



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Cyttec Corporation
File: B-231786
Date: September 28, 1988

DIGEST

1. In a sole-source procurement which is justified on grounds that only one responsible firm can meet the agency's requirements, the agency may properly reject an alternate offer without conducting discussions where the alternate offer is so technically deficient that the agency cannot reasonably assess whether the offered product will adequately fulfill its needs.
2. Allegation that solicitation's instructions to offerors proposing alternate products were unduly vague is untimely where not raised until after closing date for receipt of initial offers.

DECISION

Cyttec Corporation protests the rejection of its offer by the Department of the Air Force under request for proposals (RFP) No. F41621-88-R-0017 issued for the initial, one-time purchase of life-cycle spare parts for a Computer Automation 8200 test station used in connection with the Peacekeeper Missile program. Cyttec argues that its offer was improperly rejected for informational deficiencies and that the agency erred in failing to engage in discussions with it.

We deny the protest in part and dismiss it in part.

The solicitation was issued as a sole-source acquisition pursuant to the Competition in Contracting Act of 1984, 10 U.S.C. § 2304(c)(1) (Supp. IV 1986), naming Computer Automation, Inc. (the original equipment manufacturer (OEM) of the test station), as the only firm capable of supplying the required spare parts. The solicitation also permitted offers of alternate products, but required firms offering such alternate products to submit sufficient information with their proposals to permit proper evaluation

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of the products being offered. Specifically, the solicitation stated in pertinent part that proposals from firms offering non-OEM products would be considered provided that:

"(3) The offeror submits prior to or with its proposal engineering data (such as manufacturing controlled drawings, qualification test reports, quality assurance procedures, etc.) sufficient to determine acceptability of the item(s)."

In response to the solicitation, Cytec submitted a proposal along with a technical data package which it believed to be sufficient for purposes of evaluation.^{1/} Cytec offered to furnish "refurbished" Computer Automation parts which it apparently obtained from repair and maintenance work which it performs on other Computer Automation 8200 test stations.

After evaluating Cytec's offer along with the technical data submitted therewith, the Air Force rejected the proposal without discussions on grounds that it failed to contain information sufficient to determine the acceptability of the products offered. Specifically, the Air Force found that Cytec had submitted engineering data (i.e., schematics and revisions thereto) on only 13 of the 117 line items solicited and that the engineering data which had been submitted did not include the latest revisions thereto. The Air Force also found that the engineering data which was submitted by Cytec was marked "proprietary" to Computer Automation and no evidence of ownership or licensure had been included in Cytec's offer. In addition, the Air Force found that Cytec had not submitted any test data or reports which demonstrated the reliability of the used/refurbished parts being offered and that, to the extent that Cytec provided information regarding proposed testing methodology for its parts, such material consisted of routine diagnostic tests which were performed in connection with the general maintenance of Computer Automation 8200 test stations.

Cytec argues in its protest that the Air Force's rejection of its proposal was improper because the deficiencies cited by the Air Force were informational deficiencies that could have been corrected through discussions. According to

^{1/} In this connection, we note that Cytec had several telephonic contacts with the contracting officer in an effort to find out what was required in terms of technical data. In response to Cytec's inquiries, the contracting officer referred the firm to the solicitation provision quoted above and stated that it was the firm's responsibility to decide how much data was sufficient.

Cytec, it provided only selected technical data with its proposal because it thought that the RFP required only illustrative technical data which demonstrated the firm's capability and because the cost of providing all its technical data would be onerous to a small business firm such as itself. Cytec alleges that it has always had the requisite technical data but thought that a demonstration of its technical capability vis-a-vis the solicitation's most complex requirements would suffice for purposes of its initial offer. Cytec therefore argues that its offer was improperly rejected and should have been the subject of discussions. In this connection, Cytec also argues that the portion of the solicitation which requested information sufficient to demonstrate the acceptability of the products being offered was unduly vague and was not expounded upon by the contracting officer despite its repeated verbal inquiries.^{2/}

The Air Force responds that it properly rejected Cytec's proposal and that it was under no obligation to conduct discussions with Cytec in light of the significant deficiencies found in its proposal. Additionally, the Air Force notes that the solicitation's requirements are parts which are militarily critical and which are being procured only once for the weapon system's life cycle. Consequently, the parts in question must meet the stringent OEM specifications and have a demonstrated ability to withstand either extended use or lengthy storage time. In the Air Force's opinion, Cytec's proposal simply failed to meet the solicitation's

^{2/} In a late filing after submission of its comments on the agency's protest report, Cytec also alleges for the first time that the contracting officer's rejection of its proposal was a de facto determination that the firm was nonresponsible, even though the letter rejecting Cytec's offer specifically states that the rejection is not a determination of nonresponsibility. According to Cytec, because it is a small business the contracting officer was obliged to refer the rejection of its offer to the Small Business Administration (SBA). We disagree. The technical evaluation of proposals focuses upon the information contained in the proposal itself whereas determinations regarding responsibility focus upon a firm's general ability to perform a contract. See C. Martin Co., Inc., B-228552, Jan. 20, 1988, 88-1 CPD ¶ 56. Here, the Air Force rejected Cytec's proposal on grounds that the firm failed to provide adequate technical information to properly evaluate its offer and not because the Air Force determined that the firm was incapable of performing the contract. Consequently, the Air Force was not required to refer the matter to the SBA.

stringent technical data requirements and was properly rejected.

As noted above, the solicitation was issued pursuant to 10 U.S.C. § 2304(c)(1) (Supp. IV 1986) which permits an agency, under appropriate circumstances, to limit competition to an approved source but requires that other offerors be afforded an opportunity to compete. The parts to be acquired under this solicitation bear a restricted acquisition method code of "3-H" which is assigned to parts which are to be acquired only from the OEM because the government does not possess sufficient accurate technical data from which to draw up adequate technical specifications. See Department of Defense Federal Acquisition Regulation Supplement § 17.7203 (DAC 86-1).

In circumstances such as these, we believe that an agency fulfills its initial obligation under the Competition in Contracting Act by properly apprising potential offerors of the opportunity to compete under a given solicitation, and by properly executing a justification and approval for other than full and open competition. See e.g., AZTEK, Inc., B-229594, Mar. 2, 1988, 88-1 CPD ¶ 221.3/ Thereafter, we think that the burden shifts to the offering firm to submit a proposal which adequately demonstrates that firm's compliance with the solicitation's requirements especially where, as here, the government does not possess sufficient technical data which would enable it to develop adequate, objective specifications for the product being acquired.

In our opinion, the record does not show that Cytec submitted a proposal which adequately met the requirements of the solicitation's technical data requirements. As stated previously, the record shows that the Cytec proposal contained, among others, the following deficiencies: (1) engineering data (schematics/changes) were included for only 13 of 117 items being purchased; (2) data submitted was inaccurate, since diagrams were not the latest revisions and changes did not match revision levels; (3) the data submitted by Cytec, on its face, was marked proprietary to the OEM, and Cytec provided no proof of ownership or license to use the data; and (4) no test data or reports were submitted with the offer to enable the government to determine the reliability of any used, reconditioned or surplus parts. Moreover, the Cytec proposal failed to contain information concerning what models or types of OEM equipment the parts had been taken from, the configuration

3/ The protester does not allege that these requirements were not met.

of the items, or the age of the items. Cytec also failed to provide a listing with which the contracting officer could determine which parts would be furnished "used as is," reconditioned or unused surplus. Consequently, we think that Cytec's proposal was properly rejected as technically unacceptable.

In addition, there is no requirement that an agency permit an offeror to revise an initial proposal where, as here, the revisions required to make the proposal acceptable are of such magnitude as to be tantamount to the submission of another proposal. See generally, Decilog, B-198614, Sept. 3, 1980, 80-2 CPD ¶ 169. We therefore do not think that in this case the contracting officer was obliged to engage in discussions with Cytec.

As a final matter, we find that Cytec's allegation that the solicitation's instructions were vague to be untimely. Improperities which are apparent upon the face of a solicitation must be protested prior to the time set for the submission of proposals. 4 C.F.R. § 21.2(a)(1) (1988). Had Cytec considered the solicitation's instructions to be inadequate, the proper course of action would have been for it to either request a written amendment from the contracting officer or to file either an agency-level protest or a protest with our Office.

The protest is denied in part and dismissed in part.

for *Seymour E. Hinchman*
James F. Hinchman
General Counsel