

2. SHAW



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Piezo Crystal Co.

File: B-236160

Date: November 20, 1989

DIGEST

1. Protest allegation that agency failed to synopsise sole-source procurement properly, not filed until after award of the contract, is untimely and therefore not for consideration under the Bid Protest Regulations of the General Accounting Office.
2. Agency decision to award sole-source contract to the only known qualified source is proper where agency does not have the necessary data to conduct a competitive procurement or sufficient time to test an unproven product.
3. Protester has the responsibility of demonstrating that its product is an acceptable alternative to the designated sole-source item, and where agency has reviewed protester's submittal and reasonably concluded that acceptability of the firm's product cannot be determined without testing, agency has fulfilled its obligation to consider protester's proposal and need not conduct discussions with the offeror.
4. Protest of agency's correction of an apparent solicitation ambiguity, after receipt of proposals submitted in response to a sole-source procurement, without issuing an amendment is denied since the protester, which submitted a non-conforming proposal, was not prejudiced by the agency's action.
5. Where protester failed to offer an acceptable product in response to a sole-source procurement, neither the contracting agency's delay, if any, in advising protester of the contract award, nor its decision not to conduct a debriefing, which are procedural matters, affect the propriety of its rejection of the protester's proposal.

DECISION

Piezo Crystal Company protests the award of a sole-source contract to Hewlett-Packard Company (H-P) by the Defense

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Electronics Supply Center (DESC), Defense Logistics Agency (DLA), under request for proposals (RFP) No. DLA900-89-R-A096. The RFP was issued for 900 to 7,200 each crystal controlled oscillators to be supplied in variable quantities, as ordered. The protester contends that the agency violated federal regulations governing sole-source procurements and, otherwise, acted to improperly exclude it from the procurement. It seeks award of the contract on the basis that it offered the lowest price and a product which it contends meets the government's needs.

We deny the protest.

BACKGROUND

A crystal oscillator is a component of an electronic counter (a testing device) used in the calibration of electronic frequencies and circuits of various defense aircraft. Because of the purpose for which it is used, the required crystal oscillator must be capable of maintaining its established frequency with a high degree of accuracy over at least a 24-hour period after calibration. The record indicates that H-P manufactures the electronic counters that have been and are now being used by the user services. Although H-P also manufactures crystal oscillators for use with the electronic counters it manufactures, the government has previously purchased replacement oscillators manufactured by the General Dynamics Corporation (GD) or built to the specifications of GD Drawing No. 6010504, and designated as national stock number (NSN) 5955-00-571-9496 (hereinafter, NSN -9496).

To facilitate the calibration, checking and aligning of more sophisticated aircraft, however, H-P upgraded its electronic counters and manufactured a different oscillator, H-P part number (P/N) 59991A-K74, and designated as NSN 5955-01-289-1212 (hereinafter, NSN -1212) for use with the upgraded electronic counter. The user services subsequently discovered that NSN -9496, built in accordance with GD Drawing No. 6010504, no longer met the frequency stability requirements of the upgraded counters because it failed to retain the established frequency range over the necessary period of time and, consequently, required recalibration approximately every 2 hours. According to the record, the frequency of the new H-P oscillators is almost twice that of NSN -9496. For this reason, the engineering activity determined that NSN -9496, the oscillator built to the GD drawings, was not adequate to meet the calibration requirements of the testing equipment. Because H-P has not released the technical data by which potential alternates to its new oscillator could be evaluated, the engineering

activity also determined that H-P is the only approved source capable of providing the required oscillators and accordingly notified DESC, which has the supply management responsibility for purchasing the part.

In March 1989, a proposed procurement was synopsisized in the Commerce Business Daily (CBD) for the supply of crystal oscillators, NSN -1212. The RFP for this procurement was issued for the H-P oscillator "[in accordance with General Dynamics] Drawing NR....6010504...."

Piezo and H-P submitted proposals in response to the RFP. Piezo proposed, as the "exact product" required by the RFP, P/N 2310007-11, which it manufactures in accordance with the GD drawing, at a price of \$473.70 per unit for 1,800 units (the quantity upon which cost and pricing data was to be based and for which the contract was ultimately awarded). H-P proposed its P/N 59991A-K7 (NSN -1212) at a price of \$786.75 per unit for 1,800 units.

Shortly after the closing date for the receipt of proposals, the contracting office requested the Engineering Support Activity (ESA) to evaluate as an "alternate item" the oscillator which Piezo proposed. When, after approximately 2 weeks, Piezo learned that its proposed oscillator was being evaluated as an alternate item, it informed the agency, by letter dated May 17, that the oscillator it proposed was not offered as an alternate item, but as the exact item called for by the solicitation, since the item does not deviate from the GD drawing. There is no indication of record that the agency responded to this letter.

On May 30, the ESA's rejection of the oscillator Piezo proposed was forwarded to the contracting office and, in response to the protester's telephone inquiry on the same day, was communicated to Piezo's representative. When Piezo's representative next inquired on June 7 concerning the status of the procurement, a contracting official informed him that "the [procurement] file contained a [justification and authorization for other than full and open competition]." The protester states that the contracting official made reference at that time to "a possible sole source award."

The protester then, by letter dated June 7, expressed disagreement with the agency's actions in "needlessly making the [s]ubject RFP a sole source procurement." Piezo suggested in that letter that the agency fulfill its "critical" need for 1,800 units by making a "split award" to it and to H-P, and further requested that the agency purchase no more units through this procurement than were

critically needed, and reserve the balance of its stock requirement for competitive procurement at a later date.

The agency did not respond to Piezo until, by letter dated July 5 (received by the protester on July 10), it informed the protester that its offer was rejected and award was made to H-P,^{1/} whose oscillator was specified in the RFP. Citing 10 U.S.C. § 2304(c)(1) as authority for the restricted competition, the agency stated further that the acquisition was conducted by other than full and open competition because of equipment modifications that require the unique features of H-P's oscillator. Following its receipt of the notice of award, Piezo filed this protest, essentially contesting the award of the contract on a sole-source basis.

THE PROTEST

The protester objects to the sole-source award of the contract on the basis that the agency did not properly synopsise the procurement as a sole-source requirement, failed to demonstrate that the product was available from only one source, and did not develop specifications for the oscillator so as to foster competition on the basis of performance requirements. The protester also contends that the "scope and terms" of the RFP exceed the agency's minimum needs.

Piezo maintains that the synopsis did not identify the intended source and state the reason justifying the use of other than competitive procedures, as required by the applicable statutes and implementing regulations. The protester further maintains that the synopsis was improper and misleading because it contained a reference to standard note 26, and not to standard note 22 which is to be included if a sole-source procurement is proposed.^{2/}

^{1/} The record indicates that award was made on June 29.

^{2/} Standard note 26 states:

"Complete data not available. Available specifications, plans or drawings relating to the procurement described do not fully provide all necessary manufacturing and construction detail."

Standard note 22 advises that the government intends to negotiate with only one source; provides interested parties
(continued...)

The agency maintains that the synopsis of the procurement substantially complied with all applicable legal requirements, with the exception that it did not state the reason justifying the use of other than full and open competition procedures, but that the purpose of publicizing proposed sole-source procurements (including the justification for using other than competitive procedures) were fully met since Piezo had an opportunity to submit a proposal showing that its product would meet the agency's needs.

The agency also acknowledges that the synopsis did not "explicitly" inform potential offerors that it proposed to make an award based on the H-P oscillator, but maintains that the protester "had clear notice" from the solicitation, in conjunction with the synopsis, that the requirement was for the H-P oscillator. Concerning its inclusion in the synopsis of note 26 as opposed to note 22, the agency states that Piezo's objection is academic because Piezo was given the same benefit--consideration of its proposal--that it would have been entitled to by the inclusion of note 22.

The procurement synopsis stated:

OSCILLATOR CRYSTAL CONTROL, Sol DLA900-89-R-A096. Due abt 12 Apr 89....[NSN] 5955-01-289-1212 Del 90 days. Calling state name addr and sol nr. See Note 26. All resp sources submit offers which DESC shall consider...."

In Section B-1 (Schedule of supplies and services) the solicitation listed the requirement as:

"NSN 5955-01-289-1212 Oscillator, Crystal Controlled (28480) Hewlett-Packard P/N 5991A-K74 I/A/W Drawing NR. 12436 6010504

* * *

"Type Number 6010504-002."

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with a 45-day period in which to identify their interest and capability to respond to the requirement or to submit proposals; and states that based on the information received, the government will determine whether to conduct a competitive procurement.

The synopsis did not specifically call out H-P as the intended source; it did, however, cite the NSN -1212 designation which, according to the record, was established for the H-P oscillator in late 1988. The synopsis also advised potential offerors of the opportunity to compete in the procurement.

Initially, we note that when the protester requested and received a copy of the solicitation, it knew or should have known that either the agency specifically sought the H-P oscillator or that the item description in Section B-1 of the RFP was ambiguous on its face, because it called for the H-P product by its brand name and exclusive product number (as well as by its NSN which, as previously stated, also appeared in the synopsis), built "in accordance with" the GD drawings. This is an apparent inconsistency because the H-P oscillator is not built in conformance with the GD drawings, as are those oscillators which have recently failed to meet the government's needs, and since the drawings for the specified H-P oscillator are held by the manufacturer as proprietary information. In addition, as we noted above, the CBD synopsis advised that the "available . . . drawings . . . do not fully provide all necessary manufacturing and construction detail." Since Piezo could not provide the H-P oscillator, it reasonably should have requested clarification as to what the agency, in fact, solicited, in light of this obvious ambiguity. In our view, it was not reasonable for the protester to assume, without more information, that P/N 281007-11 which it proposed was, as it stated, the "exact product" called for by the solicitation.

Despite the ambiguity inherent in the solicitation requirement as stated in Section B-1 and even though the synopsis did not explicitly so state, Piezo knew or should have known, based on the information provided by the solicitation when read as a whole, that the agency intended to purchase the H-P oscillator, and that the oscillator it proposed was not the exact item required by the RFP. The solicitation explicitly states that it is to be read in conjunction with the 1986 DESC master solicitation, and that it incorporates the full text of the referenced paragraphs of that master solicitation. Clause H-2 of the solicitation requires that the offer specify whether it is offering the exact product or an alternate to that required by the solicitation. Clause H-2 of the master solicitation states:

"The product described by the manufacturer's name and part number in Section B of this solicitation [which includes the schedule of supplies/services] is that product which the Government has determined to be acceptable. . . . Exact product means the identical

product cited in Section B manufactured by the manufacturer cited in Section B or manufactured by a firm who manufactures the product for the manufacturer cited in Section B. Any product not meeting this criteria is considered an alternate product . . . any product offered must be either identical to or physically, mechanically, electrically and functionally interchangeable with the product cited in Section B." (Underscores in original; other emphasis added.)

This clause makes it clear that the H-P crystal oscillator, P/N 59991A-K74 (the product described by the manufacturer's name and part number in Section B of the solicitation), is the exact product which the solicitation calls for and which the agency had determined to be acceptable. Further, even though the schedule of supplies as set forth in Section B-1 is, standing alone, ambiguous as stated because it references the GD drawings, Clause H-2 makes it clear that anything other than the H-P oscillator P/N 59991A-K74 is an alternate product, concerning which the solicitation requires the offeror to provide information sufficient for the agency to determine whether the product is acceptable. Piezo therefore should have known from a reading of the solicitation (and, therefore, prior to the closing date for the receipt of proposals) that the RFP specifically called for the H-P oscillator.

If Piezo believed that its oscillator, P/N 281007-11 would meet the government's needs, it should have protested the synopsis, as well as the sole-source procurement, before the closing date when it responded to that solicitation. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1989). Thus, we conclude that Piezo's protest of the inadequacies of the synopsis, including the citation of note 26 instead of note 22, filed after award of the contract, is untimely.

By the same rationale, Piezo's allegations that the agency failed to demonstrate that the product it required was available from only one source and to promote competition by developing performance specifications for its oscillator requirement are also untimely, since the protester knew or should have known prior to the closing date that the procurement was being conducted on a restricted basis. We note, however, that the agency properly executed a justification for the sole-source procurement. Further, the agency has explained that the technical information which supports the required H-P oscillator, and which the government needs for the development of performance specifications, is not available to the government because that information is held as proprietary data by H-P, the product manufacturer. In our view the agency reasonably

concluded that only one source was available and has provided adequate justification for conducting the procurement on a sole source basis. See Mine Safety Appliances Co., B-233052, Feb. 8, 1989, 89-1 CPD ¶ 127.

Similarly, Piezo's objection to the "scope and terms" of the solicitation is also untimely. The protester challenges the agency's determination that it needs to purchase a quantity of 1,800 oscillators under the subject procurement, stating that this quantity (which Piezo says represents "the total of all purchase requests currently on file") is "overbroad." Piezo expresses the view that the agency only needs to purchase on a sole-source basis the number of units that might be delivered during the compatibility testing of its oscillator.

Although the RFP requested prices for 5 different quantities of the units, 900 to 1,799 units is the minimum quantity for which pricing information was requested, and Section B-1 of the solicitation states that cost and pricing data should be based on 1,800 units. Since the scope of the procurement was apparent from the solicitation but Piezo's protest was not filed until after award, this protest basis also is not for consideration. 4 C.F.R. § 21.2(a)(2).

The protester next asserts that the agency ignored the possibility that Piezo could demonstrate the compatibility of its product and failed to consider its proposal. This assertion is based on the agency's statement in the administrative report that it did not have "the necessary data" to conduct compatibility testing on the oscillator Piezo proposed.

This argument does not take into account certain information and instructions in the solicitation. The protester was on notice that the agency did not have complete data (specifications, plans or drawings) that would provide the necessary production details for the evaluation of the acceptability of products other than that specified in the solicitation (Section H-2, paragraph C of the master solicitation and note 26 in the synopsis). Section H of the solicitation also advised Piezo that unless it offered the exact item called for, it must, itself, provide with its offer sufficient data covering the design, materials, performance, interchangeability, testing criteria, etc., of both the product it offered and the product called out by the solicitation. This information is the "necessary data" which the agency states it did not and does not have to test

Piezo's oscillator, and Piezo has not asserted that it provided all of this data as required, or that it established the compatibility of its product with the specified product.

The record states, however, that the contracting entity did forward the information Piezo submitted concerning its product to the engineering support staff, which determined, based on the information available to it, that Piezo's product would not meet the agency's requirement. The agency explains that the only other method by which it can evaluate Piezo's product for compatibility is through actual testing, which, because of the urgent need for the requirement, time will not permit under this procurement. Furthermore, paragraph F of Section H-2 in the master solicitation states that consideration of an alternate product may be precluded by the offeror's failure to provide information to establish the acceptability of the product offered, and if the government cannot determine whether the product is acceptable prior to the expected award date, the alternate product proposed may be considered technically unacceptable for award under the subject solicitation.

We have recognized that a proper basis for a sole-source award exists where adequate data is not available to the agency to conduct a competitive procurement within the time available, and we will object to such an award only where the agency's action is shown to have no reasonable basis. Aerospace Eng'g and Support, Inc., B-222834, July 7, 1986, 86-2 CPD ¶ 38. In light of the circumstances present here, we find that absent additional informational and testing resources which the agency has stated are necessary for the evaluation of an alternate product, the protester's proposal received consideration consistent with the government's expressed capabilities. Since the protester's disagreement is insufficient to establish that the agency's determination was unreasonable, we conclude that the protester has not met its burden of proof on this protest basis.

The protester further alleges that the agency did not give it a "meaningful opportunity to discuss all relevant aspects of its proposal." The protester states that if the agency had any questions about its capabilities to provide conforming oscillators, it should have requested specific technical information and afforded Piezo an opportunity to discuss, explain and revise or modify its proposal and show how it would meet the RFP specifications.

We do not think that under the circumstances here the agency was obligated to conduct discussions in order to fairly consider the protester's proposal. A potential offeror has

the responsibility to demonstrate that its product is an acceptable alternate to the designated sole-source item. Cytec Corp., B-231786, Sept. 28, 1988, 88-2 CPD ¶ 294. The record shows that the agency properly evaluated all the information submitted by the protester and concluded that the protester's product was not acceptable. The agency states that this determination was not dependent on information which could have been provided by the protester but on a lack of data which needs to be obtained through compatibility testing.

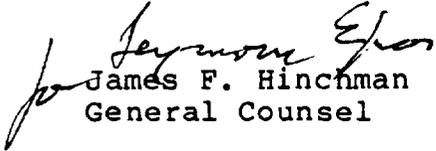
Piezo also objects to the agency's deletion of the references in Section B-1 of the RFP (Schedule of supplies) to the GD drawings, a change made pursuant to an "exception to the solicitation" taken by H-P after the closing date. Piezo contends that because the agency did not make this change by an amendment to the RFP and allow Piezo to respond to the "changed requirements," the deletion constituted an impermissible material change to the solicitation, as a result of which it was deprived of the opportunity to compete on an equal basis.

Although Piezo contends that the deletion of the reference to the GD drawings from the RFP eliminated the specifications upon which Piezo had relied in submitting its proposal, the change actually eliminated the ambiguity in the RFP's listing of the requirement, since as previously stated, the reference to the GD drawings was totally inconsistent with the requirement of the H-P oscillator. The protester's objection constitutes a tacit admission of the noncompliance of its proposal, because therein Piezo admits that it relied upon the obviously incorrect reference to the GD drawings, and not the named manufacturer and part number which, according to Clause H-2 of the RFP, is the item the agency determined to be acceptable. Since Piezo's proposal was unacceptable as submitted and the protester does not indicate that it would have offered some other conforming oscillator had the correction or "change" been made by an amendment to the RFP, the protester was not prejudiced by the deletion of the reference to the GD drawings. Astro-Med, Inc.--Request for Reconsideration, B-232131.2, Dec. 1, 1988, 88-2 CPD ¶ 545, at 2. The protest is denied on this basis.

Finally, the protester alleges that the DLA deprived it of its remedies under the Competition in Contracting Act of 1984, as implemented by 4 C.F.R. § 21.4, by failing to provide it with notice of the contract award within 10 calendar days of when it was made. In addition, the protester objects to the agency's denial of its request for a debriefing. To the extent that there was a delay in

notifying the protester of the award, the propriety of the agency's rejection of Piezo's proposal is not affected by any such delay or by the agency's declination to provide the protester a debriefing. COHU, Inc., B-233172, Feb. 3, 1989, 89-1 CPD ¶ 114; Senior Communications Servs., B-233173, Jan. 13, 1989, 89-1 CPD ¶ 37.

The protest is denied.


James F. Hinchman
General Counsel