



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Heart of Dixie Machine & Fabrication Company, Inc.

File: B-271869

Date: July 30, 1996

John T. Jozwick, Esq., for the protester.

Robert E. Young, Esq., Department of the Navy, 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. Protest challenging award under solicitation for flexor refurbishing services on the basis that the awardee did not, prior to award, demonstrate its compliance with a solicitation requirement for manufacturer testing and certification of refurbishing component's physical characteristics is denied since by its terms, this requirement was a performance requirement, not a precondition to award.
2. Protest contending that solicitation failed to apprise offerors that award could be made on the basis of initial proposals is denied since solicitation included a reference to a Federal Acquisition Regulation (FAR) provision that contemplated this possibility; to the extent the protester challenges the agency's use of the predecessor version of the current FAR provision, the protest is untimely as this was evident from the face of the solicitation but was not challenged until after the solicitation closing time.
3. Post-closing time protest challenging agency's failure to evaluate offerors' past performance is dismissed as untimely since the solicitation included no reference to evaluation of past performance, and thus offerors clearly were on notice from the face of the solicitation that past performance was not intended to be an evaluation factor.

DECISION

Heart of Dixie Machine & Fabrication Company, Inc. (Dixie) protests the award of a contract to Alabama Coastal Repair Company, Inc. under request for proposals (RFP) No. N62604-96-R-7550, issued by the Department of the Navy for flexor refurbishing services at the Naval Construction Battalion Center, Gulfport, Mississippi. Dixie contends that the award to Alabama is improper because the awardee failed to comply with one of the solicitation's certification requirements.

Dixie also maintains that the agency improperly made contract award on the basis of initial proposals, and that the agency failed to consider offerors' past performance in its evaluation of proposals.

We deny the protest.

BACKGROUND

The RFP was issued as a small business set-aside on January 19, 1996, and contemplated the award of a fixed-price contract to the offeror whose proposed price and delivery terms presented the most advantageous offer for the refurbishment of up to 141 flexors, which are steel/rubber devices used as buffers between barges or pontoons. Of significance to this protest, the RFP required offerors to refurbish the flexors with an outer cast rubber body comprised in part of a polyurethane material that "shall be tested and certified to meet" six physical properties identified in the RFP.

For their proposals, offerors were to complete and submit the RFP's 1-page pricing schedule, along with several standard Federal Acquisition Regulation (FAR) certifications and representations (e.g., FAR § 52.203-8, the Certificate of Procurement Integrity) which were set forth at section K of the RFP. The RFP also provided that the successful awardee would be required to produce an initial refurbished flexor unit for inspection by the agency.

By the March 8 closing date, four proposals—including those submitted by Dixie and Alabama—were received. By correspondence dated March 13 and March 15, the contracting officer asked both Dixie and Alabama to submit a specification sheet indicating the manufacturer name and product number of the polyurethane each firm intended to use for the refurbishment work; the purpose of this inquiry was to verify each offeror's ability to provide an acceptable polyurethane compound since the originally specified brand name product had been deleted from the solicitation due to its unavailability. After several rounds of correspondence verifying each offeror's selected polyurethane and related manufacturer data, the agency made contract award on April 17 to Alabama as the offeror proposing the lowest-priced, technically acceptable—and therefore, most advantageous—offer.

On April 25, Dixie filed this protest.

DISCUSSION

As noted above, as part of the refurbishing effort, offerors were to provide a replacement outer cast rubber body using a polyurethane material that complied with six physical properties listed in the cast rubber body specification.¹ In this regard, the RFP also stated that "[t]he contractor shall provide material certification from a testing laboratory for the polyurethane materials that certifies that the material meets the [six] physical requirements stated in the contract and drawings."

In its protest, Dixie contends that Alabama's proposal did not offer to use a certified polyurethane material which complied with each of the six required physical characteristics listed above. As a result, Dixie maintains, Alabama's proposal should have been rejected by the Navy as technically unacceptable.

Contrary to Dixie's assertions, the solicitation did not impose a polyurethane certification requirement that had to be satisfied prior to award--nowhere did the solicitation specifically direct offerors to address compliance with the polyurethane certification in their proposals. See Honolulu Marine, Inc., B-248380, Aug. 6, 1992, 92-2 CPD ¶ 87. Moreover, the solicitation did not require offerors to submit certification evidence of the polyurethane material's physical requirements, but instead required only the "contractor" to provide such certification. The use of the term "contractor" generally indicates that the certification is a general performance requirement to be addressed by the successful awardee, post-award. See Motorola Communications and Elecs., Inc., B-225613, Jan. 27, 1987, 87-1 CPD ¶ 91.

This interpretation of the specification as a general contract performance requirement is supported by the limited circumstances under which testing and certification of the polyurethane material's physical characteristics can be obtained. The record shows that a polyurethane material cannot be tested or certified for compliance with the six physical characteristics listed in the solicitation until after it has been mixed with other components, poured into a body cast, and cured as part of the flexor refurbishment process. That is, without being processed as part of the refurbishment chemical process, the polyurethane component itself is incapable of meeting any of the six general physical requirements listed in the RFP. In this regard, the Navy reports that in each of the prior flexor refurbishment procurements--including two contracts that were awarded to Dixie--no testing or certification results of the polyurethane were provided until after award, when the successful awardee began contract performance.

¹The six properties are tensile strength; ultimate elongation; hardness; tear resistance; volume change in distilled water after 504 hours at 158 degrees Fahrenheit; and change in hardness after 168 hours at 212 degrees Fahrenheit.

Under these circumstances, since the RFP did not specifically direct offerors to provide any polyurethane certification before award, and since the record shows that no testing can occur until after the commencement of contract performance, we conclude that the certification specification at issue here is a contract performance requirement that does not have to be satisfied prior to award.

Dixie next contends that the agency improperly awarded the contract to Alabama on the basis of initial proposals, since the RFP failed to apprise offerors of this possibility. We find this contention without merit since at page 49 of the RFP, the agency incorporated by reference FAR § 52.215-16, "Contract Award, Alternate III," which states that "[t]he [g]overnment intends to evaluate proposals and award a contract without discussions with offerors. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint." Thus, contrary to Dixie's contentions, the solicitation did in fact apprise offerors that the agency intended to award the contract based on initial proposals.²

To the extent Dixie challenges the agency's failure to evaluate offerors' past performance, its protest is untimely. Under our Bid Protest Regulations, protests based upon alleged improprieties in a solicitation which are apparent prior to the closing time for receipt of initial proposals must be filed prior to that closing time. 4 C.F.R. § 21.2(a)(1) (1996). In this case, it was apparent from the face of the RFP that past performance was not to be considered under any aspect of the agency's proposal evaluation; consequently, because the RFP did not provide for consideration of offerors' past performance, the protester knew or should have known—well before the March 8 closing date—that the agency would not factor offerors' past performance into its evaluation. See AAI ACL Technologies, Inc., B-258679.4, Nov. 28, 1995, 95-2 CPD ¶ 243. Since Dixie did not challenge the agency's failure to consider past performance prior to the solicitation closing date, this ground of protest is untimely.

The protest is denied.

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²Effective October 1, 1995, FAR § 52.215-16, Alternate III was renumbered as FAR § 52.215-16, Alternate II. To the extent the protester challenges the agency's failure to use the current version of this provision, its protest is untimely as this defect was apparent from the face of the RFP, but was not challenged prior to the March 8 closing time. See 4 C.F.R. § 21.2(a)(1) (1996); ADT Sec. Sys., Inc., B-249932.2, Feb. 4, 1993, 93-1 CPD ¶ 100.