



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

Decision

Matter of: AGM Container Controls, Inc.
File: B-255881
Date: April 12, 1994

Joyce C. Stewart for the protester.
Eric A. Lile, Esq., and D. Susan Spiegelman-Boyd, Esq.,
Department of the Navy, for the agency.
Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Where the solicitation advised that an offeror's failure to agree to the required delivery schedule could result in the rejection of the offeror's proposal as unacceptable, the agency properly did not award to the protester whose low-priced proposal did not meet the delivery schedule listed in the solicitation, and agency's pointing out the importance of the required delivery schedule during competitive range discussions satisfied the requirement to conduct meaningful discussions.
2. Protest filed after award that the solicitation specifications would not meet the agency's needs and that the agency "plagiarized" the protester's proprietary drawings in the production of the government's technical data package included in the solicitation is untimely.

DECISION

AGM Container Controls, Inc. protests the award of a contract to Sigma Manufacturing Industries under request for proposals (RFP) No. N00164-93-R-0108, issued by the Naval Surface Warfare Center, Crane Division, for externally mounted color change humidity indicator plugs. The protester essentially questions the agency's need for this procurement and argues that the agency improperly awarded the contract and "plagiarized" its proprietary drawings.

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

The United States Marine Corps requested the Navy to perform studies on the containers for Stinger missiles. One of the areas of study involved the intrusion of water into the missile containers which compromises the integrity

of the missiles. Each missile container has a pressure equalization valve, desiccant inside the container to absorb excess moisture, dunnage (packing material) to hold the missile, and a humidity indicator plug which contains a humidity indicator card which shows the relative humidity inside the container. The humidity indicator plugs that were then in the Stinger missile containers did not allow for easy replacement of the humidity indicator cards and required opening and moving the missile container.

The Navy, after receiving the initial task from the Marine Corps, placed a delivery order against its ordnance omnibus support services contract with COMARCO Engineering Support Division for a study on humidity in the missile containers. COMARCO performed a market survey to determine if an exterior humidity indicator plug existed. COMARCO contacted AGM, a maker of humidity indicators, and found at that time that no exterior humidity indicator plug existed; however, COMARCO recommended to the government that its concerns could be satisfied by an exterior load humidity indicator plug.

In the fall of 1992, the Navy contacted AGM about the feasibility of designing an external humidity indicator plug. In response, AGM sent the Navy several drawings, marked proprietary, and a cover letter indicating that the drawings were being provided pursuant to a no-cost engineering study. Because of the proprietary nature of these drawings, the agency knew that the drawings could not be used for a competitive procurement. A Navy employee placed the AGM drawings in the Stinger missile container study project file, which was in the possession of a COMARCO technician.

In January 1993, a Navy employee was requested to design an exterior humidity indicator plug for the Stinger missile container which would have a tamper-proof, transparent, and removable window to allow for easy external replacement of the humidity indicator card. This employee was denied access to the AGM drawings. This employee produced a level two technical drawing package for a humidity indicator plug that had a three-quarter size humidity indicator card and an o-ring seal on the back side, and required a spanner wrench for removal of the window. In February, a prototype of the design was produced; however, the Navy employee was unable to continue work on the drawings.

A delivery order was then placed with COMARCO calling for the development of a level three technical drawing package from the level two design sufficient to permit competition for humidity indicator plugs. COMARCO was also asked to improve the visibility of the humidity indicator card by placing magnification in the window, to shorten the threads

in the view window, and to determine if the three-quarter size card was readily available to industry.

A COMARCO draftsman received a copy of the Stinger missile container study project file which contained a copy of the AGM drawings. According to this draftsman, he saw the AGM drawings, but determined that they differed substantially from the Navy's design and consequently returned them to the file. In order to determine the availability of the three-quarter size humidity indicator card, a COMARCO representative contacted AGM and AGM faxed a price and delivery information on the three-quarter size card.

The RFP was issued on April 23, and provided for the award of a firm, fixed-price contract for 9,000 humidity indicator plugs, including 15 first articles. Included in the RFP were the Navy's level three drawings developed by COMARCO for the humidity indicator plug. The RFP contained the following required delivery schedule:

ITEM No.	QUANTITY	WITHIN DAYS FROM EFFECTIVE DATE OF CONTRACT
001AA	15 EA	60
001AB	1000 EA	120
001AC	2500 EA	150
001AC	5485 EA	180

The RFP cautioned that proposals that offered delivery that did not clearly fall within this required delivery schedule "will/may" be considered unacceptable and rejected. The RFP essentially provided for award to be made to the offeror with the technically acceptable, lowest-priced proposal.

Three offerors submitted proposals by the May 24 closing date for receipt of initial proposals. AGM proposed two engineering change proposals (ECP) to revise the drawing package and proposed changing the requirement for cadmium plated steel for the humidity indicator plug to phosphate or stainless steel. AGM took exception to the delivery schedule and requested that first articles be waived. Offeror A also took exception to the delivery schedule. Sigma took no exception to the requirements.

Discussions were held with all three offerors. During discussions, according to the agency, AGM was reminded of the importance of the required delivery schedule and that deviations from the schedule were not considered to be acceptable. AGM was informed that the cadmium plated steel would remain a requirement under the solicitation and that the Navy would consider the ECPs.

In response to Offeror A's complaints regarding the difficulty in procuring the humidity indicator cards, an amendment was issued on June 30, which stated that the cards would be provided by the government as government-furnished material (GFM).¹ On July 20, an amendment was issued to extend the due date for receipt of best and final offers (BAFO) to July 27, and to replace two drawings with drawings that incorporated further changes to the design and to adopt an alternate packing method based on AGM's ECPs.

The following BAFOs were received by the July 27 due date:

OFFEROR	UNIT PRICE
Offeror A	\$22.45
AGM	16.95
Sigma	19.55

While AGM submitted the lowest unit price, it again took exception to the delivery schedule and offered an alternate schedule that was 30 days longer than specified in the RFP for each line item. Based on the cost savings in AGM's proposal if its proposed delivery schedule could be adopted, the Navy performed a cost benefit analysis of the savings in AGM's proposal versus the cost of extending the delivery schedule. The cost savings from AGM's proposal compared to Sigma's proposal, the next low, compliant offer, was \$23,361. The cost of delaying receipt of the external humidity plugs was estimated at \$49,197.36, which included the cost of performing another replacement of the internal indicators on the container inventory pending receipt of the external plugs.

On July 30, award was made to Sigma as the low-priced, responsible offeror which met all the requirements of the RFP. On August 17, AGM protested this decision to the contracting officer. On November 16, the contracting officer denied the protest. On December 1, AGM filed this protest with our Office.

AGM argues that the agency improperly rejected its proposal and failed to conduct meaningful discussions because the contracting officer, while indicating that the delivery schedule was important, did not say that taking exception to the delivery schedule would make a proposal unacceptable. We are aware of no requirement that the agency has done so in the circumstances here. The RFP clearly put offerors on notice of the agency's delivery requirements. The Time of Delivery Clause stated that the government "requires

¹The agency determined that the cards were available from the Navy supply system.

delivery . . . according to the following schedule" and contained a schedule captioned "REQUIRED DELIVERY SCHEDULE." The clause also advised that the government reserved the right to award under either the required delivery schedule or the offeror's proposed delivery schedule if the offeror proposed "an earlier delivery schedule than required." Further, AGM admits that, during discussions, it was specifically advised of the importance of the delivery schedule listed in the RFP. This should have placed AGM on notice that it risked rejection if it maintained its proposed delivery schedule. Accordingly, since AGM's proposal did not meet the required delivery schedule, rejection of its proposal was proper.

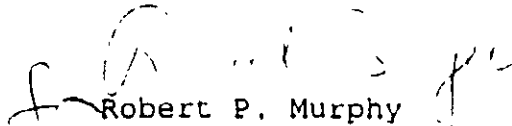
Finally, AGM argues that the RFP will not fulfill the agency's needs to properly detect moisture in the missile containers, that the Navy "plagiarized" its drawings in producing the government's technical data package, and that the Navy improperly attempted to equalize competition by issuing an amendment to provide the humidity indicator cards as GFM to all offerors.

We agree with the agency that these bases for protest are untimely. Under our Bid Protest Regulations, protests based upon alleged improprieties in a solicitation which are apparent prior to the closing time for receipt of proposals must be filed prior to that time. Where proposals are requested, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated into the solicitation must be protested not later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (1993). Here, the solicitation clearly stated the agency's requirements and contained the Navy's drawings that the protester argues were improperly based on its proprietary drawings. If AGM believed that the solicitation specifications did not represent the agency's needs or that the drawings incorporated into the solicitation were plagiarized from AGM's proprietary drawings, it should have protested prior to the May 24 closing date for receipt of initial proposals; its protest filed with the agency on August 17, after award, is untimely. Also, since the amendment which stated that the humidity indicator cards would be provided as GFM was issued on June 30, AGM should have protested this amendment prior to the July 27 BAFO due date.

AGM maintains that it did not realize that a solicitation had to be protested prior to the submission of proposals and maintains that these issues are significant to the procurement system. Prospective contractors, however, are charged with constructive notice of our Regulations since they are published in the Federal Register and appear in the

Code of Federal Regulations. See Acker Elec. Co., B-244413, July 12, 1991, 91-2 CPD ¶ 52. Further, we will not consider the merits of an untimely protest by invoking the significant issue exception unless the protest raises an issue of first impression that would be of widespread interest to the procurement community. Keco Indus., Inc., B-238301, May 21, 1990, 90-1 CPD ¶ 490. We previously have addressed the types of issues untimely raised by the protester. See Hex Indus., Inc., Avel Corp., and Cosmodyne, Inc., B-243867, Aug. 30, 1991, 91-2 CPD ¶ 223; Sea Containers Am., Inc., B-243228, July 11, 1991, 91-2 CPD ¶ 45. Moreover, the issues raised here relate only to this specific procurement action and, thus, do not have widespread significance to the procurement community.

The protest is denied in part and dismissed in part.


Robert P. Murphy
Acting General Counsel