

118716 24/11/82

DECISION



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

FILE: B-205003

DATE: June 16, 1982

MATTER OF: King-Fisher Company

DIGEST:

1. Objections to specifications raised by an independent consultant in a conversation with the contracting officer prior to bid opening does not evidence the requisite intent to protest as consultant stated that he did not intend to formally protest and did not indicate that he was acting on behalf of protester. Thus, objections to specifications first raised with GAO by protester after bid opening are untimely.
2. Bidder's ability to meet specification requirement that portion of equipment to be supplied conform to Underwriters Laboratories (UL) or Factory Mutual Systems' (FMS) requirements and to present evidence of this conformance 30 days after notice to proceed constitutes a matter of responsibility which GAO does not review unless either fraud on the part of procuring officials is shown or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Neither condition exists here.
3. Agency's view that provision stating that portion of equipment must conform to UL or FMS requirements does not mean that equipment be UL or FMS approved but that it meets those requirements is reasonable.

King-Fisher Company protests the specifications included in invitation for bids (IFB) DABT23-81-B-0139 and the award of a contract to Monaco Enterprises, Inc.

under that solicitation. The solicitation was issued by the Army for repair of fire alarm systems at Fort Knox, Kentucky. The protest is dismissed in part and denied in part.

Basically, King-Fisher complains that the IFB specifications were restrictive because (1) they required that the alarm system's transmitter be approved by Underwriters Laboratories (UL) or Factory Mutual Systems (FMS), (2) the requirement for 16 zone capacity for the system was beyond the Government's needs, (3) the requirement for the control console to have both a manual and a test operation, and for the central alarm receiver to transmit test signals not more than 30 seconds apart, can only be met by Monaco's equipment and, (4) the specifications cited an out-of-date industry standard while the current standard required a different system than that specified in the IFB. The protester also argues that the specifications were written by Monaco and states that it does not understand why its system could be acceptable at other installations and, in effect, be written out at Fort Knox. King-Fisher also argues that the Monaco bid should not have been accepted because even it cannot meet the UL or FMS test standards. The protester finally maintains that Monaco will deliver equipment which does not meet the IFB requirement for a dual console.

The agency states that since King-Fisher's protest was not filed in our Office until October 1, considerably later than the September 21, bid opening date, all its allegations which pertain to the adequacy of the IFB specifications are untimely under our Bid Protest Procedures, 4 C.F.R. § 21.2(b) (1981), and should be dismissed. King-Fisher, on the other hand, maintains that it protested orally through its consultant prior to bid opening and states that its October 1 protest to our Office was timely as it was filed within 10 days of bid opening, which constituted adverse agency action. 4 C.F.R. § 21.2(a).

The Army admits that prior to bid opening it received a telephone call on September 18 regarding the specifications. The agency, however, states that the individual who called indicated that he was not an employee of any bidder, but an independent consultant and that even though he personally believed that portions of the specifications were restrictive he stated that he was not formally protesting. Neither King-Fisher nor its consultant has disputed the agency's account of the September 18 conversation.

Under our protest procedures, the rule that protests of improprieties apparent in the solicitation--such as King-Fisher's objections to the specifications here-- must be filed prior to bid opening applies to protests initially filed with the agency as well as with our Office. Crown Laundry and Cleaners, B-202137, March 30, 1981, 81-1 CPD 237. Further, while an oral protest is permissible under Defense Acquisition Regulation § 2-407.8, it must be stated in such fashion that the intent to lodge a protest is clear. Joule Technical Corporation, B-192125, May 21, 1979, 79-1 CPD 364. The record of the conversation which shows that King-Fisher's consultant merely expressed a personal disagreement with some parts of the specifications and that he specifically stated that the conversation was not a protest does not evidence the requisite intent to protest. Moreover, we doubt whether King-Fisher's consultant, who informed the agency of his independent status during the conversation, was at that time a sufficiently interested party to protest. See Kenneth R. Bland, Consultant, B-184852, October 17, 1975, 75-2 CPD 242. Thus, King-Fisher's complaints concerning the adequacy of the specifications are untimely and will not be considered.

With respect to King-Fisher's allegation that Monaco's equipment will not "conform to the requirements of the UL or the FMS" contained in section 3.2 of IFB specifications, this requirement is a matter of responsibility and it is our Office's policy not to review protests against affirmative determinations of responsibility unless either fraud is shown on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Whitco Industrial Corp., B-202810, August 11, 1981, 81-2 CPD 120.

Since the specifications (section 3.3) do not require the contractor to submit evidence of conformance of the equipment until 30 days after the notice to proceed is issued, this requirement does not establish a definitive responsibility criterion. Provisions like this one, which state what must be supplied, are to be distinguished from definitive responsibility requirements which are preconditions of award. Contra Costa Electric, Inc., B-190916, April 5, 1978, 78-1 CPD 268. For example, were Monaco required to submit proof of laboratory approval prior to award, that requirement would constitute a responsibility

criterion. Here, by signing the bid without exception, Monaco has promised to perform the contract in accordance with its terms. Whether the bidder is capable of performance is a matter of responsibility. See Whitco Industrial Corp., supra. The same reasoning is applicable to King-Fisher's complaint that Monaco intends to use equipment which will not conform to the dual console requirement of the specification. This is simply a matter of responsibility.

Finally, the protester objects to the agency's view that actual UL or FMS approval is not required, but that merely a "functional equivalent" of such approval will be acceptable. Since section 3.2 states that "the Contractor shall submit proof that the items furnished under this specification conform to these requirements [UL or FMS testing standards]" it is our view that the agency position is reasonable. The clause states that the equipment will meet UL or FMS requirements, not that it must be UL or FMS approved.

The protest is dismissed in part and denied in part.

for *Henry R. Chen*
Comptroller General
of the United States