

Pietrovito



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Abbott GmbH Diagnostika

File: B-241513; B-241513.2

Date: February 7, 1991

Timothy Sullivan, Esq., and Katherine S. Nucci, Esq., Dykema Gossett, for the protester.

Allen Samelson, Esq., Rogers, Joseph, O'Donnell & Quinn, for Syva Diagnostica, an interested party.

Herbert F. Kelley, Esq., and Capt. Sophia L. Rafatjah, Department of the Army, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging noncompliance of brand name product with specification requirements in a negotiated brand name or equal procurement need not be filed by the closing date for receipt of proposals; it may be timely filed within 10 working days of the date on which the protester learned of the procuring agency's determination that the brand name product was compliant with the specifications. Since an agency may properly specify specifications that go beyond those of the designated brand name and may reject the offer of a brand name product that does not comply, the protester need not file a "defensive" protest but properly may await an agency determination that is adverse to the protester's interest.

2. Protest alleging noncompliance of brand name product with certain solicitation specifications is denied where the record demonstrates compliance with each specification requirement.

DECISION

Abbott GmbH Diagnostika protests the award of a contract to Syva Diagnostica under request for proposals (RFP) No. DAJA37-90-R-0268, issued by the U.S. Army Contracting Command, Europe, for the rental of urinalysis machines for drug testing and the purchase of related chemical reagents and other consumables necessary for the operation of the machines. Abbott contends that the awardee's brand name equipment does not comply with the RFP's specifications.

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We deny the protests.

The RFP, issued on a brand name or equal basis, contemplated the award of a fixed-price contract for the rental of urinalysis machines and the purchase of related chemical reagents and other consumables. In pertinent part, the RFP provided that the agency sought an Abbott TDX, Syva ETS or equal equipment, and listed general performance and function specifications for the urinalysis machines. Offerors were informed that award would be made, on an all or none basis, to the firm offering the lowest priced, technically acceptable proposal.

The RFP did not contain technical criteria for the comparative evaluation of technical proposals or contemplate the submission of technical proposals. Rather, the RFP provided that firms offering "brand name" products should submit their prices on the Standard Form (SF) 33, "Solicitation, Offer and Award." Only firms offering "equal" products were requested to submit descriptive data, with the SF 33, to demonstrate their compliance with the stated salient characteristics. The RFP also informed "equal" product offerors that the government might require samples of the equal product for evaluation purposes.

The Army received three offers in response to the RFP, including Syva's and Abbott's brand name offers, and determined that Syva was the lowest priced offeror. Since Syva offered a brand name, the Army conducted no technical evaluation of Syva's offer. Award was made to Syva on September 28, 1990. Abbott protested the award to our Office on October 5 contending that Syva's brand name product did not meet various specifications. Abbott supplemented its protest on November 1, alleging Syva's noncompliance with two other specifications.^{1/}

Initially, the Army and Syva argue that Abbott's post-award protests, alleging the noncompliance of Syva's brand name product with certain RFP specifications concern alleged apparent solicitation improprieties and were untimely filed

^{1/} Abbott in its supplemental protest also withdrew allegations concerning the compliance of Syva's brand name equipment with three other specifications.

after the closing date for receipt of proposals. The agency and awardee also argue that, even assuming Abbott's first protest was timely filed, the second protest, which was filed more than 10 working days after Abbott learned of the award to Syva, is untimely.

The protester argues, citing Lanier Bus. Prods., Inc., B-220610, Jan. 30, 1986, 86-1 CPD ¶ 110, that it was not required to protest Syva's noncompliance with the specifications until the agency had taken action adverse to the protester's interest, and that therefore it could wait to protest until the agency had evaluated offers and made award to Syva.^{2/} In this regard, Abbott argues that it need not file a "defensive" protest where an agency has not made a final evaluation determination, since a protester may presume that the agency will act properly.

We agree with Abbott that its protests are timely. A protester need not protest until it has knowledge that the agency is intending action that it believes to be incorrect or inimical to its interests. See Dock Express Contractors, Inc., B-227865.3, Jan. 13, 1988, 88-1 CPD ¶ 23. Since an agency, in a brand name or equal procurement, may use specifications that go beyond those of the designated product and may properly reject the offer of a brand name product that does not show conformance with or takes exception to the listed specifications, see Potomac Indus. Trucks, Inc., B-203119, Feb. 3, 1982, 82-1 CPD ¶ 78, and General Hydraulics Corp., B-181537, Aug. 30, 1974, 74-2 CPD ¶ 133, the protester properly could wait to protest until the agency had

^{2/} In Lanier Bus. Prods., we found timely a post-award protest concerning the noncompliance of the awardee's brand name equipment with the stated salient characteristics, where we concluded that grounds for protest had not arisen until the agency determined from its technical review of the offerors' equipment that the awardee's equipment met the salient characteristics. This case is different from Amedco Health Care, Inc., B-215122, Dec. 3, 1984, 84-2 CPD ¶ 599, cited by the agency and Syva, where we dismissed as untimely the protester's allegation, filed more than 5 months after award, that the awardee's brand name product was nonresponsive to the salient characteristics listed in the invitation for bids.

determined whether Syva's brand name offer was compliant with the RFP specifications.^{3/} Lanier Bus. Prods., Inc., B-220610, supra.

We also find timely Abbott's second protest. Abbott states that it did not learn the basis of its allegations in the second protest, concerning the two additional specifications, until it had obtained a copy of the operator's manual and system guide for Syva's ETS equipment. Abbott began actively attempting to obtain the manual immediately after learning of the award to Syva and filed its second protest within 10 working days of the date it obtained the manual.^{4/} The record indicates that the manual is not readily available to the public.^{5/} We find that the protester diligently pursued the information that formed the basis of its second protest, such that its protest, which was filed within 10 working days of receipt of this information, was timely filed. See AMP, Inc., B-239287, Aug. 16, 1990, 90-2 CPD ¶ 131.

Abbott protests that Syva's brand name equipment does not comply with certain RFP specifications. Specifically, Abbott asserts that Syva's equipment does not satisfy the RFP requirements concerning: (1) the number of modes of operation; (2) recording of semi-quantitative and qualitative results; (3) recording of date/time, reporting units, and reagent lot numbers; (4) storage of specified data in permanent nonvolatile memory; and (5) the examination of buffer quantity prior to the performance of tests. The Army states that the RFP specifications were drafted so that either

^{3/} The Army states that it did not specify characteristics that go beyond those of the designated brand names and that therefore it did not seek a modified brand name product. There is nothing in the record, however, that would have indicated to Abbott that this was the case.

^{4/} Abbott cannot pinpoint the exact date on which it received the manual but states that it received the manual during the week of October 22. Even assuming that Abbott received the manual on October 22, its protest of November 1 was filed within 10 working days of receipt. In this regard, it is our practice to resolve doubts about timeliness in favor of the protester. See Engineered Air Sys., Inc., 69 Comp. Gen. 172 (1990), 90-1 CPD ¶ 75. As there is no evidence in the record to contradict Abbott's statement that it filed its second protest within 10 working days of receiving the manual, we accept Abbott's statement as true.

^{5/} Syva considers its operator's manual to be confidential and proprietary and states that distribution of the manual is limited to Syva's customers.

of the brand name products would be compliant and that prior to issuing the RFP it ensured that both of the brand name products satisfied the RFP specifications.^{6/}

Absent some indication that the brand name products did not meet the specification requirements, the agency could reasonably accept Syva's brand name offer and make award without further investigation. See CNC Co., B-239328, July 30, 1990, 90-2 CPD ¶ 86; Mid-Florida Corp., B-228372, Jan. 22, 1988, 88-1 CPD ¶ 60. Only when this protest was filed, specifically alleging Syva's brand name product failed to comply with the listed specification requirements, did any duty in the agency arise to assure Syva's product was acceptable. See Lanier Bus. Prods., Inc., B-220610, *supra*. In this case, the agency reasonably found Syva's equipment complied with the specification requirements.

An item-by-item analysis of each of these specifications follows:^{7/}

MODES OF OPERATION

Paragraph C-2(b)(1) of the specifications provides:

"The instrument shall have three modes of operation; Panel, combination and batch. All three modes of operation must be accomplished by the same three step operation."

According to Abbott, Syva's equipment requires more than a three step operation to accomplish the three modes of operation.^{8/} The Army and Syva contend that each of Syva's modes of operation is accomplished by the same three step operation: (1) load samples; (2) select mode; and (3) press run. The Army states that the specification only provides that the required three modes of operation be accomplished by a three-step operation, and that this three-step operation does not include such preparatory steps as daily installation and set-up that are required by any drug testing device,

^{6/} Syva is the incumbent contractor.

^{7/} Our discussion of the operation and design of Syva's equipment is necessarily general due to the proprietary and confidential nature of this information.

^{8/} "Batch" mode is used when all samples are tested for the same single drug; "panel" mode is used when all samples are to be tested for the same group of drugs; and "combination" mode is used when each sample is tested for different drugs.

including Abbott's. We agree that this is a reasonable interpretation of this specification.

While it is true that Syva's operator manual under "operating procedures" contains numerous steps to "operate" the system, this section of the manual contains every step required from initial set-up to system shut-down. When reviewing only those steps necessary to accomplish the required three modes of operation, the manual shows that Syva's equipment does not require more than a three-step operation. Moreover, during the protest conference both Syva and Abbott explained the operation of their respective brand name systems, and Abbott's equipment appears to satisfy this requirement in basically the same fashion as Syva's equipment.

SEMI-QUANTITATIVE AND QUALITATIVE RESULTS

Paragraph C-2(b) (7) of the specifications provides:

"The instrument shall be capable of printing copies, results in final units, of reprinting data from the last run, and do so in semi-quantitative and qualitative results or values."

Abbott contends that Syva's equipment does not provide semi-quantitative results or values.^{9/} Syva has provided to us a copy of a test result print-out from its urinalysis machine; this print-out shows both qualitative and semi-quantitative results in final units. Accordingly, we find this contention to be without merit.

DATE/TIME, REPORTING UNITS, AND REAGENT LOT NUMBERS

Paragraph C-2(b) (8) of the specifications provides:

"The instrument shall record and print the date and time of the last calibration run and quality control runs as well as the date, time, type of run, and reagent load list of each run. The reagent load list shall include the following: assay name; reporting units; reagent lot number; and the date and time of calibration."

^{9/} "Qualitative" results indicate whether a test is positive or negative. A "quantitative" result indicates a numerical measure of "positivity" or "negativity," or in other words how far above or below the cut-off calibrator the test result is. A "semi-quantitative" result provides a numerical measure, which is less precise than "quantitative" results.

According to Abbott, Syva's equipment does not print out the date and time of calibration, the reporting units, or the reagent lot numbers, and the information that is printed is done so in a piecemeal fashion. Syva, however, has provided to us copies of test result print-outs that show each of these required items. Syva's operator's manual, under "Print Functions," also provides other sample print-outs that demonstrate compliance with these requirements. In this regard, contrary to Abbott's arguments, the RFP does not require that all of the required data be printed on a single print-out. Thus, this contention is without merit.

PERMANENT NONVOLATILE MEMORY

Paragraph C-2(b) (10) of the specifications provides:

"All assay parameters, calibration curves, quality control results, date, time and instrument parameters shall be stored in a permanent nonvolatile memory."

Abbott contends that Syva's machine does not provide for the storage of the required data in a permanent nonvolatile memory but that this data is lost when Syva's equipment is turned off.^{10/} Syva has provided us with documentation from its service manual for the Syva ETS that demonstrates that all user-generated data is stored on nonvolatile memory.

BUFFER QUANTITY

Paragraph C-2(b) (13) of the specifications provides:

"The instrument shall check buffer quantity to ensure there is sufficient buffer to perform the tests."

Abbott contends that Syva's machine does not check the sufficiency of the buffer quantity prior to performing tests, and that by not detecting the sufficiency of buffer the instrument will allow testing to proceed even though the amount of buffer is insufficient.^{11/} Syva demonstrated its systems' buffer checking capability at the bid protest conference and has also provided us with documentation from its service manual that shows that Syva's equipment checks the

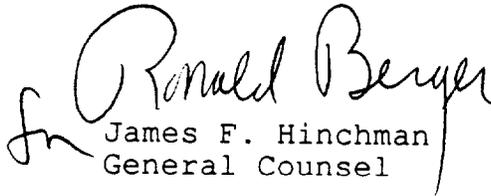
^{10/} Webster's New World Dictionary of Computer Terms (3rd ed. 1988) defines "nonvolatile storage" as "[a] storage medium that retains its data in the absence of power, such as ROM [read only memory]."

^{11/} "Buffer" is the chemical medium used in the test cuvette.

sufficiency of the buffer prior to each test. If the buffer is insufficient, the test does not begin, and the system operator is alerted. Thus, we find that Syva's machine complies with this specification requirement.

Since, as noted above, Syva's brand name machine complies with each of the specification requirements identified by the protester, we find that award was properly made to Syva on the basis of its low priced, technically acceptable offer.

The protests are denied.


James F. Hinchman
General Counsel