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DECISION

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

FILE: B-216274 **DATE:** April 15, 1985

MATTER OF: Tenavision, Inc.

DIGEST:

1. Where a solicitation does not expressly require offered equipment to be commercially available, such availability does not establish a precondition to award, but instead is a matter of the offeror's capability to furnish an acceptable item, i.e., the firm's responsibility.

2. Ordinarily, alleged ambiguities in the language of a solicitation provision must be protested to GAO before the solicitation's closing date. However, where the protester was unaware, prior to the closing date, that its interpretation of the ambiguous solicitation language was not the only one possible, the protester cannot be held to have been aware of an ambiguity for purposes of protesting before the closing date.

3. GAO questions a requirement that an offeror have a Federal Supply Schedule contract for any proposed equipment, where the schedule is not a mandatory source of supply, since the agency only intended the requirement as evidence that the offered equipment was state-of-the-art, yet the schedule does not necessarily establish that fact, and there are other ways an offeror could make the desired showing.

Tenavision, Inc., protests the rejection of its proposal under request for technical proposals (RFTP) No. 541-86-84 issued by the Veterans Administration (VA). The RFTP was part of a two-step formally advertised procurement for the acquisition and installation of an audio-visual nurse call system and radio entertainment extension system for the VA Medical Center, Cleveland, Ohio.

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Tenavision contends that the RFTP was ambiguous with regard to the requirements for which the VA found the company technically unacceptable. Tenavision also contends that the VA unfairly rejected its proposal without conducting any negotiations, while conducting negotiations with the other offerors with regard to the deficiencies in their proposals.

We sustain Tenavision's protest.

Background

The VA received proposals under the RFTP from Tenavision and two other offerors. Following an initial technical evaluation, the VA found Tenavision's proposal deficient for failing to provide information pertaining to certain RFTP requirements, and for failing to indicate Underwriters Laboratories (UL) approval for the company's proposed equipment. The VA then notified Tenavision in writing that its proposal was rejected as technically unacceptable because Tenavision's proposed equipment did not show UL approval. In addition, the VA's written notification stated that the proposal was further deficient because Tenavision did not have, as required by the RFTP, a current Federal Supply Schedule contract for its proposed equipment. Immediately after receiving the rejection, Tenavision filed its protest with our Office.

At the same time that Tenavision was notified of the rejection of its proposal, the VA sent letters to the other two offerors, notifying them of the deficiencies in their proposals and giving them an opportunity to correct these deficiencies. Both of the offerors responded, and the VA found that the responses made their proposals technically acceptable. The VA then issued an invitation for bids to the two offerors pursuant to step two of the procurement. Sound/Com Corporation submitted the lowest bid of the two, and a contract was awarded to that company.

UL Certification/Commercial Availability

Tenavision points out that the RFTP stated only that an offered piece of equipment had to conform with the UL standard in effect for that piece of equipment, "as of the date of the Invitation for Bid." Tenavision argues that in rejecting its offer the VA evidently was requiring compliance with the appropriate UL standard at the time of

issuance of the RFTP, and contends that an offeror actually should have had until the time of installation to obtain UL certification of its equipment.

The VA admits that Tenavision's failure to indicate UL approval of its equipment was "not a proper basis for rejection when the RFTP only required approval at issuance of the IFB." Rather, the VA states that the letter to Tenavision rejecting the company's proposal failed to inform Tenavision clearly of the real reason for rejection: the nurse call system offered by Tenavision would not have been commercially available at the time set for step two of the procurement. Specifically, the VA states that the literature on Tenavision's equipment was marked "preliminary" and that upon contacting the manufacturer of the nurse call system offered by Tenavision the manufacturer indicated to the VA that the system would not be commercially available for at least a year.

In response, Tenavision emphasizes that, like the requirement for UL certification, the RFTP did not provide that the nurse call equipment had to be commercially available at the time of the procurement. In Tenavision's opinion, it would have been more consistent with the RFTP's language for an offeror to have concluded that the equipment's availability was an issue only at the time of supply. In addition, Tenavision argues that the VA should have conducted discussions with Tenavision if it had any questions about the availability of the company's equipment.

The UL certification issue is, of course, moot in view of the VA's admission. Moreover, we see no legal basis for the VA's position that Tenavision's proposal was unacceptable because the company's equipment may have been commercially unavailable. First, as noted by Tenavision, the RFTP did not mention commercial availability at all. Second, the RFTP did not specify any delivery and installation dates for the nurse call equipment, so that even if a commercial availability requirement could be inferred from the RFTP, an offeror had no way of knowing when it would apply. Finally, the step two invitation did not require installation of the equipment until 18 months after a notice to proceed from the VA Medical Center--on that basis, we question the VA's concern that the system offered by Tenavision might not be available commercially for 1 year.

We have held that where a requirement for commercial availability is merely a part of general specifications for design and performance, it does not establish any precondition to award. See Caelter Industries, Inc., B-203418, Mar. 22, 1982, 82-1 C.P.D. ¶ 265. In that case, the judgment whether the prospective contractor, in fact, is able to meet its contractual obligation should be reserved for the contracting officer in making his responsibility determination. Id. In our opinion, because the RFTP did not even mention commercial availability, and in view of the extended installation timeframe, the matter, at best, should have been treated as one of responsibility, not technical acceptability, and thus should have been part of the consideration prior to award of the successful offeror's ability to perform.

Further, to the extent the VA was concerned that Tenavision could not furnish adequate descriptive literature, we recognize that an agency properly can require an offeror to show that its proposed equipment meets all technical requirements. The VA's real concern, however, evidently arose because the data Tenavision did submit was marked "preliminary," which was unsatisfactory based on the agency's position that offered equipment had to be concurrently available during the competition. Since we do not agree that the RFTP established such a requirement, we do not believe the VA's concern was warranted. In any event, the first step of two-step formal advertising generally contemplates, in furtherance of the goal of maximized competition, the qualification of as many proposals as possible through discussions, and that an agency should make reasonable efforts to bring a step-one proposal to an acceptable status. Radiation Systems, Inc., B-211732, Oct. 11, 1983, 83-2 C.P.D. ¶ 434. To the extent Tenavision's descriptive literature was deficient in an informational sense, from our review of the record any such deficiencies appear to be no more serious than the other two offerors', and they do not appear to have required extensive revision of the company's proposal. Consequently, we see no reason why the VA should not have afforded Tenavision the opportunity to address the agency's concerns through discussion, and thereby potentially maximize the competition for the second step of the procurement.

Failure to Furnish GSA Contract Number

With regard to the VA's rejection of Tenavision's proposal for not having a Federal Supply Schedule contract for its equipment, the RFTP stated: "Sealed proposals are to be submitted in accordance with current GSA contract. Please submit your GSA number with your proposal." Tenavision argues that nowhere did the language directly state that only holders of Federal Supply Schedule contracts could compete. Tenavision further argues that the Federal Supply Schedule could not have been used here as an exclusive source of contractors because the part of the schedule on which nurse call and radio extension equipment fall is nonmandatory for all users, including the VA. Nor, in Tenavision's opinion, can it be inferred from the RFTP's language that a successful offeror had to acquire its equipment from a schedule contractor.

The VA admits that the RFTP's language "falls short of communicating the objectives in including it." The VA argues, however, that any lack of clarity in the expression of the requirement was apparent upon the RFTP's issuance. The VA contends that since our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1984), require protests against apparent solicitation improprieties to be filed prior to the closing date for receipt of proposals, Tenavision's protest, filed after the rejection of its proposal, is untimely.

In addition, the VA states that the reason for requiring an offeror's equipment to be listed on the Federal Supply Schedule was to insure that the offeror's technology would not be "out-dated" and that replacement could be obtained at reasonable prices over the life of the nurse call and radio entertainment extension systems. The VA emphasizes that, for this purpose, it was immaterial that use of the Federal Supply Schedule for nurse call and radio entertainment equipment was not mandatory. The VA further emphasizes that because it required a system where neither all the replacement components, nor installation of the equipment, were listed on the schedule, there was never an intention to purchase off the schedule. Rather, the VA intended to use the schedule listing requirement to make certain that only state-of-the-art equipment would be offered.

We find Tenavision's protest on the issue to be timely. Ordinarily, alleged ambiguities in the language of a solicitation provision must be protested to our Office prior to the solicitation's closing date. 4 C.F.R. § 21.2(b)(1). We have recognized an exception to this rule, however, where the protester was unaware, prior to the closing date, that its interpretation of the solicitation provision was not the only one possible. This is because absent awareness of a second interpretation, the protester cannot be charged with knowledge of an ambiguity. See Conrac Corporation, B-205562, Apr. 5, 1982, 82-1 C.P.D. ¶ 309.

In our view, Tenavision reasonably interpreted the RFTP's language pertaining to the listing of an offeror's Federal Supply Schedule contract to have meant only that if an offeror was a schedule contract holder, or if an offeror intended to buy equipment from a schedule contract holder, the schedule contract had to be identified and complied with. We simply do not agree with the VA that Tenavision should be charged with knowing that a schedule contract was a precondition to technical acceptability, especially since the Federal Supply Schedule was not a mandatory source of supply for equipment (and installation) required by the RFTP.

Turning to the merits of the VA's reason for requesting an offeror to list a Federal Supply Schedule contract for its offered equipment, Tenavision contends that interpreting the listing request as a requirement results in an unreasonable restriction on competition. We agree. When a protester challenges a specification as unduly restrictive of competition, the burden is on the procuring agency to establish prima facie support for its contention that the restrictions it imposes are needed to meet its minimum needs. Polymembrane Systems, Inc., B-213060, Mar. 27, 1984, 84-1 C.P.D. ¶ 354. Having equipment listed on the Federal Supply Schedule was, in the VA's view, evidence that an offeror's equipment was state-of-the-art, which the agency asserts it needed. We question, however, whether having equipment on the schedule automatically means that the equipment is state-of-the-art. In any event, we find that even if having equipment on the schedule does mean that the equipment is state-of-the-art, the VA's listing requirement is still unduly restrictive because it unnecessarily limits an offeror's proof that it has state-of-the-art equipment. There should be many other ways an offeror can demonstrate

to an agency's satisfaction that its equipment is up-to-date--descriptive literature, manufacturing dates, model numbers, etc.

Conclusion

We believe Tenavision's offer should have been included with the other two for purposes of discussions. Since installation has begun, however, it is not practical to recommend corrective action that might result in terminating the awarded contract. Nevertheless, we are by separate letter to the VA recommending that steps be taken to preclude a recurrence of the procurement deficiencies discussed above.

The protest is sustained.

Harry R. Van Cleve
for Comptroller General
of the United States