

DECISION



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

FILE: B-215632; B-216895 DATE: April 2, 1985

MATTER OF: Polymembrane Systems, Inc.

DIGEST:

1. Protester is an interested party to protest the chemical composition of construction material required by the specifications where protester is prepared to offer domestic construction material if foreign material is unacceptable.
2. Protester is an interested party to protest allegedly unduly restrictive specifications, notwithstanding its submission of a responsive bid for the allegedly unduly restrictive requirement, where protest was filed prior to bid opening and protester has indicated to agency that it does not intend to furnish the material called for by the specifications despite its bid to the contrary.
3. Protest that agency is arbitrarily insisting on unduly restrictive specification, because it has procured the excluded material for use in meeting a similar requirement, is denied where record shows procurement of excluded material was for experiment to determine the material's acceptability and record otherwise establishes reasonable basis for agency caution.

Polymembrane Systems, Inc. (PMS), protests the restrictive nature of invitations for bids (IFB) Nos. N62474-83-B-8649 (B-8649) and N62474-83-B-8356 (B-8356) issued by the Naval Facilities Engineering Command, Navy Public Works Center (Navy), San Diego, California.

PMS is the apparent low bidder on B-8649. PMS did not bid on B-8356. Essentially, PMS argues that the protested IFB's unreasonably limit the materials to be used in refurbishing the roofs of Navy Buildings to single-ply roofing membranes made of ethylene propylene diene terpolymer (EPDM) (a rubber-like sheeting) and preclude use of roofing membranes made of polyvinyl chloride (PVC) (a flexible plastic)

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such as its product. We previously denied a similar PMS protest on the grounds that the Navy had established a prima facie case that the protested specifications are needed to meet its minimum needs and that PMS had not established that the requirement complained of was clearly unreasonable. Polymembrane Systems, Incorporated, B-213060, Mar. 27, 1984, 84-1 C.P.D. ¶ 354, affirmed, Polymembrane Systems, Incorporated--Reconsideration, B-213060.2, July 23, 1984, 84-2 C.P.D. ¶ 81. PMS's current protests argue that the Navy's prohibition of the use of its PVC product in these procurements is clearly unreasonable because the same Naval Command, at the same installation, for a virtually identical requirement, has specified a PVC product having the same physical characteristics as PMS's product under IFB No. N62474-83-B-8650 (B-8650) and the same Naval Command, at another California installation, has similarly specified under IFB No. N62474-83-B-4893 (B-4893) a product with the same physical characteristics as PVC.

We deny the protests.

The Navy urges dismissal of both protests on the ground that PMS is ineligible for award and, therefore, not an interested party under our Bid Protest Procedures, 4 C.F.R. § 21.1(2) (1984). The Navy also urges dismissal of PMS's protest under B-8649 on the additional ground that PMS's low bid is responsive on its face.

Concerning PMS's status as an interested party, the Navy advises that it has decided not to grant a Buy American Act (Act), 41 U.S.C. §§ 10a-10d (1982), waiver of the prohibition against the use of foreign-made construction materials. The Navy states that PMS will bid a Swiss-manufactured product and that without a waiver PMS is ineligible for award. PMS, while agreeing that a waiver of the act is required, contends that the Memorandum of Understanding between the United States and Switzerland constitutes the required waiver, and, if it does not, that it will bid a domestic PVC. Since PMS is prepared to offer a domestic product, if need be, we find PMS to be an interested party.

We further find PMS to be an interested party for purposes of its protest against B-8649. PMS clearly challenged the restrictive nature of the IFB prior to bid opening and the Navy report indicates that PMS has represented to the Navy that it does not intend to furnish EPDM in the event that it receives the award. In these circumstances, we find PMS interested for purposes of challenging the IFB's specifications.

Turning to the merits of PMS's protest, PMS contends that the Navy is arbitrary in condoning the use of PVC roofing material on some projects while barring its use on others. PMS cites our decision in Med-E-Jet Corp., B-210029, B-210447, Sept. 2, 1983, 83-2 C.P.D. ¶ 293, in which we recommended cancellation of a restrictive request for proposals and a more competitive procurement of an agency's requirement on the basis that the equipment which was barred by the restriction had been used in the past and found to be satisfactory for the particular requirement.

The Navy admits that it has sought bids for PVC roofing, but it explains that the PVC roofing was being acquired on an experimental basis until PVC's performance proved acceptable.

We denied PMS's previous protest and affirmed the denial, principally on the basis that in our view: (1) the Navy concern that PVC was subject to shrinkage and embrittlement problems after prolonged exposure to sun and heat was reasonable; and (2) in technical disputes, a protester's disagreement with an agency's technical opinion, even where the protester's position is supported by expert technical advice, does not invalidate the agency's opinion.

We find PMS's reliance on Med-E-Jet misplaced since, despite the widespread use of PVC, there is no showing that the use has been satisfactory after prolonged exposure to sun and heat. PMS has furnished several technical reports from the National Research Council Canada, Division of Building Research (hereafter referred to by Paper No.), and one technical report from the United States Army Corps of Engineers, Construction Engineering Research Laboratory, Technical Report M-343, April 1984 (hereafter Army report),

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which we think show the reasonableness of the Navy's caution in its approach to PVC roofing. For example, Paper No. 1093 explains that, in the past 20 years, hundreds of new roofing materials have been introduced in the marketplace and that:

" . . . the volume of these new materials has caused problems of selection for architects, engineers, designers and construction managers. As most of the nearly 400 new roofing materials have a limited service record, users have been forced to rely upon manufacturers' claims, which unfortunately are not justified in all cases."

Paper No. 1153 points out that many factors such as:

" . . . [i]mpurities in raw materials, particle size and molecular weight distribution of the resins, and processing conditions during manufacture (such as temperature, time, moisture content) all contribute to the physical, chemical and mechanical properties of finished products and could affect the performance of the final roof drastically."

So, although Paper No. 1093 indicates that PVC's early shortcomings have now been "virtually solved by incorporating more permanent plasticizers and fiberglass reinforcing" (PMS's product has fiberglass reinforcing) and that PVC enjoys widespread use in Europe, and the Army report concludes that reinforced PVC roofing "should be given tentative approval for Army use, pending results of field testing," we cannot find the Navy's decision, to limit its use of PVC to experimental projects until such time as it is assured that PVC's performance is acceptable, unreasonable.

Accordingly, the protests are denied.


for Harry R. Van Cleve
General Counsel