



Comptroller General
of the United States

Washington, D.C. 20548

15395/
1050242

Decision

Matter of: Photonics Systems, Inc.

File: B-258981

Date: February 24, 1995

DECISION

Photonics Systems, Inc. protests the sole-source award of a contract to GM Cope, Inc. under request for proposals (RFP) No. DTFA08-94-R-04021, issued by the Federal Aviation Administration (FAA), Department of Transportation, for a digital video map generator (VMG),¹ for its air traffic facility at Bakersfield, California.

We dismiss the protest.

On July 19, 1994, FAA contracting officials received a procurement request for the purchase of the stated VMG to replace existing inadequate equipment. A market survey was conducted by publishing a notice in the July 26 edition of the Commerce Business Daily (CBD). The notice stated that the FAA was seeking potential sources to provide one digital VMG, GM Cope model VMG-102G, or equal. The notice stated several specific technical requirements, among them that the VMG must use EPROM storage of map data. The notice provided further:

"Those contractors with the capability of providing the above equipment shall submit, in writing, to the above named individuals, complete technical information within fifteen (15) calendar days after the date of first publication of this notice. Any responses to this notice must provide technical data and any technical information necessary to substantiate capability to meet the requirement. The final determination regarding issuance of a formal solicitation will be based solely upon the technical data submitted that demonstrates the contractor's capability to meet the requirements. As a result of reviewing responses to this synopsis, the Contracting

¹A VMG generates and stores detailed maps which overlay existing radar displays for air traffic control and other mapping applications.

Officer may determine that a solicitation will be issued. If a solicitation is issued, no additional synopsis will be published. If a solicitation is issued, it will be provided to all firms that respond to this synopsis, or otherwise request a copy of the solicitation."

The FAA received two responses, one from GM Cope, and the other from Photonics, describing its Mark I VMG. The FAA received Photonics's response on August 8 and forwarded its technical data package for evaluation on August 9. On August 16, the FAA's technical office responded that, based on the information provided by Photonics, the Mark I failed to meet the requirement for EPROM storage of map data; instead it used a floppy disk system for back-up of files. Because the Photonics model was technically unacceptable for that reason,² contracting officials proceeded to write a justification and approval for other than full and open competition (J&A), in order to make a sole-source award to GM Cope. On September 19, a contract was awarded to GM Cope for \$43,155. Contract performance (delivery and installation) was completed as of September 29. On October 7, Photonics made an inquiry as to the procurement's status and was informed by contracting officials of the award to GM Cope. Photonics filed this protest with our Office on October 14.

Photonics argues that the FAA improperly failed to fully consider the merits of its Mark I VMG before proceeding with the sole-source award to GM Cope. While conceding that its product was eliminated from consideration, had it known that the EPROM storage requirement was absolute, it ultimately would have offered it.

The agency did nothing improper here. The CBD notice referenced the brand name item it intended to procure; clearly stated the technical features required, including the EPROM storage requirement; clearly stated that interested prospective offerors were to provide sufficient technical data to substantiate their capability to meet the requirements; and advised that the final decision whether to issue a solicitation would depend solely on the technical data received. In other words, interested potential offerors were on express notice that their responses were for the purpose of establishing their products' compliance with the stated technical requirements, and that their

²The Mark I was also found deficient in that it was a prototype, whereas the CBD notice contained a specific requirement that the proposed equipment be a commercial-off-the-shelf item. However, that requirement was omitted from the RFP later issued.

opportunity to compete under a formal solicitation would depend on the responses received. Based on this language, we fail to see how Photonics could have assumed that it would have a further opportunity to compete after furnishing information for a product that did not meet the clearly stated technical requirements. Where responses to a CBD notice indicate that no additional firms can meet the government's needs, the agency properly may proceed on the basis that only the product listed in the notice is acceptable. See Integrated Sys. Group, Inc., B-246447; B-246448, Mar. 9, 1992, 92-1 CPD ¶ 268. Based on Photonics's response referencing a product without EPROM storage, and the absence of any other responses, the FAA properly proceeded on the basis that only the GM Cope product could meet its needs.

Photonics argues that EPROM storage is unnecessary and hard to maintain, and that floppy disks are actually superior to EPROM for the agency's intended purpose. This challenge to the requirements included in the CBD notice is untimely. Our Bid Protest Regulations require protests of alleged solicitation improprieties to be filed prior to the time set for receipt of proposals; all other protests must be filed not later than 10 working days after the basis for protest is known or should have been known. 4 C.F.R. § 21.2(a) (1994). The CBD notice, published July 26, provided that interested firms were required to respond within 15 calendar days, or by August 10. Since Photonics did not protest the specification until long after the August 10 response deadline (and also more than 10 days after publication of the notice), it is clearly untimely and will not be considered. Integrated Sys. Group, Inc., supra.³

Photonics claims that GM Cope misrepresented that its offer was in compliance with FAR § 52.225-18, "European Community Sanction for End Products" (May 1993) and § 52.225-3, "Buy American Act--Supplies" (Jan. 1989), which were made applicable to the procurement by the RFP. This argument is based on information allegedly indicating that GM Cope performed the contract by assembling the end product in the

³Photonics complains that it was not sent a copy of the RFP or advised that its equipment was unacceptable, and that the FAA failed to publish notice of its intent to award to GM Cope. However, since Photonics's product would be nonconforming even had the FAA not made these procedural errors, Photonics was not prejudiced by them; an agency's failure to adhere to procedural requirements, in the absence of prejudice to the protester, does not provide a basis for sustaining a protest. See Advanced Sys. Technology, Inc.; Eng'g and Professional Servs., Inc., B-241530; B-241530.2, Feb. 12, 1991, 91-1 CPD ¶ 153.

United States, from Danish components. Our Regulations require that a protester be an "interested party," defined as a party having a direct economic interest in the award of a contract or proposed award of a contract, before we will consider its protest. 4 C.F.R. § 21.0(a). Since the agency found that Photonics's product did not meet the EPROM requirement, and therefore properly eliminated Photonics from further consideration, Photonics is not an interested party to challenge the award to GM Cope, Pinkerton Sec. & Investigation Servs., B-246536.5, Aug. 30, 1993, 93-2 CPD ¶ 127.⁴

The protest is dismissed.



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Assistant General Counsel

⁴In any case, the record shows that GM Cope took no exception to the Buy American or European Community Sanction provisions in its proposal. To the extent that GM Cope did not perform in accordance with the obligation undertaken in its contract, the matter is one of contract administration, which we will not review. 4 C.F.R. § 21.2(m)(1).