



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Perkin-Elmer Corporation

File: B-245682

Date: November 18, 1991

John E. Warner for the protester,
Rand L. Allen, Esq., Wiley, Rein & Fielding, for Hewlett-Packard Co., an interested party.
Janette Lever, United States Department of Agriculture, for the agency.
Paula A. Williams, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency overstated its minimum needs by using brand name or equal specifications is dismissed as untimely when filed after award, rather than before the closing date for receipt of initial proposals.

DECISION

Perkin-Elmer Corporation protests the award of a contract to Hewlett-Packard Company under request for proposals (RFP) No. 109-M-APHIS-91, issued by the Department of Agriculture, Agricultural Marketing Service (AMS), for certain laboratory instruments specified on a brand name or equal basis. The protester alleges that the contracting agency improperly rejected its proposal as technically noncompliant and argues that it is entitled to award based on its low price because the specified brand name equipment includes features which are unnecessary to satisfy the agency's minimum needs.

We dismiss the protest as untimely.

The solicitation, issued on June 18, 1991, called for various laboratory instruments specified by Hewlett-Packard model number, on a brand name or equal basis. The instruments required were gas chromatographs, mass spectrometers and high pressure liquid chromatographs and are to be used by AMS and various state agencies to detect pesticide residue in the nation's food supply as a part of the Pest Residue Monitoring Program. The solicitation listed several salient characteristics and contained the brand name or equal clause which appears at Department of

Agriculture Federal Acquisition Regulation (AGAR) § 452.210-70 (1988). The clause provides that the determination of equality of a product will be based on information furnished by the offeror or identified in its proposal as well as other information reasonably available to the contracting activity. The clause also requires the submission of all descriptive material necessary to establish that the offered equipment meets the salient characteristics requirement of the solicitation. Award was to be made to the responsible offeror whose offer conforming to the solicitation was the most advantageous to the government.

Five firms, including Perkin-Elmer and Hewlett-Packard, submitted offers and the agency conducted technical evaluations of those offers to determine whether the equipment proposed met the salient characteristics. Only Hewlett-Packard's proposal was determined to be technically acceptable. By letter dated August 27, the agency informed Perkin-Elmer that its offer was technically unacceptable because its equipment did not meet the specifications. In that letter, AMS provided examples of areas in which the protester's equipment failed to satisfy required salient characteristics, such as: its gas chromatograph does not have the required 100 vial capacity; and the offered mass spectrometer is longer than the required 8 linear inches and the number of allowed time events of 20 ions are not specified.

Perkin-Elmer challenges the agency's determination that the equipment it offered was not equal to the brand name equipment. The protester admits that its gas chromatograph does not have the 100-vial capacity called for in the solicitation, but points out that it submitted two proposals: one for a single gas chromatograph with an 82-vial capacity and, alternatively, a proposal for two gas chromatographs with a combined capacity of 164 vials (82x2). The protester simply asserts that either proposal would meet the government's needs as there is "no significant difference between an 82 and a 100 vial capacity." With respect to the solicitation requirement that the mass spectrometer shall occupy less than 8 inches of linear bench space, the protester also admits that it offered equipment which exceeds the specification limitation but argues that the agency "gave no basis for why the [mass spectrometer] could not be longer than eight (8) linear inches," and asserts that the size of the instrument has little bearing on the quality of the analysis performed by the instrument. The protester also admits that the number of timed events for its equipment (20 ions in 20 windows) is less than that called for in the specification, but argues that the number of timed events

for its equipment "is more than sufficient for most analytical procedures and compares favorably with Hewlett-Packard's equipment."

Perkin-Elmer's argument is essentially that while its equipment does not specifically meet the RFP specifications, it will satisfy AMS' needs. Thus, the protester is asserting that the solicitation specifications are improper because the stated requirements exceed AMS' minimum needs. Under our Bid Protest Regulations, a protest based on an alleged impropriety in a solicitation which is apparent prior to the closing date for receipt of initial proposals must be filed prior to the closing date, 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991). Since the salient characteristics were clearly specified in the RFP as the agency's minimum requirements, and this protest of these requirements was not filed until after award was made, the protest is untimely.

Similarly, Perkin-Elmer's allegation that by "[choosing] to utilize Hewlett-Packard specifications instead of a generic specification," the agency evidenced a "predisposition if not predetermination" to select Hewlett-Packard instrumentation is untimely because the allegation is, in fact, an objection that the RFP specifications are stated on a brand name (Hewlett-Packard) or equal basis.

The protest is dismissed.

A handwritten signature in cursive script, appearing to read "Paul I. Lieberman", followed by a horizontal line.

Paul I. Lieberman
Assistant General Counsel