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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Daniel Technology, Inc.

File: B-288853

Date: December 13, 2001

Sam Zalman Gdanski, Esq., for the protester.

Paul W. Knoth, Esq., Naval Supply Systems Command, for the agency.

Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of purchase order for modified recorders from a vendor that allegedly cannot provide products manufactured by protester is denied where solicitation did not require that product be manufactured by protester, and where agency otherwise reasonably determined that the vendor's quoted product was technically acceptable based upon the vendor's quotation of the same product number that was referenced in the solicitation with supporting product literature that adequately demonstrated product's compliance with the solicitation's limited performance specifications.

DECISION

Daniel Technology, Inc. protests the issuance of a purchase order to Saul Mineroff Electronics, Inc. under request for quotations (RFQ) No. N00600-01-Q-6754, issued by the Department of the Navy for modified Sony MiniDisc recorders and related accessories. Daniel contends that, since the RFQ sought quotations for a modified recorder and accessories manufactured and distributed exclusively by Daniel, and, since Daniel does not intend to supply its manufactured units to Mineroff, Mineroff's quotation must be rejected as technically unacceptable.

We deny the protest.

The RFQ was issued on August 14, 2001 under simplified acquisition procedures for 100 modified Sony MiniDisc recorders, including related accessories, to be used in covert recording operations (such as during criminal investigations or informant interviews). The limited product specifications provided in the RFQ did not name "Daniel" as a required brand name; the Daniel name, in fact, is not mentioned in any way in the RFQ. Rather, certain product numbers were referenced in the RFQ's

product description along with limited performance specifications (e.g., calling for compatibility with a referenced remote control, or for leads of a specified length). RFQ at 2. The referenced product numbers are substantially similar to (and some are identical to) product numbers Daniel states it has used to identify its own products.¹ The RFQ did not state that a brand name, or brand name or equal, acquisition was contemplated; no product testing or sampling requirements were specified; no technical data package or drawings were requested; and vendors were not asked to demonstrate technical equality, interchangeability, or compatibility with any other modified recorder system.² Rather, the RFQ requested quotations together with “[p]roduct information showing that proposed MiniDisc [recorders] meet Government requirements.” *Id.* at 17. In this regard, as stated above, there were only limited technical performance requirements included in the RFQ; they were broadly stated in the product description contained in the RFQ’s pricing schedule, as follows:

Sony [MiniDisc] recorder system model MZR-900/D-1400 . . . [includes]: MZ-R900/D [modified] recorder, NLS-2/MZ9 remote control switch (capable of accepting AER-16-16NT wireless remote), EM-8/NT [stereo] microphone pair with 4 ft length leads (capable of accepting STM W-9 [directed] mounted microphone), BH-M body holster and SX-30 amplified loudspeaker (pair), [enclosed] in P-14 Pelican Waterproof storage case. SPECIFICATIONS: records in stereo & mono, 2X stereo and 4X stereo modes, all programming modes shall be performed from the functional standard keyboard, recorder should utilize industry standard adtrac-4 compression scheme, all modifications shall be reversible to allow for [Sony] manufacturer [warranty] service.

¹ The only brand name mentioned in the RFQ is Sony, and it is the “Sony MiniDisc recorder system model MZR-900/D-1400” for which quotations were sought. RFQ at 2. Daniel reports that it had assumed the RFQ contained typographical errors in this regard because Sony does not manufacture a unit with that precise model number. The protester assumed it was a Daniel-manufactured product that was sought by the agency due to the direct correlation between the product numbers cited in the RFQ and product numbers used by Daniel. Daniel did not protest the terms of the RFQ prior to the closing date for receipt of proposal and is now untimely to contest the alleged impropriety. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2001).

² Daniel asserts that product testing should have been required to ensure any quoted product’s quality or interchangeability to the Daniel-manufactured product. This contention, filed after award, relates to the RFQ’s failure to include testing or technical data package requirements, an apparent solicitation impropriety that had to be challenged prior to the closing time for receipt of quotations in order to be timely for review. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1).

Id. at 2.

A purchase order was to be issued to the vendor whose quotation, conforming to the solicitation, was considered most advantageous to the government considering, as equally weighted factors, the price and technical ability of the quoted item to meet the government's requirements. Id. at 17.

Mineroff and Daniel submitted the only two quotations received by the scheduled August 17 closing date. Mineroff submitted the low quote of \$558 per unit (for an extended price of \$55,800 for the 100 units); Daniel submitted a quote for \$668.75 per unit (for an extended price of \$66,875). Both vendors' quotations included a copy of identical product literature describing enhancements to the Sony product in order to meet the RFQ's performance requirements; the only difference in the specification pages was the individual vendor's name and address affixed to each page. Finding that both quotations' product sheets described products meeting the RFQ's performance requirements and referenced the exact product numbers referenced in the RFQ, the agency found both quotations technically acceptable. Considering information it had regarding Mineroff's extensive electronics experience, the agency also concluded that the vendor had the knowledge and capability necessary to supply a compliant product to meet the agency's needs. An order for the modified recorder kits and accessories was issued to Mineroff at its substantially lower price. This protest followed.

Daniel contends that it told the agency, prior to the issuance of the RFQ, that it was the exclusive manufacturer and distributor of Daniel's modified recorder, MZR-900/D-1400, and that it did not intend to supply Daniel-manufactured products to Mineroff. The protester contends that, since the agency should have known Mineroff was quoting on something other than a Daniel-manufactured product, the Mineroff quotation should have been rejected as technically unacceptable.

The contracting agency has the primary responsibility for determining its minimum needs and for determining whether a quoted item will satisfy those needs, since it is the agency that is most familiar with the conditions under which the supplies or services will be used, and it must bear the burden of difficulties incurred by any defective evaluation. See Berkshire Computer Prods., B-246305, Feb. 28, 1992, 92-1 CPD ¶ 242 at 2. In reviewing an agency's assessment of technical acceptability, we will not substitute our evaluation for the agency's, but will examine the agency's assessment to ensure that it was reasonable and consistent with the stated evaluation factors. See Herman Miller, Inc., B-230627, June 9, 1988, 88-1 CPD ¶ 549 at 2.

Despite Daniel's contentions otherwise, there is no basis to conclude that the RFQ required a brand name Daniel item. As an initial matter, the name "Daniel" simply is not mentioned in the RFQ at all. Daniel argues that the product numbers referenced in the RFQ's product description are substantially similar or identical to product

numbers used by Daniel, and that these numbers established a brand name procurement. We do not find the protester's interpretation of the RFQ's use of these product numbers reasonable.

Daniel's interpretation appears to be based on its own unsupported assumptions as to the agency's actual requirements under the RFQ. As stated above, Daniel reports that upon issuance of the RFQ, Daniel recognized what it assumed were typographical errors in the product description, but did not challenge the inaccuracies. Instead, Daniel concluded that only Daniel-manufactured products were being sought because the RFQ referenced some (and similar) product numbers Daniel had used before. Daniel relied on this unconfirmed assumption even though the RFQ's product description did not expressly call for a Daniel-manufactured product, but rather referenced a Sony brand name product.

While the protester suggests that there can be no other interpretation of the referenced product numbers than to indicate an exclusive Daniel-manufactured product, the protester simply has not shown that the pertinent RFQ product numbers must be interpreted as such--e.g., Daniel does not show that the numbers have been formally registered in some way or are publicly recognized in the marketplace as being exclusive or proprietary to Daniel-manufactured products. Consequently, we cannot find that the RFQ's referenced product numbers alone can be reasonably interpreted, as Daniel suggests, as having converted this procurement to a brand name acquisition. The RFQ must be read as a whole and, since only limited, broad performance specifications were included in the RFQ, and vendors were not requested to specifically certify to supplying any brand name product, we cannot conclude that vendors were required to quote or supply only Daniel-manufactured items. Since this is not a brand name procurement, vendors have the right to procure the item from any manufacturer that complies with the general specifications. See Wright Tool Co., B-272413, Sept. 11, 1996, 96-2 CPD ¶ 113 at 2-3.

As stated above, to be found acceptable, the RFQ only required each vendor to include enough information about its quoted product for the agency to reasonably confirm that the product met the agency's requirements. Mineroff and Daniel each provided a product performance specification page that paralleled the RFQ's general performance requirements and product numbers. Our review of the record, including these performance specification pages and the RFQ's limited statement of product requirements, supports the reasonableness of the agency's determination that both vendors submitted adequate information to demonstrate product compliance under the broad terms of this RFQ.³ Whether or not Mineroff is capable

³ We believe Daniel's submission of the identical page of product literature to establish its own technical acceptability undercuts its challenge to the sufficiency of the information on that page to demonstrate acceptability. As to the commonality of the performance specification page in each quotation, Daniel alleges that Mineroff

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of delivering a compliant product relates to the vendor's responsibility, and an agency's affirmative determination of responsibility is not for review by our Office absent circumstances not present here—i.e., a showing of bad faith or misapplication of definitive responsibility criteria.⁴ See Wright Tool Co., B-272413, Sept. 11, 1996, 96-2 CPD ¶ 113 at 2-3. Additionally, whether or not Mineroff ultimately supplies a compliant product concerns a matter of contract administration not for our review. Bid Protest Regulations, 4 C.F.R. §21.5(a).

The protest is denied.

Anthony H. Gamboa
General Counsel

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merely photocopied a Daniel specification page and affixed its own letterhead to the document. Daniel concedes, however, that the “performance specifications are used in advertising and are therefore not proprietary to Daniel Technology” Protest at 8. The product specification sheet submitted with the Daniel quotation (similar to the one submitted by Mineroff) contains no restrictive legend and it does not state that the information sheet is proprietary to Daniel. To the extent that Daniel's subsequent protest submissions claim it is proprietary to the protester and that Mineroff's use of the information is unauthorized and unlawful, we note that the matter involves a dispute between private parties not for our review. See Applied Communications Research, Inc., B-270519, Mar. 11, 1996, 96-1 CPD ¶ 145 at 2-3; Olin Corp.—Recon., B-252154.2, June 3, 1993, 93-1 CPD ¶ 428 at 2-3.

⁴ In its comments on the agency report, Daniel alleges for the first time that Mineroff's quoted product is not a commercial item and thus cannot be considered acceptable under the RFQ, which sought quotations of commercial items. Our Bid Protest Regulations require that protests be filed no later than 10 calendar days after the basis for protest was or should have been known, 4 C.F.R. § 21.2(a)(2), and protesters are required to diligently pursue all information that may give rise to protest grounds. Daniel has not shown that information giving rise to this protest contention could not or should not have been obtained earlier, and the issue raised, by the time the firm filed its initial protest of the purchase order issued to Mineroff. Accordingly, we consider the allegation untimely and it will not be considered further. See Horizon Trading Co., Inc.; Drexel Heritage Furnishings, Inc., B-231177, B-231177.2, July 26, 1988, 88-2 CPD ¶ 86 at 7-8.