is 37C, well above the low temperature requirement of 22C." Protester's Comments, June 20, 2003, at 4.

We find the protester's argument that a temperature of 22C can be attained by turning the incubator off or by placing it in a "cold room" unpersuasive. The ability to achieve a temperature by not using the incubator is not the same as an incubator capable of achieving the temperature--and even assuming that incubation at room temperature could be achieved by simply turning the incubator off, it is not apparent how temperatures between ambient (the temperature when the incubator is turned off) and ambient +5C (the low end of the incubator's temperature range when on) could be achieved.[1] Further, there is no indication in the record that the laboratories in question contain "cold rooms."

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[1] For example, if the ambient temperature is 20C, it is not clear how a temperature of 22C, 23C, or 24C could be achieved.

Concerning the protester's argument that the working temperature of nearly all HIV ELISA assays is 37C, well above the low required temperature of 22C, this is essentially an argument that the agency does not require an incubator capable of maintaining a low temperature of 22C. Such an argument is an objection to the terms of the RFQ, which to be timely, would have needed to be raised prior to the closing date for receipt of quotations, Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2003); consequently, it will not now be considered.

With regard to the water purification systems, the record shows that award was made to Phenix for a purification system not including a first step based on water distillation or reverse osmosis despite the fact that all vendors were notified, via e-mail requests for clarification, that such a step was required. To the extent that Phenix believes that compliance with the requirement was not necessary because it was not formally made a part of the solicitation through amendment, where a contracting officer advises all vendors of a solicitation requirement in writing, the essential elements of an amendment are present whether or not the communication is designated as a formal amendment. Realty Ventures/Idaho, B-226167, May 18, 1987, 87-1 CPD ¶ 523 at 4; see also Federal Elec. Int'l, Inc., B-232295.2, Dec. 21, 1988, 88-2 CPD ¶ 610 at 10 (furnishing of copy of written question and response places offeror on notice of government requirements even though they are not reflected in formal amendment).

In sum, we conclude that the record supports the agency's determination that the equipment Phenix offered did not meet the required specifications.[2] Since award could not properly be made to Phenix based on its nonconforming offer, First Fed. Corp., B-245891, Feb. 10, 1992, 92-1 CPD ¶ 166 at 4, the agency's decision to terminate Phenix's contract was proper.

To the extent that Phenix also challenges the agency's decision to resolicit, Phenix is not an interested party to raise this issue since Phenix would not be line for award even if its protest were sustained on this ground. Adrian Supply Co., B-251886.2, June 7, 1993, 93-1 CPD ¶ 435 at 5-6. In any event, the record shows that the agency's decision to resolicit was based both on the fact that it had communicated its required orbital shaker speed only to one offeror, Para, and that there may be other areas in the specifications that need to be revised. Under these circumstances, there is no basis to object to the agency's decision to reexamine the solicitation and resolicit based on specifications that provide for competition on an equal basis and accurately reflect the agency's needs Surgi-Textile, B-289370, Feb. 7, 2002, 2002 CPD ¶ 38 at 2. Regarding Phenix's argument that it will be unfairly prejudiced in a

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[2] To the extent that Phenix argues that it offered, as an alternative, a water purification system that did meet the requirement for reverse osmosis as a first step, the fact remains that, at a minimum, the incubator Phenix offered did not meet the specifications.

resolicitation because its prices and products have been exposed, the prior disclosure of information in a vendor's quotation does not preclude resolicitation where, as here, the resolicitation is undertaken to correct perceived flaws in the original solicitation process. See SMS Data Prods. Group, Inc., B-280970.4, Jan. 29, 1999, 99-1 CPD ¶ 26 at 3-4.

The protest is denied.

Anthony H. Gamboa
General Counsel