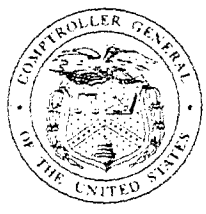


Transp

10,716

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-194180. B-194181

DATE: July 11, 1979

MATTER OF: Metal Art, Inc.

DLU 00820

DIGEST:

- 1. *→* Where evidence shows that protest against [alleged impropriety in RFP] was received at GAO before proposals were due, protest is timely and will be considered on merits notwithstanding that protest was not time/date stamped at GAO until after such time.
- 2. Contracting agency properly may restrict procurement of part for military equipment, to be used for replenishment of stock, repair, or replacement, to original manufacturer's part or identical product where Government has only limited rights in data for item or where unrestricted data in agency's possession is not adequate to conduct competitive procurement.

AGC00891

Metal Art, Inc., protests the restrictive nature of request for proposals (RFP) Nos. DLA700-79-R-0757 and -0746, issued by the Defense Logistics Agency's Defense Construction Supply Center (DCSC) for 50 beveled seats and 390 wearing rings, respectively. Each solicitation identified the item being procured by reference to certain manufacturers' part numbers, and required that any proposed alternate be shown by the offeror to be essentially identical to the cited part. Metal Art contends that DCSC should instead have furnished technical drawings of the items in the agency's possession to potential offerors, or "reverse engineered" them for the benefit of such firms, so that they could have been procured on a more competitive basis. We find no merit to the protester's contentions.

~~005837~~

Timeliness

As a threshold issue, DCSC argues that the protests were untimely filed in our Office under section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1978), which requires that a protest against an alleged impropriety in an RFP be filed prior to the time set for the receipt of initial proposals. Proposals were due under both solicitations by 3 p.m. on February 20, 1979, but Metal Art's protests, filed by telex, were not time/date stamped as received in the General Accounting Office (GAO) until February 21 at 3:23 p.m.

However, our time/date stamp is only prima facie evidence of the time of receipt in our Office. Sigma Consultants, Inc., B-194706, May 14, 1979, 79-1 CPD 350. The telex regarding RFP No. -0757 indicates on its face that it was received at the telex machine in the GAO building at 11:28 a.m. on February 19, and the one regarding RFP No. -0746 indicates receipt at 9:47 a.m. on February 20. In this connection, we note that Washington's Birthday fell on Monday, February 19, and that because of a heavy snowstorm in the Washington, D.C., area, Federal Government offices in the area, including GAO, were also closed on February 20 (although our telex machine could still receive communications).

In view of this evidence of receipt prior to the time set for the receipt of initial proposals, we consider the protests to have been timely filed in accordance with our procedures, and will consider them on the merits.

Solicitation No. DLA 700-79-R-0757

The solicitation was issued on January 30, 1979, for 50 beveled seats described by reference to Automatic Switch Company Part No. FV10-572-3. That firm was the original manufacturer of the item. Clause C30 of the solicitation, entitled "Products Offered," required that "products offered must either be identical or functionally, physically, mechanically and electrically interchangeable with the product cited in the procurement identification description * * *." The clause also provided that the

Government did not have detailed drawings for the requirement and, therefore, a firm offering an item allegedly equal in all material respects to the cited one had to furnish sufficient data regarding both items to enable the Government to evaluate the acceptability of the firm's product.

Metal Art contends that DCSC does have drawings for the beveled seats in its possession, and should have furnished them to interested firms so that they could manufacture an identical item and submit competitive proposals. Metal Art contends that the existence of the drawings is evidenced by the fact that DLA received three offers in response to the solicitation; Metal Art suggests that the offered products could not be evaluated against the specified product without such data. Metal Art also contends that even if the Government has only "limited" rights in the drawings, in which case the drawings could not be the basis for a competitive procurement, such classification of the Government's rights would be improper. Finally, Metal Art argues that in any case DCSC should, by inspection and analysis, attempt to "reverse engineer" the item, or allow Metal Art to do so, in order that it can be procured more competitively.

DCSC states that although it has unlimited rights in drawings for the Automatic Switch Company part, the drawings it possesses are not suitable for either manufacture or the evaluation of alternate offers. DCSC asserts that the drawings are only marginally legible; do not show all necessary dimensions; are 25 years old; "have not been verified as being representative of the parts presently being procured;" and are in part outdated. DCSC states that an attempt was made to verify the drawings and supply the missing dimensions from stock, but no stock was available for such purpose. DCSC also points out that since the three offers received were based on the identified part number, drawings for evaluation purposes were not necessary.

DCSC further states that it does not have the resources for reverse engineering, but that it would be possible to sell or loan to Metal Art a sample of the item for reverse engineering when one is available.

It is the responsibility of the procuring activity to establish its minimum needs, and we will not dispute the judgment that those needs can only be met by a particular manufacturer's part, or the basis for such judgment, unless clearly shown by the objector to be unreasonable. Metal Art, Inc., B-192901, February 9, 1979, 79-1 CPD 91. Where the needs of the Government can only be satisfied by a single source the Government is not required to compromise those needs in order to obtain competition. Julian A. McDermott Corporation, B-191468, September 21, 1978, 78-2 CPD 214.

It is not disputed that, for whatever reason, DCSC lacked drawings that could form the basis for the manufacture of the requirement. Where adequate data is not available to an agency to enable it to conduct a more competitive procurement, we will take no exception to an award based on the designated part. See Techniarts, B-193263, April 9, 1979, 79-1 CPD 246. Moreover, we have no basis to question the agency's position that it lacks the resources to reverse engineer the part, and that it does not have one in stock to allow the protester to do so. See BioMarine Industries, et al., B-180211, August 5, 1974, 74-2 CPD 78. Accordingly, we cannot object to DCSC's present procurement method. However, based on the record we anticipate that for purposes of future procurements DCSC will use a beveled seat delivered under the present contract either to upgrade its drawing, or to make available to prospective offerors for reverse engineering.

RFP No. DLA700-79-R-0746

This solicitation was issued on February 5, 1979, for 390 wearing rings for use on centrifugal pumps and manufactured under one of two manufacturer's part numbers: Worthington Pump Corporation (Worthington) Part No. 933806-5, and RPS, Inc., Part No. 10046. The solicitation also contained clause C30, "Products Offered."

As it did with respect to RFP No. -0757, Metal Art contends that drawings for the wearing rings exist

at DCSC for purposes of a more open procurement. Metal Art also argues that even if the Government's position is that it has only limited rights in such drawings, that classification is improper on the following basis:

"* * * at least one other manufacturer (RPS, Inc.) has supplied a product which is an acceptable alternative to the Worthington Corporation product. Any competitive advantage which Worthington Corporation or RPS, Inc., enjoyed over the other by virtue of having limited rights in the technical data has been lessened because of the acceptability of either manufacturer's part."

Metal Art further argues that, in any event, in view of the underlying philosophy of the procurement regulations to encourage and foster competition the Government's interest would best be served by using data that it even had only limited rights in to procure the wearing rings on a more competitive basis. Finally, the protester again suggests that DCSC reverse engineer the item if necessary, or afford Metal Art the opportunity to do so.

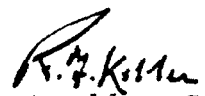
DCSC states that the reason for defining its requirements in terms of the two manufacturers' part numbers is that the Government has only limited rights in the only two drawings in its possession upon which a more competitive procurement could be based. Although the drawings can be used to compare alternate products offered, they cannot be released without the permission of the parties that furnished them. Defense Acquisition Regulation (DAR) § 9-201(c) (1976 ed.). DCSC points out that while it does have unrestricted parts and materials lists and identification drawings for the wearing rings, none of these drawings are sufficient for a competitive acquisition. However, in response to Metal Art's protest, DCSC has requested permission from Worthington and RPS, Inc. to release their drawings, but the firms have declined to grant it. Thus, although it was unsuccessful, DCSC apparently made a good faith effort to obtain the necessary drawings on an unrestricted basis. Under the circumstances the Government is therefore authorized by DAR § 1-313(c) to procure the items from sources that have satisfactorily manufactured or furnished them in the past.

With respect to the above, the fact that RPS, Inc., can furnish an approved alternate does not change the nature of the Government's rights, since the record shows that in a prior procurement Worthington's drawings in DCSC's possession were used only to approve RPS, Inc.'s part.

Regarding Metal Art's suggestion that the requirement be reverse engineered, DAR § 1-304.2(b) provides that where there is no other way for the Government to competitively procure an item, reverse engineering may be used but only if significant cost savings can be reasonably demonstrated and the action is approved by the head of the procuring activity. It is DCSC's position that where, as here, there are two independent sources for the item and competition therefore is evident, there is no reason to believe that reverse engineering, if possible, would significantly reduce costs. Since we have no basis to question that position, this aspect of the protest will not be considered further. Metal Art, Inc., supra.

There is of course nothing to prevent Metal Art from securing either Worthington's or RPS's wearing ring for the purpose of reverse engineering them and then offer to supply that item for evaluation under Clause C30 in any future procurement

The protests are denied.


Acting Comptroller General
of the United States