



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** SINTECH A Division of MTS Systems Corporation

**File:** B-245470

**Date:** December 27, 1991

Rashid N. Khan for the protester.  
Darleen A. Druyun, National Aeronautics and Space Administration, for the agency.  
David K. B. Hooper, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. With regard to both an original sealed bid solicitation and subsequent negotiation, a firm's inclusion in its offers of protests of the specifications concern alleged improprieties apparent from the solicitation and are untimely since filing protests in this manner does not bring them to the contracting officer's attention prior to the time set for bid opening, or for receipt of proposals.
2. Contracting officer properly rejected protester's bid as nonresponsive and its subsequent negotiated offer as unacceptable where on their face they took exception to several material specification requirements.
3. An offeror who is ineligible for award because its offer is unacceptable is not an "interested party" under the bid protest provisions of the Competition in Contracting Act of 1984 to maintain a protest of an award to another offeror.

### DECISION

SINTECH A Division of MTS Systems Corporation protests the award of a contract to Instron Corporation under invitation for bids (IFB) No. 3-448412 issued by the National Aeronautics and Space Administration's (NASA) Lewis Research Center (LeRC) in Cleveland, Ohio, for a materials testing system.

SINTECH contends that NASA's specifications "have been copied from [the] Instron specification"; are without "technical merit" and "do not reflect NASA's minimum needs"; that SINTECH can meet NASA's actual needs; and that the awardee does not meet NASA's stated needs.

The protest is dismissed.

The IFB, as issued on March 29, 1991, set bid opening for May 1. As the result of protests filed with LeRC by SINTECH on April 26 and June 3, NASA twice amended the specifications and delayed the bid opening to June 29. On that date three bids were received. SINTECH, the low bidder, enclosed with its bid a letter that stated that the company still had objections to several of the specifications, that its system did not comply with some of the specifications, and that it was "repeating" its previous protest that several of the specification requirements were unreasonable.

The contracting officer reviewed all three bids and determined that for various reasons all were nonresponsive. In the absence of any responsive bidder, LeRC decided to cancel the IFB and complete the acquisition through negotiation. Federal Acquisition Regulation §§ 14.404-1(e)(1) and 15.103. The contracting officer notified all three bidders by letter of July 18 in which the agency also advised the bidders of revised specifications which could affect price and included the reasons why LeRC had determined each bid to be nonresponsive. As for SINTECH, in addition to SINTECH's express exception to several specifications, the agency advised SINTECH that its bid was also deficient in that it failed to include required descriptive literature demonstrating compliance with several aspects of the specification and a signed Procurement Integrity Certificate.

All three of the original bidders, SINTECH, Zwick Corporation, and Instron Corporation, submitted offers. Although SINTECH submitted the lowest offer, it again submitted with its offer a letter in which it reiterated its objections to some of the specifications. In this letter, SINTECH also admitted that it would not meet requirements which it thought "did not make any technical sense." The contracting officer subsequently notified SINTECH that its offer had been rejected as unacceptable. NASA made the award to Instron, the lower priced of the two remaining and technically acceptable offerors. In its protest to our Office filed on August 30, SINTECH still maintained that the specifications did not reflect NASA's actual needs and that the awardee's offer should have been rejected as unacceptable because the awardee does not meet a certain specification requirement.<sup>1</sup>

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<sup>1</sup>SINTECH has objected to the fact that NASA has not suspended performance of the contract. However, suspension of performance was not required here because notification of NASA of the protest, although provided by our Office within 1 working day of the filing of the protest, as specified under the Competition in Contracting Act of 1984 (CICA),

Common to all of SINTECH's protests are objections to the propriety of NASA's specifications. SINTECH filed two timely protests of the specifications with the agency and twice NASA did amend its IFB in response to SINTECH's concerns. Nevertheless, SINTECH apparently believed that even as revised, the specifications were improper and unduly restrictive of competition. In that case, SINTECH was required to file a protest before its bid was opened, or its offer received under the subsequent negotiated phase of the procurement.

Under our Bid Protest Regulations, protests based upon alleged improprieties apparent from the face of a sealed bid or negotiated solicitation must be filed prior to bid opening or the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991); Mechanical Resources, Inc., B-241403, Jan. 30, 1991, 91-1 CPD ¶ 93. SINTECH's objections to several of the solicitation's material requirements fall within this rule. A protest filed with a bid cannot properly be considered as filed before opening since the contracting officer is not authorized to open the bid until the time set for bid opening. Federico Enters., Inc. dba Federico Helicopters--Recon., B-230724.3, May 11, 1988, 88-1 CPD ¶ 450. Again, the same considerations apply to the receipt of offers under the negotiation phase. SINTECH's protests of the specifications are thus dismissed as untimely.

Second, by incorporating in its offers its objections to the solicitation requirements, SINTECH not only failed to timely protest these requirements but made its bid nonresponsive and its subsequent offer unacceptable. To be responsive, a bid must represent an unequivocal offer to provide the exact thing called for in the IFB such that acceptance of the bid will bind the contractor in accordance with the solicitation's material terms and conditions. Seaboard Elec. Co., B-237352, Jan. 26, 1990, 90-1 CPD ¶ 115. When a bid does not offer to comply with the specifications included in the solicitation, or where a bidder provides information that materially reduces, limits, or modifies a solicitation requirement, the bid must be rejected as nonresponsive. Hagglunds Prinoth, B-238244, Apr. 12, 1990, 90-1 CPD ¶ 385.

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31 U.S.C. § 3553(b)(1) (1988), was received beyond 10 calendar days after award; CICA requires suspension of performance only where the agency is notified of a protest to our Office within 10 calendar days after award. 31 U.S.C. § 3553(d)(1). Lundy Technical Center, Inc., B-243067, June 27, 1991, 70 Comp. Gen. \_\_\_, 91-1 CPD ¶ 609.

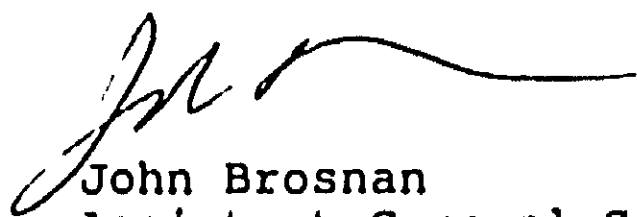
Similarly, a proposal which takes exception to material solicitation requirements is unacceptable and may not form the basis for award, Fraser-Volpe Corp., B-237617, Mar. 12, 1990, 90-1 CPD ¶ 263.

SINTECH admits in its response to NASA's submission to our Office that the company cannot and will not provide equipment meeting certain of NASA's requirements. A nonresponsive bid or technically unacceptable offer cannot be accepted, even if acceptance would bring savings to the government. The importance of maintaining the integrity of the competitive process outweighs any monetary benefit to be obtained from waiving material deficiencies, Sac and Fox Indus., Ltd., B-231873, Sept. 15, 1988, 88-2 CPD ¶ 250.

Finally, since SINTECH's offer fails to meet material requirements of NASA's specifications, SINTECH is ineligible to receive the award and thus cannot be an interested party to protest the award to Instron.

Under the bid protest provisions of CICA, our Office is required to decide only protests submitted to it by "interested parties." 31 U.S.C. § 3553(a). An "interested party" is defined under the act to mean "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract." We have said that a protester, be it a bidder or offeror, is not an interested party where it would not be in line for a contract award were its protest to be sustained. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7; VECO/Western Alaska Constr., B-243978, Sept. 9, 1991, 91-2 CPD ¶ 228.

The protest is dismissed.



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