Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Radiation Safety Services, Inc.

File: B-239995.2

Date: November 27, 1990

Eli A. Port for the protester.
H. David Parkhill for Tech/Ops Landauer, Inc., an interested party.
L. James Tillman, Department of Energy, for the agency.
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DIGEST

1. Protest of requirement for raw data as to the number of alpha tracks generated during exposure of radon monitors is denied where agency demonstrates that raw data is needed to permit identification of anomalies in the data which could skew the readings.

2. Protest of requirement for tape seals on radon monitors is denied where the agency demonstrates that the tape seals are the only effective means available to it for protecting the monitors against additional radon exposure while they are being shipped back to the laboratory for analysis.

3. Protest of requirement that material used in radon monitors to record alpha tracks have no more than 3 tracks/ 10 square millimeters (sq. mm.) at the time it is inserted into the monitors is sustained where the record shows that material with more than 3 tracks/10 sq. mm. would serve the agency's needs.

4. Protest of requirement for submission with offers of a quality assurance plan tailored to meet specific agency requirements is sustained where agency indicates that it intended to require only the submission of offerors' standard quality assurance plans with their offers but solicitation language does not reflect the agency's intended meaning.

DECISION

Radiation Safety Services, Inc. (RSSI) protests the specifications in request for proposals (RFP) No. BP2-GP015-A-66, issued by Martin Marietta Energy Systems, Inc. (Energy Systems) for radon monitors. Energy Systems issued the solicitation pursuant to its prime contract with the Department of Energy (DOE) for management and operation of DOE's Oak Ridge, Tennessee, facilities. RSSI argues that the specifications are drawn around the product of one firm and are unduly restrictive as a result. The protester also objects to the requirement for the submission of a quality assurance plan with the offer as exceeding the government's requirements.

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

The RFP requested offers to supply and analyze after exposure a total quantity (including options) of 300,000 alpha-track radon monitors to be used in U.S. Naval facilities. The alpha-track monitors contain pieces of alpha-sensitive material (foils) which record the tracks of the alpha particles that are emitted as radon decays. The number of tracks on a foil is determined by submerging the foil in a base solution to make the tracks more prominent and then counting them under a microscope. The closing date for receipt of offers was July 19, 1990.

As a preliminary matter, DOE argues that RSSI is not an interested party to protest the specifications since the protester does not manufacture a monitor that has passed Round 6 of the Environmental Protection Agency's (EPA) Radon Measurement Proficiency (RMP) tests, as required by the solicitation. Specifically, the agency alleges that RSSI cannot comply with the requirement that the seller have passed Round 6 "utilizing the detector design being offered" since in order to settle a patent infringement suit brought against it by another firm, Tech/Ops Landauer, Inc. (Tech/Ops), it agreed to cease producing and selling the only monitor that it manufactures that passed Round 6.

RSSI responds that as a result of its agreement with Tech/Ops, it has relocated one component in its monitor. According to the protester, this change does not affect performance and the monitor is essentially the same as the monitor that passed Round 6. Energy Systems concedes that given its lack of familiarity with the RSSI monitor, it cannot determine whether the change in design is significant. Energy Systems points out, however, that the change must have been fairly significant given that it changed the monitor from one that infringed Tech/Ops's patent into one that did not.

Since Energy Systems admits that it cannot determine whether RSSI's changes to its design are significant, we cannot conclude based on the current record that RSSI is incapable of supplying a monitor that is essentially the same as the one that passed Round 6. We therefore decline to dismiss RSSI's protest on the grounds that it is not an interested party.

The protester argues that the specifications are drawn around the product of one of its competitors, Tech/Ops, and are unduly restrictive as a result. In particular, RSSI objects to the specifications requiring that background (the number of tracks on the foil prior to exposure) be less than 3 per 10 square millimeters (sq. mm.); that field by field data on tracks be reported for each detector; that the joint between the two halves of filtered detector holders be sealed with a piece of metalized tape before the detector is sealed in a containment pouch for shipment back to the laboratory for analysis; and that a strip of metalized adhesive tape with a peel-off cover for the adhesive side of the tape be provided to seal the openings following the exposure period.

The agency argues as a preliminary matter that since the solicitation permitted offerors to take exception to the solicitation's terms, RSSI should just have taken exception to any specifications to which it objected. The agency contends that any exception taken by the protester, had it chosen to offer, would have been considered in due course, discussed, and resolved by Energy Systems procurement personnel during the course of the procurement.

Taking exception to a specification, however, is not equivalent to protesting it. If an offeror takes exception to a material term of an RFP and the disagreement is not resolved in its favor (through amendment of the solicitation, for example), the offeror risks being rejected as technically unacceptable since a proposal that fails to conform to the material terms of a solicitation may not form the basis for an award. Federal Computer Corp., B-239432, Aug. 29, 1990, 90-2 CPD ¶ 175. Therefore, RSSI was not obligated to forego protesting simply because the RFP permitted offerors to take exception to specification provisions.

With regard to RSSI's contention that the specifications are written around the characteristics of another firm's device and thus are unduly restrictive, the fact that specifications are based on a particular product is not improper in and of itself. Rather, when a protester challenges a specification as unduly restrictive of competition, we will review the record to determine whether the restrictions imposed are

reasonably related to the agency's minimum needs. Hewlett-Packard Co., B-239800, Sept. 28, 1990, 69 Comp. Gen. ___, 90-2 CPD ¶ 258. Here, we see no basis to question two of the requirements which RSSI challenges; with regard to the third requirement which RSSI challenges--relating to the number of background tracks on the foil--we find that the record fails to show that the specification is reasonably related to the agency's needs.

FIELD BY FIELD RAW DATA

RSSI objects to the requirement that the contractor maintain and report raw data as to the number of tracks in specified areas (fields) on a foil rather than simply reporting the average number of tracks per field. According to the protester, Tech/Ops is the only company that routinely collects data on a field by field basis. RSSI complains that it will be required to reprogram its data analysis system if the raw data is required.

Energy Systems explains that its purpose in requiring the raw field counts rather than just the averaged total is to assure that any data anomalies (e.g., certain fields with consistently high or low results that could skew the average) are identified and the effects minimized. In response, RSSI argues that the collection of raw data to identify data anomalies is unnecessary where adequate quality control procedures are in place.

We see nothing objectionable in the requirement for field by field data. Although, as the protester contends, adequate quality control procedures will tend to prevent the occurrence of such anomalies, the requirement for field by field data is reasonably related to the agency's need to assure that the contractor's quality control procedures are in fact adequate.

METALIZED TAPE

The protester objects to the requirement that if the detector has filtered openings in the holder to allow entrance of the radon gas, the joint between the two halves of the holder must be sealed with a piece of metalized tape before the detector is sealed in its containment pouch for shipment back to the laboratory for analysis. The protester also objects to the requirement that a strip of metalized adhesive tape with a peel-off cover for the adhesive side of the tape be provided to seal the openings following the exposure period. The protester asserts that only Tech/Ops has a qualified detector incorporating tape seals. RSSI also objects to the seals on the grounds that they trap radon inside the monitor which distorts the readings. The protester argues that rather than requiring that the monitors be sealed prior to shipment, the

agency should require that blank field monitors, which would record the levels of radon encountered during transit, be shipped along with the exposed monitors.

Energy Systems argues in response that it already requires that field blanks be shipped back along with the exposed monitors. According to the contractor, the Navy personnel responsible for the monitors rarely follow its instructions regarding the blanks, however, and thus only about 10 percent of them are in fact returned. Energy Systems therefore contends that although sealing the monitors could cause some distortion in the readings, it is the only way of assuring that major distortions do not occur while the monitors are in transit. In this regard, the contractor points out that shipments of exposed monitors have on occasion been delayed by customs authorities in foreign ports for up to 3 months.

Energy Systems's argument is in essence that although the tape seals are not a perfect solution to the problem of protecting the monitors against further exposure while they are being shipped back to the laboratory, the tape seals are the only workable solution available to it. Under the circumstances, we think that the requirement for the tape seals is reasonably related to the agency's needs.

BACKGROUND REQUIREMENT

With regard to the requirement for background of less than 3 tracks/10 sq. mm., Energy Systems explains that its reason for requiring foil with a low number of background tracks is that it calculates the number of background tracks using sampling procedures, and the greater the number of background tracks in the sample that it examines, the greater the variability in the number of background tracks on each foil in the lot represented by the sample.1/ Avoiding such variability is important, according to Energy Systems, because the greater the range of possible background values, the greater the margin for error in determining the increase in the number of tracks after exposure.

The degree of precision in defining the number of background tracks required to avoid adversely affecting the readings after exposure will vary depending on the number of tracks

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1/ According to Energy Systems, EPA has estimated that the margin of error in the use of these sampling procedures is 33 1/3 percent, meaning that if a sample is determined to have 3 tracks/10 sq. mm., other foils in the lot may be presumed to have from 2 to 4 tracks. If, on the other hand, the sample is determined to have 15 tracks/10 sq. mm., then the foils in the lot may be presumed to have anywhere from 10 to 20 tracks.

that are produced during exposure. Energy Systems in fact concedes that in large radon concentrations or exposures for longer than 6 months (i.e., circumstances in which large numbers of tracks will be produced), the background figures become insignificant. The protester argues that due to the design and greater sensitivity of its device--which means that far more tracks are produced at the same levels of radon exposure than in other monitors--a lesser degree of precision in defining the number of background tracks is required.

RSSI asserts that a representative reading from one of its monitors is approximately 2,000 tracks, and thus that, compared to a monitor which yields significantly lower actual readings, far more than 3 background tracks could be allowed before there would be any significant adverse affect on the reliability of the actual readings from monitors of its design. The agency expresses skepticism that the protester's monitor will in fact produce such high readings and suggests that the monitors with which it is familiar yield significantly lower numbers. The agency concedes, however, that it is unfamiliar with the protester's device and instead based the specification on its knowledge of what is currently commercially available.

We agree that it is reasonable for the agency to require a high level of quality assurance with regard to the reliability of the actual readings and that the number of background tracks is important with regard to assuring greater accuracy of actual readings. However, the agency has not refuted RSSI's contention that the limit on the number of background tracks needed to achieve the desired level of quality assurance will vary depending on the sensitivity and design of the monitor; nor has it explained in any detail how it arrived at the figure of 3 background tracks, or why, given the potential differences in design and sensitivity of the radon monitors, 3 background tracks is the required limit.

In light of the protester's argument that a higher number of background tracks may yield the same level of quality assurance depending on the design and sensitivity of the monitor, and the agency's failure to adequately explain its rationale for the current requirement, we find that the record does not show that the requirement for 3 tracks/10 sq. mm. is reasonably related to the agency's minimum needs. Accordingly, we recommend that the specification in the RFP be revised to accurately reflect the agency's need for a high level of quality assurance without improperly excluding a particular design monitor; for example, the agency may consider expressing the limit for background tracks in terms of a formula or ratio relative to the actual readings produced by an offeror's design. To the extent that the agency is concerned about the capability of RSSI's monitors to perform

as the protester describes, the agency may consider including in the RFP a requirement for testing to demonstrate that the monitor offered meets the background requirement, or incorporating in the evaluation scheme a factor relating to the accuracy and reliability of the actual readings.

QUALITY ASSURANCE PLAN

The protester also objects to the requirement that offerors submit a quality assurance plan with their offers. RSSI points out that DOE found--in response to a previous RSSI protest--that an earlier version of the solicitation, which required that offerors provide a quality assurance plan prior to award, did not reflect the government's actual requirements. The protester argues that if the requirement for a quality assurance plan before award did not reflect the government's actual needs, then neither does the requirement that a quality assurance plan be submitted with offers.

In response, the agency contends that the solicitation required vendors to submit their standard quality assurance plans with their proposals, and that revision of the successful offeror's plan to meet the stricter quality assurance standards required for this program would be accomplished after award but prior to the start of manufacturing. The agency explains that the purpose of requiring the submission of vendors' standard plans with their offers is to assure that sufficient controls are already in place so that the plan can be readily adapted to meet the RFP's requirements, while the reason for not requiring that all offerors submit plans meeting the stricter quality assurance standards with their offers is to permit the nonawardees to avoid incurring the expense of revising their standard plans to meet the stricter standards.

Although Energy Systems may have intended to require only the submission of offerors' standard quality assurance plans with their offers, the solicitation was not written in such a way as to convey that intent. The RFP provided with regard to quality assurance plans that:

> "The Seller shall submit a QA Plan to the Company with the offer. The Plan must include the processes and procedures to be used to ensure success of the subcontracted effort. Refer to the attached Appendix A for a definition of the information to be included in the QA Plan. Manufacturing of the detectors for this subcontract cannot begin until the QA Plan has been approved by the Company."

We do not think that it is apparent from the wording of this provision that offerors are required to submit only their

standard quality assurance plans with their offers, which is what Energy Systems intended. On the contrary, by calling for submission with offers of a quality assurance plan which includes "the processes and procedures to be used to ensure the success" of the offeror's performance, the RFP reasonably can be interpreted as requiring a plan tailored to the requirements of this program. Accordingly, we sustain this ground of protest and recommend that the RFP be amended to make Energy Systems's stated intent clear.

In view of our findings that the requirement for 3 background tracks/10 sq. mm. is not reasonably related to the agency's minimum needs, and that the solicitation provision regarding the quality assurance plan does not reflect the agency's intended meaning, we recommend that the agency amend the RFP in accordance with this decision and reissue it with the revised requirements. In addition, we find that RSSI is entitled to recover the costs of filing and pursuing the protest. 4 C.F.R. § 21.6(d) (1990); Westinghouse Electric Corp., B-227091, Aug. 10, 1987, 87-2 CPD ¶ 145.

The protest is sustained in part and denied in part.

for Comptroller General
of the United States