

24839-111

DECISION



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

FILE: B-208510.2

DATE: April 13, 1983

MATTER OF: Gull Airborne Instruments, Inc.

DIGEST:

1. Protest alleging improprieties in solicitation which was filed with contracting agency and GAO after date set for receipt of initial proposals is untimely under section 21.2(b)(1) of our Bid Protest Procedures, which requires such protests to be filed before date for receipt of initial proposals.
2. Protest alleging that contracting agency should have considered technical superiority of protester's proposal and awarded to protester even though its price was higher than awardee's price is denied. Solicitation's evaluation criteria essentially stated only that price and other factors would be considered and that ability to perform also would be considered. Agency reasonably considered products of protester and awardee to be technically equal except for the fact that protester offered to deliver product on an accelerated basis. Our review finds that solicitation's rather limited criteria were followed. Moreover, in view of the fact that protester and awardee offered products which were essentially technically equal, decision to award to lower priced offeror is not objectionable.
3. Protest alleging that awardee will not be able to meet required delivery schedule is dismissed since it involves challenge to contracting agency's affirmative determination of awardee's responsibility which GAO will not review in circumstances presented.

Gull Airborne Instruments, Inc. (Gull), protests award of a contract to UMC Electronics Company (UMC) by the Department of the Army pursuant to solicitation No. DAAJ09-82-R-A887. The contract calls for UMC to supply 169 indicator test sets, technical manuals, and design data

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and contains an option for an additional 84 indicator test sets. Gull contends that the solicitation's specifications contained a material ambiguity, that the Army did not adequately consider the superior technical merit of Gull's proposal, but selected UMC on the basis of price alone, and that UMC's offer was nonresponsive to the solicitation's delivery requirements.

The protest is dismissed in part and denied in part.

Gull alleges that the specifications were ambiguous because they required that the indicator test sets conform to Military Specification No. MIL-T-58092C(AV), which did not adequately inform offerors that 24 component interface cables are necessary in order for the sets to perform properly. Gull also charges that since the referenced military specification incorporated drawing No. 467-000-P00, entitled Cable Assemblies, Army Test Set, the drawing should have been provided to all offerors as part of the solicitation package. Gull contends that because of the ambiguity concerning the required number of interface cables and the failure to provide the drawing of the cable assemblies, offerors were not competing on an equal basis.

We find this issue of Gull's protest to be untimely. The military specification was contained in the solicitation as originally issued. Under section 21.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 21 (1982), protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals must be filed prior to the date for receipt of initial proposals in order to be considered on their merits. Initial proposals were required to be submitted by June 30, 1982. Gull first protested this issue to the contracting agency in a meeting with the Government Contract Specialist on October 6 and by letter dated October 7, and its initial protest was filed in our Office on November 15. Since neither Gull's protest to the contracting agency nor its protest to our Office was filed before the date set for receipt of initial proposals, this issue of protest is untimely and will not be considered on its merits.
Calabrese & Sons, Inc., B-208301, August 17, 1982, 82-2 CPD
139.

Gull contends that, in accord with the solicitation's evaluation criteria, the Army should have conducted a thorough technical evaluation which would have shown the clear technical superiority of Gull's proposal and product. Gull charges that the contracting officer made his choice on the basis of price alone. Had technical merit been accorded equal weight, Gull believes it would have been awarded the contract.

The evaluation of proposals is the function of the procuring agency, requiring the exercise of informed judgment, and it is not our function nor practice to conduct a de novo review of proposals or to make an independent determination of their acceptability or relative merits. Our review is limited to examining whether the agency's evaluation was fair and reasonable and consistent with the solicitation's stated evaluation criteria. KET, Inc., B-190983, December 21, 1979, 79-2 CPD 429.

Regarding the evaluation of offers, the solicitation incorporated by reference standard form 33A, which states in pertinent part in paragraph 10 of the "Solicitation Instructions and Conditions":

"(a) The contract will be awarded to that responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered.

* * * * *

"(f) The right is reserved to accept other than the lowest offer and to reject any or all offers."

The solicitation also contained a section entitled, "Evaluation Factors for Award," which stated in relevant part:

"If a bid/proposal submitted in response to this solicitation is favorably considered, a Government survey team may contact the bidder's/offeror's facility to determine his ability to perform.

"Current financial statements and other pertinent data shall be made available for examination. The survey team may also evaluate the bidder's/offeror's system for determining the financial and technical ability of his proposed subcontractor(s) if any."

No more specific criteria were set forth in the solicitation.

The record shows that the solicitation did not request any information which would show the technical superiority of one proposal over another and Gull did not supply any such information. The record also shows that the contracting officer considered the end products offered by Gull and UMC to be technically equal. According to the contracting officer, the only advantage offered by Gull was its accelerated delivery schedule (210 days) while UMC offered to meet the required delivery schedule (480 days). The contracting officer chose UMC over Gull because Gull's offered price was \$660,790--\$221,877 more than UMC's offered price of \$438,913. While the contracting officer considered the accelerated delivery one of the "other factors" to be considered in accord with paragraph 10, quoted above, he concluded that the offer of accelerated delivery was not worth the extra expenditure for equal products. Furthermore, before awarding to UMC, the preaward survey team determined UMC to be technically capable of performing in a timely fashion and specifically noted, among other things, UMC's experience gained in a recent contract to supply flight instrument testers which the Army contends are similar to the item required under this contract. The preaward survey team also examined UMC's subcontractor vendor quotes to evaluate UMC's ability to perform on schedule.

Based upon the above information, we conclude that the contracting officer and preaward survey team together conducted an evaluation of proposals which was in conformity with the rather limited evaluation criteria set forth in the solicitation and quoted above. Since both offerors' products were considered essentially technically equal except for the delivery element, and in view of the cost savings to the Government, we cannot conclude that the decision to award to UMC was unreasonable. We have held on many occasions that, where technical proposals are reasonably considered to be technically equal, award to the lower priced offeror is not

objectionable. See, for example, Employee Assistance Service, B-207057, July 19, 1982, 82-2 CPD 56; Western Ecological Services Company, B-204550, September 13, 1982, 82-2 CPD 220.

Gull's last argument--that UMC will be unable to manufacture the product and make delivery within the required timeframe--is mischaracterized by Gull as a charge that UMC is nonresponsive; in reality, this issue involves the matter of UMC's responsibility. Responsiveness concerns the promise of a bidder to perform in accordance with the invitation for bids. See John Grace & Co., Inc., B-190439, February 15, 1978, 78-1 CPD 131. Since this was a negotiated procurement, use of the term "responsiveness" is inappropriate. In any event, UMC's proposal clearly stated that it would meet the desired delivery schedule and, therefore, UMC is in compliance with the solicitation's delivery requirements.

Contrary to the protester's contention, the solicitation did not require a technical evaluation of each offeror to determine ability to manufacture the product within the required delivery schedule. The section entitled "Evaluation Factors for Award" stated that an offeror's facility and financial statements would be examined to determine capability to perform only if that offeror's offer were otherwise favorably considered for award. While this language was placed under the evaluation factors section, a reading of that section in its entirety shows that a pre-award survey on the likely awardee only was contemplated. Moreover, the solicitation did not require submission of financial or technical information bearing on an offeror's ability to perform in a timely manner for evaluation as to technical acceptability. Therefore, we conclude that the traditional determination of responsibility was all that was contemplated or required.

The Army determined, after a preaward survey, that UMC would be able to perform capably within the time constraints imposed by the solicitation. This was an affirmative determination of UMC's responsibility which had to be made before award. Our Office does not review challenges to an agency's affirmative determination of a firm's responsibility in these circumstances. See Mars Signal Light Company, B-204994, October 21, 1981, 81-2 CPD 331. Therefore, this issue of the protest is dismissed.

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

for *Milton J. Jordan*
Comptroller General
of the United States