



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Kvaerner Hydro Power, Inc.

File: B-259997

Date: January 20, 1995

DECISION

Kvaerner Hydro Power, Inc. protests the award of a contract to Voith Hydro, Inc., under invitation for bids (IFB) No. DACW57-94-R-0016, a two-step sealed bid procurement issued by the United States Army Corps of Engineers, for the rehabilitation of the Bonneville power plant in Cascade Locks, Oregon. The required work includes replacing ten turbine runners and four generator rewinds. Kvaerner protests that the generator conductors offered by the awardee's subcontractor, Siemens Power Corp., do not meet the IFB requirements and that the Corps has effectively relaxed the IFB requirements by accepting the awardee's bid.

We dismiss the protest as untimely.

The IFB in this case provided that the procurement would be conducted using the two-step sealed bidding procedures set forth in Federal Acquisition Regulation (FAR) subpart 14.5. Under step one of a two-step sealed bid procurement, bidders submit technical proposals, which the agency evaluates to determine the technical acceptability of the supplies offered, leaving only price to be addressed in the second step. In step two, bidders, whose proposals have been found technically acceptable, submit sealed bids based on their acceptable technical proposals, and award is to be made to the low responsive and responsible bidder.

The IFB here permitted multiple proposals and bids and allowed bidders to propose alternate subcontractors for the generator portion of the contract work. Regarding the manufacture of the generators, the IFB stated that the generator conductors "shall be insulated with multiple layers of mica tape in combination with suitable backing materials."

The agency received technical proposals from numerous offerors, including the protester and the awardee, by the May 24 closing date. Both Kvaerner and Voith submitted proposals using Siemens as the generator subcontractor, as well as proposals using ABB Power Generation, Inc. as the generator subcontractor.

After conducting discussions and evaluating proposals, the agency determined that Kvaerner's and Voith's proposals, which proposed Siemens and ABB as subcontractors, were among those considered technically acceptable. On August 12, the agency provided written notice to Kvaerner approving its various technical proposals and inviting the protester to submit bids based upon those proposals by the September 27 bid opening date.

On August 25, Siemens sent Kvaerner a facsimile transmission stating that it had discovered an "error" in its technical proposal, which would affect its bid price. Specifically, Siemens's stated that it wished to revise the guaranteed generator efficiencies stated in its technical proposal, and had approached the Corps for permission to do so. Siemens stated that the Corps had denied its request, but would consider a request from Kvaerner on this issue.

According to the protester, the guaranteed generator efficiencies are based, in part, on the conductor insulation method used by the manufacturer. The protester states that Siemens's desire to revise its guarantee indicated that Siemens's proposed insulating method did not comply with the IFB requirement that generator conductors "shall be insulated with multiple layers of mica tape in combination with suitable backing materials." On August 25, the protester asked the Corps to grant Siemens's request to correct its technical proposal.

On September 6, the agency responded to Kvaerner's request as follows:

"Siemens will not be allowed to correct their proposal. Step one is completed and bidders will bid on what was accepted in their technical proposal. It was determined that if Siemens were allowed to change their proposal, it would be unfair to the other bidders. It has been determined that the needs of the government and the availability of many other approved sources as a result of the completed step one procedures do not permit delaying the procurement to re-open the step one process to allow Siemens to correct their proposal."

The agency received 12 bids on the September 27 bid opening date. At bid opening, the agency announced the total amount of each bid and the names of the bidders and their generator subcontractors. Voith submitted the apparent low bid, with Siemens as the generator subcontractor. Voith also submitted the apparent next low bid, with ABB as the generator subcontractor. Kvaerner submitted the sixth, seventh, eighth, and ninth low bids, using subcontractors

other than Siemens, including ABB, Kvaerner did not submit a bid using Siemens as a subcontractor because, "[b]ased on Siemens's . . . admission of error, [Kvaerner] determined that Siemens's technical proposal . . . did not meet the specifications of the project."

On November 10, 1 1/2 months after bid opening, Kvaerner filed an agency-level protest alleging that the technical proposal of Voith's generator supplier, Siemens, did not conform with the IFB conductor insulation requirements and that Voith's apparent low bid should be rejected. In its protest, Kvaerner stated that it had direct knowledge of Siemens's manufacturing methods and had "good reason to believe that any bidder which named Siemens as a generator supplier would not meet the original specifications."¹ Kvaerner claimed that its protest of this issue was timely because it was allegedly based on an October 31 letter from the Corps, discussing the agency's interpretation of the IFB conductor insulation requirement.² Kvaerner claimed that the agency's interpretation amounted to a relaxation of the specifications and that the agency could not properly accept Siemens's technical approach based on the specifications as written. On December 27, the Corps dismissed Kvaerner's protest as untimely.³ This protest followed.

Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a) (1994), protests other than those involving apparent solicitation improprieties must be filed, either with our Office or the contracting agency, not later than 10 working days after the basis for protest was known or should have been known. Where a protest concerns the acceptability of a competitor's first-step technical proposal in a two-step sealed bid procurement, the pertinent inquiry is when the protester knew or should have known the necessary information concerning the agency's action in accepting the

¹Kvaerner claimed that it was aware of Siemens' conductor insulation methods because it had named Siemens as a generator subcontractor in response to a solicitation for a similar project. Kvaerner omitted to mention that it had gained knowledge of Siemens' conductor insulation methods during step one of this procurement.

²The agency's October 31 letter responded to an inquiry from ABB, the generator subcontractor named in Voith's next low bid and in one of the protester's bids. In the letter, the agency noted that ABB, a subcontractor, lacked standing to protest the acceptability of the Voith/Siemens proposal. On November 4, ABB furnished the agency's letter to Kvaerner, which subsequently protested the matter.

³Award was made shortly thereafter on January 4, 1995.


proposal. See ACCESS Corp., B-189661, Feb. 3, 1978, 78-1 CPD ¶ 100. For example, a protest that a particular manufacturing approach does not comply with the specified requirements of the first step of a two-step procurement must be filed within 10 days after the protester knows or has reason to know that the offeror was qualified using that manufacturing approach. See Access Corp., *supra*; Datametrics Corp., B-251566, Feb. 9, 1993, 93-1 CPD ¶ 120; Ingersoll-Rand Co., B-189071, Oct. 3, 1977, 77-2 CPD ¶ 254.

As of the September 27 bid opening date, the protester knew that Voith's apparent low bid named Siemens as the generator subcontractor and, by Kvaerner's admission, it had "good reason to believe that any bidder which named Siemens as a generator supplier would not meet the original specifications." Kvaerner claims, however, that it assumed the agency would reject a bid using Siemens as a subcontractor because, on September 6, the agency denied Siemens's request to correct an "error" in computing the guaranteed generator efficiencies in its technical proposal. Kvaerner claims that it interpreted this letter to mean that the agency no longer considered proposals which offered Siemens as a subcontractor to be technically acceptable--a belief that Kvaerner claims was only belied when it received the agency's October 31 letter, explaining the Corps' interpretation of the relevant specification.

At the outset, we do not interpret the Corps's refusal to accept revisions to Siemens's technical proposal as a disqualification of that proposal. The letter explicitly states that "[s]tep one is completed and bidders will bid on what was accepted in their technical proposal." In any event, regardless of how the protester interpreted the agency's September 6 communication, step two of the procurement was only open to those bidders whose proposals had been deemed technically acceptable, *see* FAR § 14.503-2(a)(1), and the protester admits that it was on notice as of the bid opening date that Siemens's proposal was considered technically acceptable, stating, "[c]ontrary to what the Corps indicated in its September 6 letter, the Corps ranked Voith, which named Siemens as a generator supplier, at the bid opening on September 27, 1994." Thus, the protester knew or should have known as of September 27 that the Corps considered Siemens's proposal technically acceptable and had sufficient basis to protest this determination without knowing precisely how the agency interpreted the applicable specifications, as later stated in the October 31 letter. See ACCESS Corp., *supra*. Accordingly, Kvaerner's protest, filed with the agency 1 1/2 months after bid opening, is untimely and will not be considered. See 4 C.F.R. § 21.2(a).

In addition to its protest being untimely, Kvaerner also lacks the status of an interested party necessary to pursue a protest. Under the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3556 (1988), only an "interested party" may protest a federal procurement. That is, a protester must be an actual or prospective supplier whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a). A protester is not an interested party where it would not be in line for contract award were its protest to be sustained. ECS Composites, Inc., B-235849.2, Jan. 3, 1990, 90-1 CPD ¶ 7. In this case, Kvaerner would not be in line for award even if we sustained its protest that the acceptance of the Voith/Siemens bid was improper. There are four intervening bidders which precede the protester in eligibility under this solicitation, none of whom proposed Siemens as a subcontractor. Indeed, Voith submitted the next low bid using one of the same subcontractors as the protester (ABB). Since Kvaerner's protest concerns Siemens' allegedly noncompliant manufacturing approach--which does not affect the eligibility of the intervening bidders--the protester lacks the direct economic interest required to maintain a protest.

The protest is dismissed.



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