



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: HHI Corporation

File: B-266041; B-266041.2

Date: January 25, 1996

Jack W. Reed, Esq., Peterson, Reed, L.L.C., for the protester.

Vera Meza, Esq., Department of the Army, for the agency.

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DIGEST

Protest that agency improperly relaxed requirements--(1) that offered demisters have emissions certification at time of proposal submission, and (2) that manufacturer has had demisters of similar capacity in operation for 5 years--by accepting for award a demister that does not meet these requirements, is denied where protester has not established competitive prejudice as a result of the waiver.

DECISION

HHI Corporation protests the award of a contract to D.L. McLaughlin Co., Inc., under request for proposals (RFP) No. DAAC01-95-R-0015, issued by the Department of the Army for the repair of two chrome line ventilation systems. HHI asserts that McLaughlin's offered system did not meet the material requirements of the solicitation.

We deny the protest.

Offerors were required to supply two demisters, one with a capacity of 22,500 cubic feet per minute (cfm) and a second with a capacity of 56,000 cfm. After receiving and evaluating best and final offers, the Army awarded the contract to McLaughlin as the lowest-priced, technically acceptable offeror. (McLaughlin's price was \$866,231; HHI's was \$973,343.)

The solicitation required offerors to furnish with their offers technical literature to show that the demister used for the ventilation system and all component parts met or exceeded specified federal and California state emission standards. The solicitation further stated that proof of compliance was either the label or listing of the Environmental Protection Agency or cognizant California agency, or a written certificate from any approved, nationally recognized testing organization. The solicitation also required offerors to submit proof that demisters of capacity similar to that specified in the RFP had been installed by the manufacturer or its

representative, and had been in satisfactory use for at least 5 years prior to the proposal closing date.

McLaughlin offered demisters manufactured by KCH Services, Inc. HHI maintains that McLaughlin did not submit proof that the KCH demisters met the emission standards or that there were KCH demisters with a 56,000 cfm capacity that had been installed for 5 years.¹ HHI concludes that the Army improperly waived material requirements in awarding the contract to McLaughlin, and that the award therefore was improper.

In response, the Army states that, while McLaughlin did not furnish the proof of compliance with the emission standards with its proposal, the firm will be required to supply this proof of compliance at the time of delivery. The Army further states that McLaughlin has submitted information showing that KCH chrome mist eliminator systems with capacities of 120,000 cfms and 80,917 cfms had been installed for Aviall Incorporated and National Hand Tool, respectively, at least 5 years ago.

It appears that McLaughlin's system did not meet the two requirements. McLaughlin has not submitted the required proof of compliance with emission standards, and the agency's decision to permit McLaughlin to comply at the time of delivery constitutes a relaxation of the requirement. Similarly, while the overall systems installed at Aviall and National Hand Tool are 120,000 and 80,917 cfm, it appears that none of the individual demisters installed at Aviall has a capacity greater than 20,000 cfm, and that none of the demisters installed at National Hand Tool has a capacity greater than 25,000 cfm. In this regard, despite being given the opportunity to do so, neither the Army, KCH, nor McLaughlin has disputed HHI's

¹HHI also argues that the proof had to show that a vertical demister had been installed for 5 years because the solicitation requires a vertical demister. The Army disputes that the solicitation requires a vertical demister but, in any case, the RFP did not specify a certain system configuration--vertical or horizontal--in connection with this requirement. Therefore, offerors were not required to submit proof that vertical systems had been installed.

HHI also argues that the proof had to show that the system that was installed for 5 years met the current emission standards specified in the solicitation. We disagree. The provision which required offerors to show proof of compliance with the emission standards and the provision which required offerors to submit proof that systems of the specified capacity had been installed for 5 years are separate provisions. The first provision is concerned only with the demister that will be installed, the second provision is concerned generally with ascertaining that demisters of the specified size have been in place and working.

argument along these lines and, following a conference call with representatives of our Office, the protester, the agency, the awardee, and KCH, KCH acknowledged that the Aviall and National Hand Tool projects are comprised of a number of demisters of varying capacity, none of which has a capacity of 56,000 cfm. Also, during that conference call, the agency stated its belief that a successfully operating 20,000 cfm system was adequate to demonstrate that a 56,000 cfm system would operate successfully; in other words, the agency applied a relaxed standard (compared to the standard in the RFP) in determining McLaughlin's system's compliance with this requirement as well.

Our Office will sustain a protest that an agency improperly relaxed its requirements for the awardee only where the protester establishes a reasonable possibility that it was prejudiced by the agency's actions, that is, where the protester demonstrates that, had it known of the changed or relaxed specifications, it would have altered its proposal to its competitive advantage. Laser Diode, Inc., B-249990, Dec. 29, 1992, 93-1 CPD ¶ 18.

Notwithstanding our conclusion above, the record does not demonstrate a reasonable possibility that HHI was prejudiced by the relaxation. In attempting to demonstrate that it was prejudiced, HHI argues that it is cheaper to provide equipment that is not tested (for emissions compliance) and proven; HHI specifically asserts that equipment that is neither tested nor proven can be purchased for \$150,000 less than tested and proven equipment. First, with respect to the emission standards testing, the Army did not waive the requirement for proof of compliance, but only delayed the time for submitting the proof from proposal submission to when the system is delivered. Since McLaughlin thus will be required to furnish a system meeting the requirement, the cost saving suggested by HHI will not be available to McLaughlin.² Accordingly, HHI has not demonstrated that its competitive position was affected by the agency's decision to require the certification at the time the demister is delivered rather than at the time proposals were submitted.

²HHI argues that McLaughlin still had a pricing advantage, since it could base its offer on the price of an as yet uncertified demister. This argument simply makes no sense. Since the testing costs would have to be incurred before delivery, McLaughlin would either have to increase its offered price to cover these costs (just as would any other offeror), or purposely omit the testing costs from its price and absorb those costs. This latter option--i.e., omitting certain costs from an offered price or pricing an offer below cost--is a pricing strategy available to all offerors on all federal procurements. HHI could have made a decision to offer the demister to the government at a price that did not include the costs incurred to test and certify the demister to comply with the emission standards.

Second, HHI also has not shown, and there is no reason to believe, that it would have offered a different demister at a \$150,000 lower price (or otherwise changed its proposal) had it known that the agency would consider a smaller capacity demister acceptable to meet the requirement for proof of successful operation of similar capacity demisters for 5 years. Establishing prejudice generally requires more than a mere statement by the protester that it could have lowered its price had it known of the relaxed requirements, particularly where, as here, the protester presumably has access to more specific information bearing on the issue of prejudice. See Colonial Storage Co.-Recon., B-253501.8, May 31, 1994, 94-1 CPD ¶ 335. Despite our specific request for an item-by-item explanation of the prejudice it suffered as a result of any relaxation of requirements, HHI neither specifies the equipment it would have offered under the relaxed requirements, nor explains (and it is not apparent) why any alternative demister would be significantly less expensive just because the manufacturer had a smaller demister in operation for 5 years.

Since HHI has not established prejudice, there is no basis for sustaining the protest.

The protest is denied.

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