



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Haz-Stor Company

File: B-251248

Date: March 18, 1993

Mark G. Roer for the protester.
Terrence J. Tychan, Department of Health and Human Services,
for the agency.
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the decision.

DIGEST

1. Agency reasonably concluded, based on information submitted with awardee's bid, that awardee intended to supply buildings that met standards of Underwriters Laboratory 2-hour fire rating classification.
2. Protest contentions filed 8 weeks after award based on information obtained in agency report in response to an initial protest challenging whether awardee's bid offered to comply with the requirements of the invitation for bids (IFB) and whether awardee is capable of meeting IFB requirements are dismissed as untimely because protester failed to diligently pursue information that formed the basis of the new protest contentions.

DECISION

Haz-Stor Company protests the award of a contract to Haz-Mat Containment Corporation for six hazardous materials storage buildings under invitation for bids (IFB) No. 221-92-9136, issued by the Food and Drug Administration (FDA).

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

The FDA issued the IFB on July 13, 1992, for between one and six prefabricated, hazardous waste storage facilities. Among other things, the IFB required that, "The buildings are to have an Underwriters Laboratory (UL) 2-hour fire rating classification. . . ." Seven bids were received at the September 9 bid opening and after the low bidder was rejected as nonresponsive FDA reviewed Haz-Mat's second low bid, including the descriptive literature submitted with it and concluded that the bid was responsive. As a result the FDA awarded the contract to Haz-Mat on October 27.

Haz-Stor in its initial protest submission complains that the award to Haz-Mat is improper because the buildings made by Haz-Mat do not meet the IFB requirement for an Underwriters Laboratory 2-hour fire rating classification. Haz-Stor explains that only buildings bearing the UL label are considered to be covered by the UL classification and contends that Haz-Mat does not offer a UL-labeled building.

In response, FDA asserts that the solicitation did not require the buildings to bear the UL label. Rather, the agency contends that it was only using the 2-hour fire rating as a standard which bidders were required to meet and that Haz-Mat's bid meets that standard.

It may be proper in some cases for a solicitation to require a product to conform to the standards of a particular testing firm, or to state that the certificate or label of that testing firm will be accepted as evidence that the offered product meets applicable standards. However, the absence of a seal of approval should not automatically exclude a noncertified product that in fact conforms to such standards. Pem All Extinguisher Corp., B-231343.3, Nov. 2, 1988, 88-2 CPD ¶ 430.

Haz-Mat did not in its bid take exception to any of the IFB requirements. In fact in the literature submitted with its bid the awardee stated in general that it "will meet or exceed UL and Factory Mutual Research standards." Also, in connection with the building's walls, roof, ceiling, doors, etc., the literature specified that the UL requirements would be met. The contracting officer, after reviewing the bid and the literature concluded that the buildings Haz-Mat intended to provide met the standards for a 2-hour fire rating classification from UL.

Haz-Stor argues, however, that in order for the agency to be able to conclude that a product which does not have the private testing firm's listing or seal in fact meets the agency's requirements, the solicitation must set out independent standards for the product to meet, in addition to the standards of the testing firm. The protester points out that the solicitation here did not provide any specifications other than reference to the UL rating classification which the agency could use to independently verify if the offered building meets the requirement for a UL rating.

We disagree with Haz-Stor that because the FDA did not set out independent specifications it could use to verify compliance with the UL rating, the FDA cannot determine if the offered buildings meet the UL rating standards unless they actually have been tested by UL. Since it is our understanding that the requirements that the building must

meet in order for it to qualify for the referenced "UL 2-hour fire rating classification" are publicly available, the agency may accept a bid from a firm whose building it reasonably concludes meets those requirements whether or not the building has the actual UL rating. See Advance Machine Co., B-217326, Oct. 29, 1985, 85-2 CPD ¶ 479. Thus, based upon our review of the record in the context of the general argument raised by Haz-Stor in its initial protest submission, we have no basis upon which to object to the FDA's conclusion that the awardee's bid showed compliance with the IFB requirements.

In its comments submitted in response to the FDA's report, Haz-Stor argues that the ceiling design offered by Haz-Mat is not up to the standards needed for a UL rating and that Haz-Mat's literature contains misstatements that indicate the firm does not understand the UL rating or the specifications set out in the IFB. These arguments are based on a review of the awardee's bid and accompanying descriptive literature. We will not consider them because they are untimely.


Where a protester in its initial protest submission, presents arguments in general terms and then, in its comments on the agency report, for the first time details alleged procurement deficiencies, in order to prevent the unwarranted piecemeal presentation or development of protest issues, we will not consider the detailed arguments unless they independently satisfy the timeliness requirements under our Bid Protest Regulations. General Elevator Co., Inc.--Recon., B-250289.2, Feb. 16, 1993, 93-1 CPD ¶ ____. Under our Bid Protest Regulations, a protest must be filed within 10 working days of the time the basis of the protest is known or should have been known. 4 C.F.R. § 21.1(a)(2) (1992).

When Haz-Stor filed its initial protest on November 6, arguing that the buildings offered by Haz-Mat did not meet the UL 2-hour fire rating classification, Haz-Stor was aware that the FDA had awarded the contract to Haz-Mat as the low responsive bidder. Other than filing its initial general protest and waiting to receive the agency report in response to its protest, which included a copy of Haz-Mat's bid and descriptive literature, Haz-Stor did not seek any information concerning Haz-Mat's bid. Since this procurement was conducted by sealed bidding there was a public opening of the bids and the awardee's bid including its descriptive literature was available to Haz-Stor independent of the protest report. Thus Haz-Stor's supplemental protest concerning these issues which were raised in its comments to the agency report filed on December 20--8 weeks after the award and 6 weeks after its initial protest--is untimely because Haz-Stor did not

diligently pursue the publicly available information which formed the basis of its protest. Dantec Elecs., Inc., B-243580.2, Nov. 12, 1991, 91-2 CPD ¶ 444; Hartford Constr. Corp., B-235642.2, Aug. 29, 1989, 89-2 CPD ¶ 187.

In addition, in the comments submitted in response to the FDA's report, Haz-Stor, for the first time, again, based upon its review of the awardee's bid and accompanying descriptive literature, argues: (1) that based on its low price Haz-Mat can not meet the standards as specified in the IFB; (2) that the FDA could not have properly determined that Haz-Mat is responsible because the awardee is using a subcontractor to manufacture the buildings; and (3) that contrary to the IFB, Haz-Mat did not supply a certificate of approval for its buildings certifying that they meet the Uniform Building Code. For the same reasons cited above for Haz-Mat's expanded arguments concerning the awardee's UL rating, we consider the new arguments to also be untimely.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel