



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

Decision

Matter of: Keystone Valve USA, Inc.

File: B-240954; 240954.2

Date: April 8, 1991

Thomas E. Hill, Esq., Duke & Riley, for the protester.
Jonathan H. Kosarin, Esq., Department of the Navy, for the agency.
Stephen Gary, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained on basis that solicitation requirement for level 3 drawings, which include detailed data on manufacturing processes, exceeded agency's actual needs, where record shows that agency's need for drawings was to support emergency repair and overhaul of the valves, for which full production data is not needed.

DECISION

Keystone Valve USA, Inc. protests the requirement for level 3 drawings in request for proposals (RFP) No. N00104-90-R-DA52, issued by the Department of the Navy for butterfly valves. Keystone asserts that the requirement exceeds the agency's minimum needs.

We sustain the protest.

The RFP, which provides for butterfly valves used in various shipboard applications, was issued in March 1990. The solicitation includes a requirement for delivery of level 3 drawings, as defined by two Department of Defense (DOD) standards which the RFP incorporates by reference. The first, DOD-D-1000B (Military Specification for Drawings, Engineering and Associated Lists), categorizes drawings as level 1, 2, or 3 depending on the maturity of the item. Level 1 drawings, for example, represent an experimental product, while level 3 drawings are prepared only after all first article testing has been completed and the product has been proven. Level 3 drawings "reflect technical data possessing the highest level of confidence," and can therefore be used by any competent

manufacturer to produce an identical or interchangeable item. Their intended use, according to the specification, is "to provide engineering data for support of quantity production to permit competitive procurement for items substantially identical to original items." See generally Ingersoll-Rand Co.--Recon., B-230101.2, June 16, 1988, 88-1 ¶ 574.

The second specification, Military Specification MIL-V-24624 (Valves, Butterfly, Water and Lug Style, Shipboard Service), paragraph 3.17, calls for engineering drawings with a level of detail "necessary for maintenance and overhaul of the valve. Detail of these parts shall be so complete as to permit emergency manufacture by a Naval ship repair facility without assistance from the original manufacturer."

Based on what Keystone considered an apparent conflict between the two standards referenced in the RFP, the firm requested clarification of the level of drawings required. According to Keystone, while DOD-D-1000B, paragraph 3.3.3, entitled "Level 3, Production," specified the highest level of detail, as appropriate and necessary for full quantity production and competitive acquisition of an item, the specification for butterfly valves merely called for that level of detail necessary to make a small number of items for purposes of emergency overhaul or repair. Further, Keystone specifically referenced DOD-D-1000B, paragraph 3.3.3.1, which provides that "level 3 engineering drawings . . . shall include details of unique processes, i.e., not published or generally available to industry, when essential to design and manufacture; . . . critical manufacturing assembly sequences; . . . and quality control data." (Emphasis added.) In light of this apparent conflict and the cost involved in preparing quantity production drawings, as well as the fact that the RFP required that offerors specifically assert their proprietary data rights in their proposals or risk losing such rights, Keystone asked if the agency actually intended for the contractor "to furnish engineering drawings suitable for quantity production."

In response, the Navy issued an amendment which repeated Keystone's inquiry verbatim and stated in reply that, "In accordance with DOD-D-1000B, Level 3 drawings are required." Keystone then filed an agency-level protest, arguing that the requirement for level 3 drawings unduly restricted competition and imposed an undue cost burden on offerors by requiring more detailed engineering drawings than were necessary to meet the agency's needs. Keystone asserted that since the valve was a qualified product list (QPL) item and there were already sufficient QPL firms to provide adequate competition, there was no need for level 3 information which, according to paragraph 6.4.3 of the specification, was intended for the

"support of quantity production to permit competitive procurement."

In denying the protest, the Navy explained that its "needs under this solicitation . . . [were for] technical data . . . sufficient for emergency repair or overhaul." The agency further stated:

"Clearly, detailed manufacturing or process data, which would fall within the description of 'level 3' for purposes of DOD-D-1000B, may be acquired for purposes other than use in competitive acquisition, and the primary contemplated requirement for such data is emergency repair or overhaul." (Emphasis added.)

Keystone then protested the proposed procurement to our Office,^{1/} reiterating earlier arguments that level 3 drawings exceed the Navy's stated needs for drawings sufficient to permit emergency repair and overhaul. Keystone argued, for example, that the level 3 definition would call for detailed specifications for the tooling necessary for quantity production of the subject valves. Such tooling, according to Keystone, is specialized tooling designed to produce many valves in a quantity production environment. In an emergency repair and overhaul environment, in contrast, run-of-the-mill tooling would suffice since only one or two valves typically would be repaired. Likewise, Keystone stated, there are machine set-ups used in quantity production that are not used in an overhaul or repair effort. Such set-ups include, for example, special fixtures designed to hold the components in place while they are being machined (e.g., on a lathe). The purpose of such fixtures is to enhance the efficiency of the manufacturing processes and to decrease dimensional differences between parts. Though expensive, Keystone recognizes that the cost is justified in the case of quantity production; obviously, however, according to Keystone, such fixtures would not be fabricated by one tasked with repairing

^{1/} That protest, filed before the closing date for submission of proposals and designated B-240954, was later incorporated into the protest under consideration here. Although Keystone submitted an offer under the RFP, the agency considered it unrealistically high in price and, based on a determination of urgent and compelling circumstances, made an award notwithstanding the protest to Contromatics, Inc. See Competition in Contracting Act, 10 U.S.C. § 2304(c)(2) (1988).

or overhauling one or two valves, since they would not be cost effective.^{2/}

Primarily to address the issue of whether level 3 drawings, including these detailed manufacturing processes, were required by the Navy, we held a fact-finding conference in our Office on November 9. At the conference, Navy witnesses indicated that, contrary to Keystone's interpretation of the requirement, the Navy never intended that full quantity production drawings, including manufacturing process information, be provided. According to the Navy, such drawings are not necessarily required by the level 3 specification and are not needed by the agency for this procurement. See e.g., Transcript (Tr.) at 53-56. The Navy's presentation of its views at the conference led Keystone to amend its protest.^{3/}

Keystone now argues in its amended protest that, had it known prior to the solicitation closing date that the Navy's interpretation of the level 3 requirement did not include proprietary manufacturing process information and other proprietary information needed for full quantity production, it would not have objected to the specification in the first place. Keystone asserts that the Navy never expressed this interpretation prior to the conference, and that the agency's concession at this juncture confirms that the stated requirement for level 3 drawings exceeds its actual needs, and that the RFP therefore was defective.

The Navy argues initially that Keystone's new protest arguments are untimely. According to the agency, if Keystone saw in the specification an apparent requirement for manufacturing process drawings, the firm was required to object to that requirement prior to the closing date for the submission of proposals. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1990). According to the agency, however, none of Keystone's submissions or statements prior to its October comments indicated that Keystone's objection to the requirement for level 3 drawings was based on the firm's understanding that process drawings would be required. Consequently, according to the Navy, until Keystone raised the issue in its comments on the Navy's report, the agency had "assumed that Keystone had the same understanding as the

^{2/} Keystone made these detailed arguments concerning manufacturing process requirements in its comments on the agency's report on the protest, which the protester filed on October 22.

^{3/} When Keystone filed its comments on the conference on November 21, we determined that the submission should be designated a new protest, since it raised arguments based on information disclosed for the first time at the conference.

Navy's" In the agency's view, therefore, the fact "that Keystone misread [the specification] language to include quantity manufacturing methods and process information was a problem of its own creation."

We disagree. The Navy's timeliness argument rests on the premise that Keystone knew or reasonably should have known that the RFP reference to level 3 drawings did not include a requirement for full quantity production data. The record, however, as indicated in the excerpts quoted above, clearly shows that at each step of the way the agency led Keystone to believe that it intended to require such data. As noted above, for example, in responding to Keystone's agency-level protest, the Navy explicitly confirmed its view that "detailed manufacturing or process data, which would fall within the description of level 3 for purposes of DOD-D-1000B, may be acquired for purposes other than use in competitive acquisition, and the primary contemplated requirement for such data is emergency repair or overhaul." It was only at the conference that the Navy, for the first time, offered its different interpretation of the requirement, which is what gave rise to Keystone's argument that the RFP therefore overstated the agency's needs. Since the protest was filed within 10 days after the conference, it clearly is timely.
4 C.F.R. § 21.2(a)(2).

Turning to the merits, the Navy states that it specified level 3 drawings because level 2 drawings are not sufficient for its needs. This determination was based in part on the Navy's experience under prior contracts (including a contract with Keystone for butterfly valves) where only level 2 drawings were required. Under those contracts, according to the agency, the drawings it was able to obtain were inadequate for purposes of emergency repair and overhaul. See e.g., Tr. at 8-9, 26-27, 58. Consequently, in effect, the Navy argues that it had to specify level 3, the next higher level of detail.

We find that the record supports Keystone's assertion that the level 3 drawing requirement overstates the agency's actual needs. While the Navy certainly may take steps to obtain additional data where the data obtained under a prior contract were inadequate, it cannot specify its data requirements in an RFP in a manner that would require offerors to furnish more data than is actually needed. This clearly is what the Navy did here. Although the Navy asserts that Keystone "has clearly misinterpreted DOD-D-1000B to require noncritical quantity production information that is not in fact required to be provided by the solicitation being protested," the agency does not explain how it believes Keystone could have determined precisely which process data the Navy considered critical and which it considered noncritical. In this regard, Keystone's interpretation of the specification appears to be

entirely consistent with its plain language, as quoted above, and also is consistent with the Navy's explanation, in its response to Keystone's agency-level protest, that the level 3 drawings were specified "in support of quantity production."


Notwithstanding these indications to Keystone and other offerors that quantity production data were required, the agency took the position at the conference that it in fact does not require data to support quantity production. In this regard, we note the following exchange between the hearing officer and the Navy's chief expert witness at the hearing:

"Q. Is it your understanding . . . that the level 3 drawings are necessary but that they may in fact include some additional information that you don't need? A. Yes. Q. In other words, level 2 isn't enough; level 3 may include more than you need. A. Like for production drawings. We don't need data which would relate to producing several hundreds of these valves." Tr. at 20.

In other words, while the Navy's experience had convinced it that something more than level 2 drawings would have to be specified, the agency did not need the detailed process data included within the definition of level 3 drawings. The Navy nevertheless included the level 3 requirement in the RFP without ever indicating that specified noncritical detailed process information was not required. By doing so, the agency overstated its needs. See Hewlett-Packard Co., B-239800, Sept. 28, 1990, 69 Comp. Gen. ____, 90-2 CPD ¶ 258.

Since, pursuant to the Navy's determination of compelling urgency, performance has commenced, appropriate corrective action--namely, amendment of the specifications to reflect the agency's actual needs--is not feasible. Vitro Servs. Corp., B-235040, Feb. 9, 1989, 89-1 CPD ¶ 136. We find, however, that Keystone is entitled to the costs of preparing its proposal and of pursuing the protest, including reasonable attorneys' fees, and are so advising the Secretary of the Navy by separate letter. 4 C.F.R. § 21.6.

The protest is sustained.


for Comptroller General
of the United States