

A. JCSatz



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Julie Research Laboratories, Inc.

File: B-240885

Date: December 31, 1990

Loebe Julie for the protester.
Jacquelin Pardum, Esq., and Charles J. Roedersheimer, Esq.,
Defense Logistics Agency, for the agency.
Sylvia Schatz, Esq., David Ashen, Esq., and John M. Melody,
Esq., Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Protest that agency acted improperly in determining that proposed alternate product satisfied solicitation requirement for interchangeability with referenced brand name voltage standard is denied where, although alternate model was not subject to same shock and vibration standards as the referenced model, the relaxation of this requirement did not result in competitive prejudice to the protester, and thus was unobjectionable.

2. Where protest as initially filed asserted only generally that the awardee's voltage standard, offered as an alternate product, should not have been accepted for award because it is of a lesser quality than the specified product manufactured by the protester, and a detailed argument that specific characteristics of the alternate product differ materially from those of the specified product was raised for the first time in the protester's comments on the agency report, the detailed argument is untimely and will not be considered; the detailed argument was based on information that the protester had in its possession when it filed its protest, and thus had to be raised at that time.

DECISION

Julie Research Laboratories, Inc. (JRL) protests the award of a contract to IET Labs, Inc. under request for proposals (RFP) No. DLA900-89-R-1535, issued by the Defense Electronics Supply Center (DESC), Defense Logistics Agency (DLA), for voltage standards. The RFP specified an acceptable model of voltage standard manufactured by JRL and permitted offers of alternate

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products interchangeable with the referenced model. JRL maintains that the contracting officer unreasonably accepted IET's proposed alternate product on the basis of data which did not show that the alternate product was interchangeable with JRL's product.

We deny the protest.

Voltage standards produce precision output voltages for use as a reference in maintaining the accuracy of electronic equipment. The RFP described the voltage standard here as National Stock Number (NSN) 6625-01-224-7919 and referenced JRL part number ZVR-518 as the exact product to be offered. The RFP included the "Products Offered" clause, however, which permitted offers of alternate products "either identical to or physically, mechanically, electrically, and functionally interchangeable" with the JRL product. The clause cautioned that the government may lack detailed specifications or sufficient data to determine the acceptability of other products, and required offerors of alternate products to furnish "all drawings, specifications, or other data necessary to clearly describe the characteristics and features of the product" offered, including its "design, material, performance, function, interchangeability, inspection and/or testing criteria and other characteristics." Award was to be made to the offeror of an acceptable product whose price was most advantageous to the government.

Two firms submitted offers by the closing date. JRL offered its specified model ZVR-518, while IET, the low bidder, offered an alternate product, designated as model HSVR-18.9. As part of its offer, IET submitted commercial literature on its voltage standard that listed some, but not all, of the characteristics listed in the JRL product commercial literature. Nevertheless, based upon a comparison of the firms' literature, DESC found that IET's part was interchangeable with JRL's part in all material respects. Since this would be a first-time buy of this item from IET, however, DESC specified that a government source inspection would be required. Best and final offers (BAFO) were requested on February 13, and IET again submitted the low offer, \$449, which was \$80.80 less than JRL's unit price of \$529.80. As a result, DESC made award to IET on March 16 as the low responsible offeror.

Following award, the agency modified IET's contract to require testing for shock and vibration, pursuant to military specifications, even though this testing was not explicitly required by the RFP. IET's unit price, increased to \$503 to cover the cost of testing, was still low.

On April 6, JRL filed an agency-level protest generally asserting that IET's alternate product did not offer performance equivalent to JRL's product, and specifically questioning the reliability of IET's item. After the contracting officer, by letter dated August 6, denied JRL's protest, JRL filed this protest with our Office on August 22.1/

JRL generally argues in its original protest submission that IET's alternate product is an unqualified, untested voltage standard of lesser quality than JRL's model ZVR-518 and thus should not have been approved as an acceptable alternate. JRL maintains that by accepting IET's product, DESC essentially relaxed the RFP requirements for IET without first issuing an amendment or holding discussions with all potential offerors to notify them of this change. JRL states it would have offered a less expensive alternate product equal in capability to IET's had it received notification from DESC of its less stringent requirements.

IET's commercial literature did not describe certain characteristics of its voltage standard which were addressed in JRL's commercial literature, including mounting configuration, shock and vibration standards, non-operating temperature range, humidity operating range and weight. JRL argues that the mere submission of IET's commercial literature summarizing the characteristics of its part was not sufficient to show that the part was interchangeable with JRL's part; by not requiring IET to provide more detailed information, JRL maintains that the agency waived the requirement in the Products Offered clause for "all drawings, specifications, or other data necessary to clearly describe the characteristics and features of the product" offered, including its "design, materials, performance, function, interchangeability, inspection, and/or testing criteria."

DESC concedes that there were minor differences between IET's and JRL's items, but maintains these differences are insignificant because the respective voltage standards are interchangeable in all material respects and that it had sufficient information upon which to base a determination of acceptability. DESC notes that IET specifically referenced in

1/ Preliminarily, the agency argues that we should dismiss JRL's protest as untimely because, after filing its agency-level protest, it waited more than 4 months for the agency's response before filing this protest with our Office. The record shows, however, that JRL checked on the status of its protest at least twice (based on a telephone bill) during this period. We find this sufficient here to indicate reasonable diligence by JRL in pursuing the matter.

its proposal JRL's data sheet for the specified JRL voltage standard; IET stated that its model was "functionally equal" to the JRL model and met "all the required specifications" as set forth in the JRL literature. In addition, DESC reports that the mounting configuration specified for JRL's model was the industry standard to which IET could be expected to conform (and to which it did conform). DESC points out that IET's model only weighs approximately one ounce, the weight specified for the JRL voltage standard, and that this characteristic was not considered material since no possible configuration of IET's model, which was described in its literature as measuring only one cubic inch, could have varied the weight to any significant extent so as to affect interchangeability. Likewise, DESC reports that the operating range of the IET model with respect to relative humidity was considered immaterial since it would be encapsulated. Further, according to the agency, only the operating temperature range, and not the non-operating range, of the voltage standard was material since the item was not readily affected by temperature changes and, in any case, would not be subjected to extreme temperatures.

Evaluating offers of alternate products pursuant to the Products Offered clause essentially involves a determination of the technical acceptability of the proposal (that is, compliance with the technical requirement to describe clearly the characteristics of the product and to establish its interchangeability with the brand-name product), and not an evaluation of the alternate item itself. See Sony Corp. of Am., 66 Comp. Gen. 286 (1987), 87-1 CPD ¶ 212. Although JRL believes that the Products Offered clause requires in all cases the submission of extensive and detailed data on the alternate product offered, it has been our position that whether an offeror presents sufficient information, aside from test results or other proven performance data, to demonstrate the technical acceptability of its offer of an alternate is essentially a technical judgment committed to the agency's discretion. The sufficiency of the information depends on the circumstances of the particular procurements, taking the nature and function of the equipment into account, i.e., whether there is adequate assurance that the equipment in which the part will be used will perform properly. To be consistent with the statutory requirement for specifications permitting full and open competition, 10 U.S.C. § 2305(a)(1) (1988), the Products Offered clause must be construed as giving the agency broad discretion to accept offered equivalent products. Indeed, the acceptance of lower-priced alternates is the preferred result since it promotes competition and the possible development of detailed specifications for future procurements. See Valcor Eng'g Corp., 66 Comp. Gen. 613 (1987), 87-2 CPD ¶ 143; Blackmer Pump, B-231474, Sept. 9, 1988, 88-2 CPD ¶ 225.

Here, we find that DESC reasonably determined primarily to rely upon IET's commercial literature to demonstrate the essential material characteristics of IET's proposed voltage standard. Again, the technical data listed in the Products Offered clause--"all drawings, specifications and other data" "design, material, performance, functions, interchangeability, inspection and/or testing criteria"--are merely examples of the types of data that can be submitted and not all types are required to be furnished in all instances. JRL has made no showing that additional data beyond that provided in standard commercial literature is necessary to establish the performance characteristics of commercially available equipment of this complexity. In this regard, we have specifically rejected the argument advanced here by JRL that test data proving proposed capabilities is always required; as we have indicated, there is no absolute requirement that an alternate offeror have previously tested the item unless the RFP expressly requires, which it did not here, proven performance of the alternate as a precondition of award. See Everpure, Inc., B-231732, Sept. 13, 1988, 88-2 CPD ¶ 235.

Nor do we believe that DESC acted unreasonably in concluding that the failure of IET's commercial literature to address the characteristics of its proposed voltage standard with respect to mounting configuration, weight, non-operating temperature range and humidity range did not preclude a finding of interchangeability. Although we have previously held that an alternate product is required not merely to be the functional equivalent of the referenced one, but also to possess the same physical characteristics, see East West Research, Inc., B-237844, Feb. 28, 1990, 90-1 CPD ¶ 248; Hobart Brothers Co., B-222579, July 28, 1986, 87-2 CPD ¶ 120, this in no way requires that every physical characteristic be precisely the same. The Products Offered clause expressly differentiates between a product "identical" to the referenced product and an interchangeable product. We believe that the concept of interchangeability as properly interpreted requires only that no material differences exist between the alternate product and the referenced product with respect to those characteristics essential to the proper performance of the item. Thus, for example, where the size or color of an item is immaterial to its proper functioning, we do not believe that a mere difference in size or color should preclude a determination of interchangeability. Here, DESC has explained why it reasonably expected to receive a conforming product--e.g., based upon likely conformance to the industry standard for mounting configuration--and why any conceivable differences with respect to certain characteristics of the IET voltage standard--weight, non-operating temperature, and humidity range--were immaterial to the interchangeability of

the item in its projected use. JRL has not shown the agency position in this regard to be unreasonable.

It was improper for DESC to approve IET's voltage standard as an alternate in the absence of information showing that the standard would satisfy the applicable military specifications concerning shock and vibration testing. JRL, but not IET, in its commercial literature stated that its model met the military requirements with respect to shock and vibration. DESC had no reasonable basis for otherwise concluding that IET's model met those requirements. In this case, IET's blanket statement of compliance with the interchangeability requirement--i.e., its claim of functional equivalence--did not satisfy the solicitation requirement for "all drawings, specifications, or other data necessary to clearly describe the characteristics of the product" offered, including its "interchangeability, inspection and/or testing criteria." Cf. United Satellite Sys., B-237517, Feb. 22, 1990, 90-1 CPD ¶ 201 (blanket statement of compliance does not meet requirement to affirmatively establish compliance with salient characteristics in brand name or equal procurement).

JRL asserts that DESC relaxed the "specifications" when it approved IET's nonconforming voltage standard as an alternate. JRL states in its comments on the bid protest conference held on this case that had it known DESC would relax the specifications, it could have offered "less expensive lower grade parts which are merely the normal fallout of JRL's premium [model] production."

The record establishes that DESC has not waived the specifications. It erroneously relied first upon IET's blanket statement of compliance to assure compliance in areas not addressed by IET's literature and then upon the post-award modification of IET's contract. Instead of relying on that blanket statement of compliance, the agency should have discussed with IET, prior to requesting BAFOs, the absence from IET's offer of any specific reference to the military requirements concerning shock and vibration. See A.T. Kearney, Inc., B-237366; B-237366.2, Feb. 14, 1990, 90-1 CPD ¶ 278. Nevertheless, IET represents that its product complies with the military standards for resistance to shock and vibration and IET's contract as modified requires testing to confirm this. Thus, had the matter been raised during discussions, it would have been a simple matter for IET to provide the necessary information.

The agency's failure to discuss the matter with IET prior to award, however, and its modification of IET's contract after award, were not prejudicial to the protester. JRL's choice of which model to offer was based upon the same requirement for conformance to the military specifications with respect to

shock and vibration that was applicable to IET's model. Moreover, JRL has not alleged that it would have lowered its price for its offered model had it been given the opportunity to submit a revised BAFO. Although generally we will find prejudice where the government's stated needs are relaxed for one offeror, see, e.g., Logitek, Inc.--Recon., B-238773.2; B-238773.3, Nov. 19, 1990, 90-2 CPD ¶ _____, or where the protester reasonably establishes that it would have offered a different price had it had the opportunity, see Racal Filter Technologies, Inc., B-240579, Dec. 4, 1990, 90-2 CPD ¶ _____, here neither circumstance is present. Thus, we conclude on this record that JRL was not prejudiced by DESC's actions. See International Transcription Servs., Inc., B-240488, Nov. 28, 1990, 90-2 CPD ¶ _____.

In its comments on DESC's report, JRL for the first time argues that IET's product as described in IET's commercial literature materially deviates from the specified JRL model with respect to 10 specific characteristics. JRL concludes that in view of the lesser capabilities of IET's product, it should not have been accepted as a "physically, mechanically, electrically and functionally interchangeable" alternate, as required by the RFP.

Under our Bid Protest Regulations, a protest must set forth a detailed statement of the legal and factual grounds of the protest. 4 C.F.R. § 21.1(b)(4) (1990). Where a protester, in its initial protest submission, argues in general terms that a procurement was deficient, and then, in its comments on the agency's report, for the first time makes out a detailed argument specifying precisely the alleged procurement deficiencies, the detailed arguments will not be considered unless they independently satisfy the timeliness requirements under our Regulations. See Dayton T. Brown, Inc., B-223774.3, Dec. 4, 1986, 86-2 CPD ¶ 642; see generally Astro-Med, Inc., B-232147.2, Nov. 1, 1988, 88-2 CPD ¶ 422.

Here, JRL's detailed position underlying its original protest against acceptance of IET's item as an alternate product was nowhere stated in its initial protest submission, even though, as it indicated at the bid protest conference it had in its possession prior to submitting its initial protest to our Office IET's commercial literature listing the characteristics of IET's item. JRL did not furnish its detailed analysis of the differing characteristics of IET's voltage standard until it submitted its comments on the agency report. Accordingly,

we consider JRL's arguments with respect to those characteristics of IET's voltage standard described in IET's literature to be untimely. Id.

The protest is denied.


for James F. Hichman
General Counsel