

144739



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Romer Labs, Inc.

File: B-243027

Date: June 25, 1991

Tom Romer for the protester.
Jack L. Radlo for Vicam, Inc., an interested party.
Miley Sutherland, Department of Agriculture, for the agency.
Anne B. Perry, Esq., and Paul Lieberman, Esq., Office of the
General Counsel, GAO, participated in the preparation of the
decision.

DIGEST

1. Protest that agency improperly determined that awardee's product complied with solicitation testing requirements and standards is denied where protester's interpretation of the testing requirements is neither reasonable nor consistent with the solicitation when read as a whole.
2. Allegation that additional testing requirements are necessary to determine compliance with the specifications is untimely where not filed until after award.
3. Protest that awardee's product does not meet the specifications and that awardee's scientific data should be verified independently by agency scientists is denied where the agency evaluated the scientific data submitted by awardee and reasonably determined that the data demonstrated compliance with the specifications, and there is no evidence that the data is incorrect.

DECISION

Romer Labs, Inc. protests the award of a contract to Vicam, Inc. under request for proposals (RFP) No. 113-M-APHIS-90, issued by the Animal and Plant Health Inspection Service, Department of Agriculture, for quantitative aflatoxin test kits. Romer Labs asserts that Vicam's test kits do not comply with the RFP specifications.

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

The solicitation is for state-of-the-art, quantitative aflatoxin test kits. Aflatoxin is a chemical mycotoxin, which is believed to be a carcinogen and results from the metabolic activity of certain molds. A mycotoxin is a toxic substance produced by a fungus. The test kits are to be used to determine the total aflatoxin content in corn, corn meal, corn gluten feed, corn germ meal, corn gluten meal, corn/soy blend, sorghum, wheat milled rice, and soybeans. Agriculture estimates a need for 50,000 test kits per year.

The solicitation, as amended, contained a Protocol Agreement Statement, signed by each offeror, that specified the standards by which the test kits would be judged and the necessary documentation required to be included with the proposal. Essentially, the kits were to undergo tests that demonstrated their ability to measure total aflatoxin in specified commodities.

The RFP provided that proposals would be evaluated on the basis of 80 percent for technical considerations and 20 percent for cost. Thirteen factors were identified in the Protocol Agreement, only four of which are relevant to this protest. Factors 1 and 2 concern the test kit's ability to analyze for total aflatoxins in identified commodities, factor 9 concerns the limit of detection (LOD) of the offered test kits, and factor 10 concerns the test kit's minimum shelf life.

After the initial technical evaluation, Vicam and Romer were the only offerors whose proposals were included in the competitive range. Best and final offers were received, and award was made to Vicam as the offeror whose proposal was highest rated and most advantageous to the government, based on price and technical factors combined. Romer requested and received a debriefing, and subsequently filed a protest in our Office.

Romer challenges the award on the grounds that Vicam's proposed test kits fail to satisfy factors 1, 9 and 10 of the Protocol Agreement. Specifically, with respect to factor 1, Romer alleges that Vicam's test kit meets the requirement that total aflatoxins be analyzed within the accuracy and precision of factors 6 and 7, but does not meet the requirement that test kits analyze aflatoxins separately in accordance with the accuracy and precision required by factors 6 and 7. The protester also alleges that Vicam's test kit does not comply with factor 10, the requirement that the kits have a 3-month shelf life, since Vicam's product is viable for only 1 month after it is opened. Romer further argues that Vicam has not demonstrated that its test kit satisfies factor 9, since it only shows a compliant LOD on its test of corn, and does not demonstrate compliance for all eight commodities. The

protester also argues that factor 9 as delineated in the Protocol Agreement does not adequately test the LOD of the kits.

Romer's protest is based, in large part, on its interpretation of the RFP testing requirements and standards, an interpretation that is different from the agency's. Where a dispute exists as to the actual meaning of a solicitation requirement, we will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation. Honeywell Regelsysteme GmbH, B-237248, Feb. 2, 1990, 90-1 CPD ¶ 149. To be reasonable, an interpretation must be consistent with the solicitation when read as a whole and in a reasonable manner. Aerojet Ordnance Co., B-235178, July 19, 1989, 89-2 CPD ¶ 62. Under this standard, Romer's interpretations of the RFP testing requirements are not reasonable.

Romer argues that factor 1 requires offerors to show precision and accuracy in testing of both total aflatoxins and each aflatoxin separately. The agency contends that the precision and accuracy standards apply only to the testing of total aflatoxins. We find that the only reasonable interpretation of the solicitation in this regard, when read as a whole, is that it requires precision and accuracy in the testing for total aflatoxins.

The solicitation was issued for kits capable of testing for total aflatoxins. The Protocol Agreement calls for testing to be done to demonstrate a kit's ability to accurately measure total aflatoxins. Factor 1 states:

"Capability if analyzing for total aflatoxins (B1, B2, G1, and G2)."

"Only test kits capable of analyzing for total aflatoxin will be considered. Offerors must submit documented data showing their test kit is capable of accurately analyzing for total aflatoxins. This documentation must show that the test kit is capable of analyzing each aflatoxin separately in spiked corn samples at 20 ppb. Accuracy and precision must meet the requirements specified in factors 6 and 7 below."

Factors 6 and 7 contain formulas that the offeror is to use in demonstrating that its data evidence compliance with the standards which are also included. These formulas seek data for total aflatoxin testing. Factor 6 states that "Accuracy will be based on testing of spiked corn samples having known concentrations of total aflatoxin." (Emphasis added.)

Factor 7 calls for the precision to be calculated for total aflatoxins, and states that such a figure must remain within specified limits. Accordingly, while the documentation must show the capability to analyze each aflatoxin separately, the accuracy and precision requirements clearly are to apply only to the testing for total aflatoxins, and not to each aflatoxin separately.^{1/}

Romer next alleges that the technical requirement under factor 10 for a shelf life of a minimum of 3 months means that a product will remain viable, after it is opened, for a period of 3 months. The protester argues that Vicam's test kit fails to satisfy this requirement since it only lasts 1 month after it is opened. The agency contends, and we agree, that this is an unreasonable reading of the requirement, especially in light of the manner in which these kits are used. Each kit contains a single test which is discarded after one use, therefore, there is no logical reason to open a test kit and store it, or to require a 3-month shelf life for such storage. Further, as the agency points out, and the protester concedes, the customary industry usage of the term shelf life refers to the amount of time a product can be stored and still remain suitable for use. It is commonly understood that this means stored in original condition, and not after a product has been opened. While Romer does not dispute that this is the common definition of shelf life, it contends that if this is what the agency intended, it should have provided the definition in the RFP. The simple answer to this contention is that if Romer, in light of the common definition of the term, was actually unsure of the agency's intended definition of the term "shelf life," it should have sought clarification before proposals were due. Network Solutions, Inc., B-234569, May 15, 1989, 89-1 CPD ¶ 459.

The protester's next allegation is that the agency failed to require Vicam to conduct the factor 9 tests for the LOD on all eight commodities, and instead permitted Vicam to submit test results on corn alone. In support of its argument, Romer submitted a letter from the former head of the technical evaluation team, now retired, which states that he "intended"

^{1/} Romer alleges that at the pre-proposal conference it understood the accuracy and precision requirements to apply to both total and separate aflatoxins. However, Romer provides no evidence indicating that this understanding was confirmed by the contracting officer.

that the LOD tests be performed on all eight commodities to determine compliance. Romer also argues that the testing procedure contained in factor 9 is inadequate to determine the LOD.

The evaluator's intent that the LOD testing should be performed on all eight commodities is not relevant if it contradicts the clear language of the solicitation. See PCT Serv., Inc., B-240597, Nov. 23, 1990, 90-2 CPD ¶ 422. Where the language of a solicitation is unambiguous, contractual terms will be given their usual and ordinary meaning. See American Science and Eng'g., Inc. v. United States, 633 F.2d 82 (Ct. Cl. 1981); Department of the Interior--Request for Advance Decision, B-228262, Jan. 12, 1988, 88-1 CPD ¶ 18.

Factor 9 states:

"The limit of detection (LOD) of offered test kits shall be less than or equal to 5 ppb. The LOD is defined as follows: $LOD = (\text{mean}) + 2(\text{SD})$. The mean is determined from readings of 10 different extracts of an aflatoxin-free sample . . . and the standard deviation of those 10 readings. Offerors must provide the LOD for their test kits. Test kits not meeting the LOD requirement will not be considered."

This factor does not require an offeror to submit evidence of the LOD on each of the eight commodities as the protester urges us to find. Rather, it calls for a demonstration of the LOD of the test kit in general. This interpretation of the testing requirement is supported by the fact that testing on each commodity is specifically listed under other factors; for example, factor 2 calls for data showing total aflatoxin analysis on each of the commodities. Further, although Romer argues that Vicam's test kit must undergo the LOD testing for each of the commodities, it has offered no proof that the LOD reading contained in Vicam's proposal, which was derived on the basis of tests done on corn, is not sufficient. In other words, Romer has not demonstrated how the LOD would change based on the commodity on which it is tested and measured. Insofar as Romer's argument is that the testing standard is insufficiently stringent, or that it should contain a different testing method, its protest is unconvincing. Protests based on alleged improprieties apparent on the face of the

solicitation must be filed not later than the closing date for receipt of initial proposals.^{2/} 4 C.F.R. § 21.2(a)(1) (1991).

After receiving the agency report, Romer raised a new allegation, apparently arguing that Vicam's test results under factor 2 demonstrate that its product may not comply with the specifications and, thus, must be independently verified by the agency's own labs.


A contracting agency's responsibility for determining its actual needs includes determining the type and amount of testing and verification necessary to ensure that a product complies with the specifications. Constantine N. Polites & Co., B-239389, Aug. 16, 1990, 90-2 CPD ¶ 132. We will not object to such a determination where it is reasonable. Barrier-Wear, B-240563, Nov. 23, 1990, 90-2 CPD ¶ 421. Further, substantial discretion is vested with contracting agencies in conducting the evaluation of proposals, especially where the evaluation involves highly technically complex analyses concerning a scientifically state-of-the-art product, which the agency is in the best position to assess. See Englehard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324.

Here, the record reflects that the agency conducted the evaluation in accordance with the criteria contained in the solicitation, and reasonably concluded that Vicam offered a superior product. The agency evaluated the scientific data provided by Vicam and reasonably determined that the data demonstrated specification compliance, and there was no indication that the data were incorrect or otherwise provided a basis for the agency to conduct verification tests. Romer's speculation that Vicam's test kits may not pass an agency's verification testing, and its mere disagreement with the

^{2/} The untimeliness of this assertion is not altered by the fact that Romer disputed this standard with the agency in its proposal, since to the extent that its notation of this allegation on its own Protocol Agreement (which was turned in before the proposals were due) constituted an agency-level protest before the closing date for receipt of proposals, receipt of proposals constituted initial adverse agency action, and Romer was required to protest within 10 working days. Jones & Co., B-228870, Nov. 23, 1987, 87-2 CPD ¶ 509.

agency's evaluation results, do not supply a sufficient basis to sustain a protest. See Saco Defense Inc., B-240603; B-240391, Dec. 6, 1990, 90-2 CPD ¶ 462.

The protest is dismissed in part and denied in part.


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General Counsel