

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

PLT

10,494

FILE: B-194222

DATE: June 18, 1979

MATTER OF: Bogue Electric Manufacturing Company

[Protest Alleging]

CNG 01760

DIGEST:

1. Allegation that competitor cannot perform contract] is not for consideration since it amounts to protest against contracting agency's affirmative determination of competitor's responsibility and GAO will not review such determinations save in limited circumstances not present here.
2. Allegation concerning deficiency in IFB's technical information filed after bid opening is untimely and not for consideration on merits.
3. Protester has not carried burden to substantiate its claim that agency misappropriated drawing.
4. Allegations concerning proprietary data which directly or indirectly question responsibility of another concern will not be reviewed.
5. Matter involving possible misappropriation of proprietary data by former employee relates to dispute between two private parties and is not for GAO resolution.

- CNG 01760

DLG 01841 -

Bogue Electric Manufacturing Company (Bogue) protests the Navy's proposed award of a contract to Wilco Electric, Inc. (Wilco), under invitation for bids (IFB) No. N00104-78-B-1170. Bogue states three grounds of protest: (1) Wilco is incapable of meeting the solicitation's technical requirements; (2) the solicitation did not furnish necessary technical data without which it is impossible for any offeror other than Bogue or the General Electric Company (GE) to manufacture the required equipment; and (3) only Bogue and GE have the legal right to manufacture the required equipment because of their ownership of patent and proprietary data rights.

CNG 0030

~~005609~~

(The IFB was issued on an unrestricted basis for 11 amplidyne to be used at sea in MK68 gun directors.) An amplidyne is essentially an electrical power amplifier in the configuration of a sophisticated electric motor consisting of "a direct-current generator that * * * precisely controls a large power output whenever a small power input is varied in the field winding of the generator." Webster's New Collegiate Dictionary 39 (1975 ed.). (Bogue reports that amplidynes were invented and patented many years ago by GE. During the Korean War, GE licensed Bogue, in its capacity as a GE subcontractor, to produce the patented amplidynes, ^{which were} ~~These amplidynes~~ were, in turn, sold by GE to the Navy.) Bogue further reports that the field structure of an amplidyne is entirely different from that found in conventional generators and that without certain lamination drawings having a "peculiar geometry, it is impossible to duplicate the performance of an amplidyne with respect to sensitivity and response." In Bogue's opinion, the specific geometry of the field structure is a work of art rather than an engineering design.

The first ground of protest is based on Bogue's belief that Wilco is incapable of producing the required amplidynes. However, since Wilco's bid neither limited, reduced nor modified its obligation to perform, it must be considered responsive. 53 Comp. Gen. 396 (1973). Thus, Wilco's ability to furnish the required amplidynes is a matter of responsibility. Bogue's allegation of Wilco's inability to perform constitutes a protest against the Navy's affirmative determination of Wilco's responsibility.

We do not review protests against affirmative determinations of responsibility unless either fraud is alleged on the part of procuring officials or the solicitation contains definitive responsibility criteria which have allegedly not been applied. Central Metal Products, Incorporated, 54 Comp. Gen. 66 (1974), 74-2 CPD 64; Yardney Electric Corporation, 54 Comp. Gen. 509 (1974), 74-2 CPD 376. Since neither exception is applicable here, we will not consider this aspect of Bogue's protest.

Bogue's second ground of protest concerns a deficiency in the technical information which was furnished as part of the IFB. The IFB required manufacture of the amplidynes in accordance with MIL-M-2130 (a performance specification) and Ordnance Drawing 2679999 (a specification-controlled drawing) which lists Bogue part numbers. Bogue argues that the IFB lacks in process technical data and in process procedures necessary for manufacturing the amplidynes.

Although Bogue advised the Navy of its concern in this regard in a February 5, 1979, letter, it did not assert it as a ground of protest until its February 27, 1979, protest to our Office.

Our Bid Protest Procedures require that protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be filed prior to bid opening. 4 C.F.R. § 20.2(b)(1) (1978). The bids were opened December 1, 1978. Bogue's protest was received on February 28, 1979. Since the deficiency complained of is apparent on the face of the solicitation, the protest had to be received prior to the December 1, 1978, bid opening in order to be timely. Thus, this aspect of Bogue's protest is untimely and will not be considered on the merits.

Bogue's final ground of protest concerns the existence of alleged patent and proprietary data rights which Bogue contends legally preclude any manufacturer, other than GE or itself, from fabricating the amplidynes. The Navy reports: (1) that Bogue has failed to furnish any patent numbers in support of its allegation that the amplidyne is covered by GE patents; (2) that Bogue has failed to furnish any evidence that it is a licensee of GE under the patents; (3) that, if the patents were infringed, the real party in interest is GE and not Bogue; and (4) that patents issued in 1953 would have expired by now. In view of the above, we believe that Bogue has failed to present the information and evidence necessary to substantiate its case. Kurz-Kasch, Inc., B-192604, September 8, 1978, 78-2 CPD 181.

Bogue's allegations concerning misappropriation of proprietary data are aimed both at the Navy and at

Wilco. Bogue states that it received the drawings, technical data, in-process manufacturing and test procedures necessary for the production of high performance amplidynes from GE. Wilco, however, states that in the mid-sixties Bogue underbid GE and obtained a subcontract from another firm which required it to manufacture amplidynes and that Bogue, using the same type of information as is found in the IFB, was able to successfully duplicate the performance of GE amplidynes without using GE's drawings.

Regarding Bogue's allegation of Navy misappropriation, the record shows that the Navy possesses Bogue Drawing No. A-34914 and that the drawing is referenced in the solicitation's data package. However, the Navy states that the drawing is devoid of any restrictive proprietary legend. We believe this alone is an insufficient basis upon which to conclude that the Navy misappropriated the Bogue drawing. As we indicated above, the burden is on the protester to substantiate its case. Kurz-Kasch, Inc., supra.

Regarding the allegation of misappropriation of proprietary data against its competitor, we believe that such an allegation amounts to an indirect attack on the responsibility of Bogue's competitor. In other words, the competition either will not be able to furnish what is required or, in the alternative, the competition can only furnish what is required by misappropriation of Bogue's proprietary data. We have taken the position that if a protest concerning proprietary data directly or indirectly questions the responsibility of another concern, the matter is not appropriate for our review. Worthington Pump Inc., B-192385, October 11, 1978, 78-2 CPD 267. We note that the record indicates that Wilco's president was a Bogue employee from 1944 through 1972 and apparently served as Bogue's president in 1964. To the extent that Bogue's current allegation is related to its former employment of Wilco's president and his possible use of information which he might have gained while in Bogue's employ, we believe that such an allegation essentially relates to a dispute between two private parties regarding proprietary rights which should not be resolved by our Office. Washington School of Psychiatry, B-189702, March 7, 1978, 78-1 CPD 176.

Accordingly, the protest is dismissed in part and denied in part.



Acting Comptroller General
of the United States