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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Teledyne CME--Request for Reconsideration

File: B-228368.2

Date: March 21, 1988

DIGEST

Where protester alleging restrictive solicitation terms has submitted an offer which is not low, and the allegedly restrictive terms had no material impact on the protester's price, the General Accounting Office will not consider the matter, since even if the protest were sustained, protester would not be in line for award.

DECISION

Teledyne CME requests that we reconsider our decision in Teledyne CME, B-228368, Oct. 27, 1987, 87-2 CPD ¶ 404, in which Teledyne protested the amended terms of request for proposals (RFP) No. N00123-87-R-0544, issued by the Naval Regional Contracting Center, Long Beach, California. In that decision, we dismissed Teledyne's protest as untimely, based upon information furnished by the Navy that Teledyne had first protested the allegedly objectionable terms of the RFP after the time and date set for the receipt of best and final offers (BAFOs). Teledyne's subsequent request for reconsideration contains information which suggests that Teledyne may have filed a timely agency-level protest and thus had timely filed its protest with our Office. We do not resolve this issue, however, as we find the protest to be academic.

The RFP was issued on February 23, 1987, and called for the submission of initial offers by April 9, for a quantity of traveling wave tube amplifiers (TWTAs). The original solicitation called for offers for a fixed quantity of 45 TWTAs, with option quantities totaling an additional 67 units. Additionally, the original solicitation contained a delivery schedule which included first article testing and a schedule for offers where first article could be waived. The schedules called for specified quantities beginning 270 calendar days after award where first article is required

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and 210 calendar days from contract award where first article is waived. Finally, the solicitation provided that award would be made to the lowest priced, technically acceptable offeror.


By closing, two initial proposals had been received--that of Teledyne and that of the awardee, ITT Corporation. Discussions were then conducted and BAFOs were requested to be submitted by June 19. ITT's BAFO contained a proposal to provide TWTAs which were identical to equipment previously furnished by that firm. Accordingly, ITT requested waiver of the first article testing requirements contained in the solicitation. By contrast, Teledyne submitted a BAFO which contained an alternate technical approach and, after lengthy discussions, it was determined that first article testing would be required of Teledyne. The solicitation was then amended. By the terms of amendments No. 0003 and No. 0004, the option quantities were deleted and added to the fixed quantities and the liquidated damages clause appearing at Federal Acquisition Regulation (FAR) § 52.212-4 was added to the solicitation. Additionally, the delivery schedule was revised to require delivery beginning December 15, 1987 and each successive month thereafter. This schedule significantly accelerated the delivery requirements. After issuance of the amendments, Teledyne and ITT submitted a second round of BAFOs on September 23. Teledyne submitted a price based only on the original schedule in both of the alternate approaches in its BAFO. ITT's offer met the revised accelerated schedule.

ITT's second BAFO was substantially the same as its first; previously furnished equipment was offered and the firm requested waiver of first article testing. Teledyne's second BAFO again proposed the alternate technology for which first article testing would be required. As stated above, Teledyne proposed only on the original, less stringent delivery schedule. Thereafter, the Navy waived first article testing for ITT and made award to that firm on September 26.

It is clear from the record that Teledyne was not prejudiced by the complained of specifications. Teledyne's second BAFO was based on the original, less stringent delivery requirements and was higher in price than the awardee's conforming BAFO. It is also clear that this price differential is due to the first article requirement that Teledyne must meet, a requirement that Teledyne does not challenge. Accordingly, even if we were to sustain the protest against the amended RFP terms, that would not help Teledyne since it is evident from Teledyne's second BAFO that the first article requirement prevents Teledyne from being the low offeror even under the original specifications.

We will not review a protest of allegedly restrictive requirements where the evaluation of offers subsequently discloses that the protester is not the low offeror in line for award and the complained of provisions had no material effect on the protester's pricing. See Whittaker-Yardney Power Systems, B-227831, Sept. 10, 1987, 87-2 CPD ¶ 232; Ven-Tel, Inc., B-204233, Mar. 8, 1982, 82-1 CPD ¶ 207. That is the situation here.

Therefore, the protest is dismissed.


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