



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Environmental Tectonics Corporation

File: B-222568

Date: September 5, 1986

DIGEST

1. Agency's inadvertent omission of language providing that one of four similar items included in a solicitation was to be acquired on a brand name or equal basis did not render the solicitation ambiguous because, when read in its entirety, the solicitation is subject to only one reasonable interpretation, i.e., that the item was also to be acquired on a brand name or equal basis.
2. Protest that specified delivery schedule unduly restricts competition is denied where protester fails to support its allegation.
3. Where an agency demonstrates that a provision requiring delivery within 14 days of contract award is reasonably related to its needs, the fact that only one offeror can satisfy the requirement does not automatically make it unduly restrictive.

DECISION

Environmental Tectonics Corporation protests the allegedly defective terms of invitation for bids (IFB) No. 263-86-B(64)-0075, issued April 30, 1986 by the National Institutes of Health (NIH). The solicitation was for four laboratory sterilizers with accessory racks and shelves. The protester contends that the solicitation was ambiguous as to whether the agency intended to acquire one of the sterilizers on a brand name or equal basis and that inexperienced bidders could not achieve the required delivery schedule, so that it unduly restricted competition.^{1/}

^{1/} Initially, the protester also alleged that the specifications were improperly written around the equipment of the brand name manufacturer. The protester has not pursued this basis of protest, and we consider it abandoned. See The Big Picture Co., Inc. (B-220859.2, Mar. 4, 1986), 86-1 CPD ¶ 218.

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We deny the protest.

The equipment covered by the IFB was to replace existing sterilizers used by the National Institute of Arthritis, Diabetes, and Digestive and Kidney Diseases. The NIH synopsisized the requirement in the Commerce Business Daily (CBD) on April 14, 1986 and issued the IFB on April 30. Due to what NIH describes as the urgency of procurement, it set bid opening for May 15, with delivery required 14 days after award. The IFB specified American Sterilizer Company as the brand name manufacturer for the gravity steam, single-door laboratory sterilizers to be acquired.

As originally issued, the solicitation expressly stated that all but the first sterilizer could be either the American Sterilizer model identified or an equal product having certain salient characteristics. The purchase description for the first sterilizer (identified as model 2021) did not include the "or equal" language.

On May 13, after receiving a copy of Environmental Tectonics' protest, the contracting officer agreed that NIH had inadvertently omitted the "or equal" language for the first sterilizer. To rectify this, on May 14 NIH issued an amendment in which it expressly stated that the item was also to be acquired on a brand name or equal basis. NIH states that it notified all known potential bidders, including the protester, of this change by both telephone and telegram. The amendment did not extend the next-day bid opening.

Two firms, American Sterilizer Company and Vernitron Medical Products, submitted bids; the protester did not. NIH rejected Vernitron, the apparent low bidder, as nonresponsive because it had provided no descriptive literature for the purportedly equal model sterilizer on which it bid. After making a finding in accord with the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(c)(2) (Supp. III 1985), that the user activity would suffer serious injury if contract award were delayed, the agency proceeded with the award to the brand name manufacturer on June 5. The awardee delivered the equipment on June 19.

Environmental Tectonics contends that NIH's failure to state expressly that offerors could furnish either the specified brand sterilizer or an equal for one of the four items rendered this portion of the solicitation ambiguous. As indicated above, NIH acknowledges the omission of the "or equal" language in the original solicitation, but argues that

any ambiguity was removed by the amendment. The protester, however, alleges that it never received the amendment.

Regardless of whether the protester had notice of the change, we find the purchase description, as originally drafted, subject to only one reasonable construction. When read in context with other provisions of the solicitation, rather than in isolation, it was not ambiguous. See Wheeler Brothers, Inc., et al., B-214081.3, Apr. 4, 1985, 85-1 CPD ¶ 388; Roach Manufacturing Corp., B-208574, May 23, 1983, 83-1 CPD § 547. The solicitation set forth the salient characteristics of the model 2021 sterilizer, as well as of the other sterilizers. Such characteristics are only provided for items to be procured on a brand name or equal basis. In addition, the solicitation, at Section M, Evaluation Factors for Award, included the standard clause setting forth the method by which products offered as equals would be evaluated. In view of this, we find that purchase description can only be read as requesting either the brand name product or an equal one.

Environmental Tectonics also contends that the required delivery schedule unduly restricted competition. When a protester makes this allegation and provides some support for it, the procuring agency must establish prima facie support for its contention that the restrictions it imposes are reasonably related to its needs. See Cleaver Brooks, B-213000, June 29, 1984, 84-2, CPD ¶ 1. Once the agency establishes support for the challenged specifications, however, the burden shifts to the protester to show that they are clearly unreasonable. See Information Ventures, Inc., B-221297, Mar. 10, 1986, 86-1 CPD ¶ 234.

In challenging the reasonableness of the delivery requirement, the protester states that the agency required not only that the contractor actually deliver the sterilizers to the user activity but also supervise their installation, testing, and demonstration within 14 days of contract award. This schedule, the protester maintains, would not be reasonably achievable by the brand name manufacturer and would be impossible for an inexperienced bidder, as evidenced by the fact that NIH received only two bids, only one of which was found responsive.

We do not find this argument sufficient to satisfy the protester's initial burden of providing some support for its claim. The protester's concern is that, as an inexperienced bidder, it could not perform certain tasks in addition to actual delivery within the specified time. This concern,

however, stems from the protester's misconstruction of the solicitation. The delivery requirements for this contract were set forth in sections F.1, F.2, and F.3 of the solicitation. These three sections respectively provided the required delivery schedule, specific instructions for delivery of the requested item, and the actual point of delivery. They did not include any of the three tasks referred to by the protester, which were separately set forth in section F.4 of the solicitation. This section neither specifies a time frame within which the tasks must be completed (other than providing that the contractor shall supervise the installation and test and demonstrate the equipment upon completion of installation) nor implies that all tasks must be completed within the 14 days.

We therefore do not agree that the successful bidder would incur a contractual obligation to complete testing and demonstration within the time for delivery.

Even assuming that the protester did in fact provide support for its contention, we find that NIH has presented prima facie support for the delivery requirement which the protester has not refuted. The NIH states that the 170 scientists for whom the sterilizers were to be acquired were relocating to newly renovated facilities in different buildings than they had previously occupied. To be fully operational, these facilities had to include sterilizers, since without them, NIH states, the scientists would be unable to perform their work. The agency determined that its existing sterilizers, which were 30 years old, were inadequate and that the new facilities should contain new equipment. The sterilizers, NIH concludes, were urgently needed so that the move could be made with the least possible disruption. Moreover, NIH states, the sterilizers were off-the-shelf products.

We find this explanation sufficient to establish the reasonableness of the 14-day delivery requirement. As NIH has shown, its needs were satisfied by standard, commercially available sterilizers. Prospective contractors would not have had to design and manufacture a product to comply with the agency's requirements. The awardee only had to deliver the requested item to the activity within 14 days.

The protest is denied.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel