



Comptroller General
of the United States

Washington, D.C. 20548

91-2 CPD 538

Decision

PR

Matter of: Aydin Computer and Monitor Division
File: B-245644
Date: December 12, 1991

Mary A. Wenrich for the protester.
Tony Surak for Telecommunications Techniques Corporation, an interested party.
Jonathan H. Kosarin, Esq., and Gary Van Osten, Esq., Department of the Navy, for the agency.
Behn Miller, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against solicitation's sample testing requirements is dismissed as untimely where the requirements were apparent from the face of the solicitation but the protest was not filed until after the initial closing date.

DECISION

Aydin Computer and Monitor Division protests the use of sample testing in request for proposals (RFP) No. N00104-91-R-QA31, issued by the Department of the Navy for bit-error rate testers, for use in evaluating shipboard telecommunication systems. Because of the allegedly improper use of sample testing, Aydin argues that its proposal was improperly rejected as technically unacceptable.

We dismiss the protest.

The RFP was issued on December 26, 1991, as a 3-year requirements contract. Under the solicitation, offerors were to provide a maximum yearly quantity of 60 bit-error rate testers (National Stock Number (NSN) 7Z 6625-01-304-1742). The closing date for receipt of initial proposals was scheduled for January 25, 1991; offerors were instructed to submit both a price and technical proposal by this date.

Section M of the solicitation set forth the tester's purchase item description (PID) which listed all the item's

technical requirements.¹ Section M also advised offerors that sample testing might be required to determine if offered models complied with the solicitation's technical requirements. Offerors were advised that "[m]odels submitted for testing must contain any modifications necessary to meet the requirements" set forth in the PID.

At the January 25 closing date, the Navy received three offers. After reviewing each offeror's technical proposal, the Navy decided to request two bit error rate testers from each offeror for sample testing. By letter dated February 7, the Navy requested two tester models from Aydin; included with this request was a copy of the sample testing result that the Navy had on file from sample testing it had conducted on the same Aydin tester model under a prior procurement.

By letter dated February 13, Aydin objected to the Navy's requirement for sample testing as unnecessary. Since the Navy had already tested the Aydin model under a prior procurement and relying on Federal Acquisition Regulation (FAR) § 14.202-4--which only permits bid sample testing in the event that an item's characteristics cannot be adequately described in a solicitation's technical specifications--Aydin contended that sample testing was unnecessary. Aydin also requested a list of the characteristics for which the samples would be evaluated.

By letter dated February 25, the Navy informed Aydin that although sample testing had been performed on the proposed Aydin tester model under a prior procurement, these tests determined the Aydin model as being technically unacceptable. The Navy also advised Aydin that compliance with certain technical criteria--such as electromagnetical interference (EMI)--could not be ascertained without sample testing. Additionally--in response to Aydin's February 13 request--the Navy provided Aydin with a list of the technical areas in which the samples would be tested and evaluated.

¹The PID set forth express technical requirements and also, by reference, incorporated the technical specifications of military specification MIL-T-28800, "Test Equipment for Use with Electrical and Electronic Equipment"; MIL-T-28800 requires test equipment to meet required performance criteria while being subjected to extreme environmental conditions involving temperature, humidity, shock and vibration.

By letter dated February 27, Aydin again argued that in view of FAR § 14.202-4, the RFP's sample testing requirement was unnecessary; however, by letter dated March 11, Aydin informed the Navy that it would furnish two tester models for sample testing.² In this regard, Aydin advised the Navy that the samples it was furnishing would not be in final form--capable of full technical compliance with the RFP's technical criteria--since the Aydin tester model was still undergoing development to incorporate all of the technical specifications required by this solicitation.

On March 22, Aydin submitted two tester models to the Navy for sample testing. In a letter accompanying the submission, Aydin reiterated that:

"Because of the product improvement schedule, these bid samples will demonstrate each of the functional requirements of the current specifications. However, since it is not yet packaged in its final form, a description of the final product form factor is enclosed with these bid samples."

The Navy proceeded to test Aydin's sample testers for compliance with the RFP's technical criteria--including MIL-T-28800; this testing disclosed numerous defects and discrepancies between the Aydin prototype and the RFP's requirements.

By letter dated May 29--apparently after learning of these test results--Aydin submitted an explanation "to clarify the relationship between our bid samples and the proposed production equipment." In this explanation, Aydin also provided a physical description of how the tester would appear in its final, technically compliant form.

After reviewing this explanation and the sample testing results, the Navy determined that Aydin's proposed final model would require a major redesign in order to comply with the solicitation's purchase description. Accordingly, by letter dated August 28, the Navy notified Aydin that its technical proposal and tester sample had been determined technically unacceptable and, accordingly, rejected Aydin's offer.

In its protest--filed in this Office on September 13--Aydin argues that offered samples should not have been required to be fully compliant with the RFP's technical specifications at the time of their submission since actual contract

²In its March 11 letter, Aydin reiterated its argument that the sample testing requirement was nonetheless improper.

delivery was not required until 240 days after award.³ Aydin also argues that the solicitation's sample testing requirement violated FAR § 14.202-4(b)(1), which provides that "[b]idders shall not be required to furnish bid samples unless there are characteristics of the product that cannot be described adequately in the specification or purchase description."

Relying on this regulation, Aydin maintains that the sample testing requirement was improper since--according to Aydin-- "[all] cited [test] parameters . . . were . . . clearly and obviously stated" in the solicitation. Additionally, Aydin argues that the Navy's use of the term "bid sample" in the solicitation misled Aydin about the use of sample testing in this procurement. Because of this term, Aydin claims it did not realize that all submitted tester models were required to be fully compliant with the solicitation's technical specifications and accordingly Aydin was misled into competing.

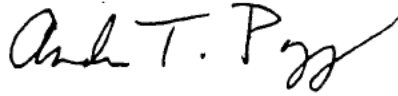
Our Bid Protest Regulations contain strict rules requiring timely submission of protests; these timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Servicio Internacional de Proteccion Baker, S.A., B-241670, Jan. 22, 1991, 91-1 CPD ¶ 64. Under our timeliness rules, protests based on alleged improprieties in a solicitation, such as improper or unrealistic technical requirements, which are apparent prior to the time set for the receipt of initial proposals, must be filed before that time. 4 C.F.R. § 21.2(a)(1) as amended by 56 Fed. Reg. 3,759 (1991); Electronic Sys. USA, Inc., B-241254, Jan. 16, 1991, 91-1 CPD ¶ 43.

Here, as conceded by Aydin, the solicitation's technical requirements--including the sample testing requirement and the use of the term "bid sample"--were clearly set forth for all offerors at section M; to be timely, Aydin should have raised its objections to these criteria and terms prior to the January 25 initial closing date. Section M of the solicitation also clearly placed offerors on notice that all submitted samples must meet the technical requirements set forth in the solicitation's PID; in this regard, offerors were expressly advised that promises of future technical compliance would be considered "insufficient" by the Navy.

³On August 16, the Navy issued amendment No. 0002 which set forth the following delivery date requirement: "for the minimum order all items to be delivered 240 days after date of contract."

Aydin concedes that its samples were technically noncompliant. If Aydin intended to submit an incomplete technical sample and still be considered technically acceptable, it should have protested the relevant provisions of section M prior to the January 25 closing date. See Custom Training Aids, Inc., B-241446.2, Feb. 12, 1991 91-1 CPD ¶ 151.

The protest is dismissed.



Andrew T. Pogany
Acting Assistant General Counsel