Phillips

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

FILE: B-222437 **DATE:** July 1, 1986

MATTER OF: Webb Designs, Inc.

DIGEST:

1. Protest that a competitor allegedly used the protester's proprietary bid samples, descriptive literature and testing data in its bid without the protester's consent constitutes a dispute between private parties that is not for consideration under General Accounting Office Bid Protest Regulations.

2. Allegation that competitor's bid was nonresponsive because the bid samples submitted by the competitor were proprietary to protester is denied, where bid unequivocally offered to provide product conforming to specification requirements and the contracting officer had no knowledge that the bid samples allegedly belonged to the competitor.

3. Allegation that bid is nonresponsive because it did not contain bid sample of certain item is without merit where solicitation did not specifically require sample of item.

4. Protest that the product to be supplied will not comply with the specifications is a matter of contract administration for consideration by the agency, not General Accounting Office.

5. Allegation that awardee lacked ability to perform the contract concerns the bidder's responsibility, the affirmative determination of which is not considered by General Accounting Office except under limited circumstances not present here.

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Webb Designs, Inc. (Webb), protests the March 10, 1986, award of a contract to Gary Raub & Associates (Raub), the low offeror, under request for proposals (RFP) 600-72-86, issued by the Veterans Administration (VA) Medical Center, Long Beach, California. The solicitation was a total small business set-aside which sought offers for a woven blind automatic leveling system. Webb contends that Raub's offer should have been rejected as nonresponsive[1/] to the solicitation requirements. Webb also argues that Raub was not a responsible offeror.

The protest is dismissed in part and denied in part.

Initially, Webb contends that Raub improperly used Webb's proprietary samples of the woven blind in its bid. Webb asserts Raub removed Webb's label, affixed its own name and represented that the submitted samples were its (Raub's) own. Also, Webb contends that Raub misappropriated and converted for Raub's use the descriptive literature concerning the automatic leveling system developed by Webb, which was Webb's proprietary data. Webb also argues that Raub misappropriated a Webb proprietary report received from the United States Testing Company (USTC) regarding fire retardancy tests conducted on the Webb "Curaflame" woven blind and submitted the report to the contracting officer, representing that it belonged to Raub.

A competitor's alleged use of another firm's proprietary data or information presents a dispute between two private parties that is not for consideration under our Bid Protest Regulations. See Austin Company, Advanced Technology Systems, B-212992, Mar. 1, 1984, 84-1 C.P.D. ¶ 257, and SETAC, Inc., B-209485, July 25, 1983, 83-2 C.P.D. ¶ 121. The courts, rather than this Office, are the

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1/ We recognize that the solicitation designated the procurement as an RFP and that the concept of responsiveness, which is associated with formally advertised procurements, does not generally apply to negotiated procurements. See, e.g., True Machine Co., B-215885, Jan. 4, 1985, 85-1 C.P.D. ¶ 18. However, VA states that the contracting officer erroneously designated this procurement as an RFP. Consequently, he conducted this procurement as a sealed bid procurement without any objection from the offerors or bidders.

appropriate forum to determine the rights of the parties regarding proprietary data. See Telemechanics, Inc., B-203428, B-203643, B-204354, Oct. 9, 1981, 81-2 C.P.D. ¶ 294. Thus, we dismiss Webb's allegations that Raub improperly used Webb proprietary information in its bid.

Webb also asserts that since Raub did not submit its own samples of the woven blind, but used samples produced by Webb, Raub's bid should be rejected as nonresponsive. We disagree. Responsiveness concerns whether a bidder has offered unequivocally to provide supplies and services in conformity with the material terms and conditions of the solicitation. See Power Test, Inc., B-218123, Apr. 29, 1985, 85-1 C.P.D. ¶ 484. The record indicates that Raub submitted these samples which were labeled as belonging to Raub. The contracting officer had no basis for a finding that the samples submitted by Raub did not belong to Raub and did not represent the characteristics of the items Raub intended to supply under the contract. Thus, we deny this aspect of Webb's protest.

Next, Webb alleges that Raub failed to submit a sample of the automatic leveling system, a required feature of the blinds solicited, before bid opening as required by the solicitation. Webb maintains that without this sample there is no way to determine whether Raub's leveling system complied with the specification requirement. However, the solicitation did not require bidders to submit a sample of the automatic leveling system. The standard bid sample clause, Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.214-20 (1985), was included in the solicitation. That section provides, in pertinent part, that "Bid samples, required elsewhere in the solicitation, must be furnished as part of the bid . . . ." Although the bid sample clause was included in the solicitation, specific bid samples were not required anywhere else in the solicitation. Thus, while certain bid samples were submitted by bidders, there was no specific requirement that bidders provide a leveling system sample.

Webb further alleges that Raub failed to submit descriptive literature prior to bid opening as required by the solicitation. Raub indicated in its bid, "Bid samples and descriptive literature [submitted] under separate cover." The bid opening officer stated that he received the descriptive literature, as well as the woven blind samples, at the time of bid opening. Webb has not introduced any evidence disputing this report, and we have no basis to question the VA's statement. See Unico, Inc., B-216592, June 5, 1985, 85-1 C.P.D. ¶ 641.

Webb contends that Raub will be unable to comply with the solicitation requirement that the yarn for the blinds be Verel-Rayon and Verel-Flax since Verel was a product which has been discontinued by the manufacturer and Webb allegedly is the only firm which maintains an inventory of this material for use in its woven blind material. Raub did not take exception to this solicitation requirement. Therefore, Raub is required to comply with this requirement. Whether it does so is a matter of contract administration, for consideration and resolution by the VA; it is not a matter cognizable under our Bid Protest Regulations. See Spacesaver Systems, Inc., B-218581, May 8, 1985, 85-1 C.P.D. ¶ 515.

Finally, Webb argues that Raub was a nonresponsible bidder because Raub's use of Webb's samples and information clearly indicated that Raub lacked the ability to perform the contract. Before awarding the contract, the contracting officer necessarily determined that Raub was responsible. See 48 C.F.R. § 9.103 (1985). Our Office does not review protests concerning affirmative determinations of responsibility absent a showing of possible fraud on the part of procuring officials or that the solicitation contained definitive responsibility criteria that were not applied. See Joiner Van and Storage Service, Inc., B-218438, Apr. 24, 1985, 85-1 C.P.D. ¶ 469. Neither exception is alleged here. This aspect of the protest is dismissed.

The protest is dismissed in part and denied in part.

for Seymour Efros
Harry R. Van Cleve
General Counsel