



The Comptroller General
of the United States

Washington, D.C. 20548

Vin Schank - PL

Decision

Matter of: M. C. & D. Capital Corporation
File: B-225830
Date: July 10, 1987

DIGEST

1. Under Bid Protest Regulations, where an alleged solicitation defect is initially timely protested to the contracting agency, a subsequent protest to the General Accounting Office after bid opening is timely when filed within 10 working days of notification of initial adverse agency action on the protest.
2. Protester who did not submit a bid under challenged invitation for bids (IFB) is an interested party to protest IFB specification as unduly restrictive where the protester states that it would submit a bid if the specification were amended.
3. Protest that invitation for bids (IFB) for roofing repair is unduly restrictive because it requires fibrous glass insulation, which the protester contends is produced by only one firm, is denied where the agency determined that its minimum needs require that insulation to be used in repair be compatible with existing fibrous glass insulation and the protester has not shown that determination to be unreasonable.
4. Standard Material and Workmanship clause in Federal Acquisition Regulation, permitting substitution of equivalent materials during contract performance with contracting officer's approval, does not limit contracting agency's authority to draft specifications as restrictively as necessary to meet its minimum needs.

DECISION

M. C. & D. Capital Corporation protests the specification for insulation in invitation for bids (IFB) No. F32604-87-B-0014, issued by the Air Force for roof repairs at Minot Air Force Base, North Dakota. We deny the protest.

039439

The IFB, issued on February 2, 1987, originally specified fibrous glass insulation board meeting Federal Specification HH-I-526C/I. The IFB also included the Material and Workmanship clause at Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.236-5 (1985), which in relevant part authorizes the contractor, with the contracting officer's approval, to substitute materials equal to those named in the solicitation, unless otherwise specifically provided in the solicitation.

On February 10, M. C. & D. protested to the contracting agency that the reference in the IFB to fibrous glass insulation meeting the listed federal standard limited bidders to only a single insulation product manufactured by Owens-Corning of Ohio. The protester also argued that the listed federal standard had been canceled and that the referenced Owens-Corning insulation should not be considered mandatory since under the Material and Workmanship clause, a reference to a particular product merely establishes a standard of quality to be met by other items submitted as equal to that specified or referenced. The protester argued that the contracting officer was required to approve other nonfibrous glass insulation products upon a showing of equivalency to the Owens-Corning insulation.

On February 27, the Air Force amended the IFB, deleting the listed federal standard, which had been canceled, and substituting American Society for Testing and Materials (ASTM) standard C726/E84. The amendment did not delete the requirement for fibrous glass insulation. When it received the amendment on March 5, M. C. & D. again protested to the agency, contending that the amended IFB still improperly required an insulation material only made by Owens-Corning. This letter was received by the contracting officer on March 9. By letter of March 5, received by the protester on March 9, the agency denied the initial protest, stating that fibrous glass insulation was required so that the repaired sections would be compatible with the existing roofs which contained fibrous glass insulation.

Bids were opened on March 10; M. C. & D. did not submit a bid. On March 18, M. C. & D. protested to this Office, contending that the amended IFB still is restrictive of competition and conflicts with the Material and Workmanship clause. Award has been withheld pending our decision on the protest.

As a preliminary matter, the Air Force contends that the protest is untimely and that M. C. & D. is not an interested party entitled to protest. According to the Air Force, since M. C. & D.'s agency level protest was denied on

March 9, the protest to this Office based on alleged solicitation defects was required to be filed prior to bid opening pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1986). Since the protest was not filed until March 18, after the March 10 bid opening, the Air Force argues it is untimely.

We do not agree. M. C. & D. timely protested the terms of the IFB to the Air Force. Contrary to the Air Force's contention, M. C. & D.'s subsequent protest to this Office did not have to be filed before bid opening to be timely. Rather, when, as here, an alleged solicitation impropriety is timely protested to the contracting agency, a subsequent protest to GAO must be filed within 10 working days of formal notification of or actual or constructive knowledge of initial adverse agency action on the protest. 4 C.F.R. § 21.2(a)(3). In this case, the initial adverse agency action was the contracting officer's letter denying the protest, received by M. C. & D. on March 9. M. C. & D.'s protest was filed at this Office on March 18, within 10 working days of the agency level denial. Thus, the protest was timely filed.^{1/} See Werres Corp., B-223394, Oct. 14, 1986, 86-2 CPD ¶ 426.

We also reject the agency's contention that M. C. & D. is not an interested party to protest the terms of the IFB. According to the agency, M. C. & D. did not submit a bid and is only a potential supplier so it does not have sufficient direct economic interest to be an interested party under 4 C.F.R. § 21.0(a). M. C. & D., however, says that it is a potential bidder and would submit a bid if the solicitation were amended to allow insulation other than Owens-Corning fibrous glass. Based on this representation by the protester, which we have no reason to question, it appears to us that M. C. & D. has the requisite interest in this procurement to maintain a protest of the specifications. Phillips Cartner & Co., Inc., B-224370.2, Oct. 2, 1986, 86-2 CPD ¶ 382.2/

^{1/} Even if the IFB amendment, received by M. C. & D. on March 5, is considered initial adverse agency action on the protest, the subsequent protest to this Office was still timely filed.

^{2/} The Air Force's legal memorandum on the protest states that the protester failed to file a copy of the protest with the Air Force within 1 day after it was filed with our Office, as required by 4 C.F.R. § 21.1(d). This contention is without merit; the protest was filed with our Office on March 18 and the contracting officer acknowledges that

M. C. & D.'s basic complaint is that the IFB is unduly restrictive of competition since it allows only the use of fibrous glass insulation that meets the requirements of ASTM C726/E84. According to the protester, Owens-Corning is the only domestic firm that makes fibrous glass insulation that meets that standard and that the insulation will cost the government from 90 to 150 percent more than insulation produced by other firms. M. C. & D. challenges the agency's argument that the restriction is required by the need for compatibility with insulation in the existing roofs. The protester argues that compatibility is not an issue since there is no physical reaction between different insulation types that come into contact with each other and since other insulation types can be cut to the required thickness. Also, according to the protester, by varying the thickness of insulation to be used, other insulation materials can provide the same thermal value as the Owens-Corning fibrous glass insulation.

M. C. & D. further argues that, by specifying fibrous glass insulation that meets ASTM C726/E84, the IFB conflicts with the standard FAR Material and Workmanship clause which, according to the protester, requires the agency to allow the contractor to use materials which are equal to those specified in the solicitation. M. C. & D. also contends that the Material and Workmanship clause requires that the justification for a specification limiting the type of materials to be used must be stated in the solicitation. The protester argues that the IFB here is defective since it does not state, on its face, the Army's basis for restricting the type of insulation required by, for example, explaining that the roofs to be repaired all have the same insulation.

M. C. & D. requests that the IFB be amended to either justify the use of only the Owens-Corning fibrous glass insulation or to allow the use of other insulation materials that are equivalent to the Owens-Corning insulation.

We first address the protester's contention that the requirement of fibrous glass insulation meeting ASTM C726/E84 is unduly restrictive of competition. When a protester alleges that specifications unduly restrict competition, the procuring agency bears the burden of presenting prima facie support for its position that the restrictions are necessary to meet its actual minimum needs.

the Air Force received a copy of the protest on March 19.

Ralph Construction, Inc., B-222162, June 25, 1986, 86-1 CPD ¶ 592. The determination of the government's minimum needs, the best methods of accommodating them and the technical judgments upon which those determinations are based are primarily the responsibility of the contracting officials, who are most familiar with the conditions under which the supplies and services are to be used. ASC Pacific Inc., B-217188, May 3, 1985, 85-1 CPD ¶ 497. Consequently, once the agency establishes support for the challenged specifications, the burden shifts to the protester to show that the specifications in dispute are clearly unreasonable. Information Ventures, Inc., B-221287, Mar. 10, 1986, 86-1 CPD ¶ 234.

An agency can specify requirements for supplies which possibly only one supplier is able to produce, provided those requirements are necessary to meet its minimum needs. Municipal & Industrial Pipe Services Ltd., B-204595, Jan. 18, 1982, 82-1 CPD ¶ 39. Specifically, restrictive requirements are proper where compatibility of new equipment or supplies with those already in use is required. DSP Technology, Inc., B-220593, Jan. 28, 1986, 86-1 CPD ¶ 96.

In response to M. C. & D.'s protest, the Air Force says that only fibrous glass insulation meeting the ASTM standard can be used because the solicitation is for repair, not replacement, of existing roofs, which already contain fibrous glass insulation. Based on the advice of its technical experts, the agency argues that insulation used in the repair must be compatible with the existing insulation with respect to a number of properties, but particularly with respect to thickness and thermal resistance (a measure of ability to restrict heat flow). The agency also says that since each insulation type requires a different design and different installation techniques, the contractor cannot be allowed to freely substitute insulation types under the Material and Workmanship clause. For example, according to the Air Force, some insulation materials, such as polyurethane, lack fire resistance, so an additional layer of a fire resistant material is necessary when polyurethane is used. The Air Force says that it cannot rely on the roofing contractor to recognize and accommodate differences between insulation types in planning the roofing system and in installation.

We do not believe that M. C. & D. has shown the Air Force's insulation requirements to be unreasonable. Although, as M. C. & D. argues, other insulation types may be available at the required thickness, the protester ignores the requirement that the insulation have equal thermal resistance at the same thickness as the existing insulation. The protester does not suggest any type of insulation that would

meet this requirement. Rather, the protester says that other insulation types could be used at a greater thickness to compensate for the variance in thermal resistance. In support of this position, M. C. & D. has submitted drawings which it contends show how insulation of greater thickness than that in the existing roof could be used even though the result, as shown in the protester's drawings, is that the repaired section is not level with the existing roof. We have no reason to question the judgment of agency technical personnel that such a condition is unacceptable. As the Air Force explains, using various other thicknesses would allow damming and ponding of water on the roof surface resulting in damage to the roof.

Further, the protester does not challenge the agency's determination that the use of other types of insulation would require a different roofing design than that called for in the solicitation. Various insulation types differ with respect to fire resistance, impact resistance, durability, moisture resistance and a number of other properties. Substituting another insulation type for the specified insulation would require adapting the roofing system design and, in some cases, adding other materials to compensate for the insulation type used. We see no basis to disagree with the agency's judgment that such changes would adversely affect the compatibility of repaired sections with the existing roof.

We also reject the protester's contentions regarding the FAR Material and Workmanship clause. That clause does not impose any restriction on the agency's authority to draft specifications based on its minimum needs. Also, contrary to the protester's contention, there is nothing in the Material and Workmanship clause which requires that the solicitation include on its face a justification for any restrictive requirements included in the solicitation. Rather, the clause merely permits a contractor during contract performance to propose using equipment or materials which are the equivalent of those specified by brand name or referenced in the solicitation. Ryan Electric Co., PSBCA No. 1020, Sept. 15, 1982, 82-2 BCA ¶ 16,042. The contracting officer, however, has the discretion to reject a proposed substitute which does not meet the listed

requirements. Baker & Co., ASBCA No. 21,896, Dec. 29, 1977,
78-1 BCA ¶ 13,116.

The protest is denied.

for Seymour Efron
Harry R. Van Cleve
General Counsel