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

30936

B-177423

May 18, 1973

Cole and Groner
1730 K Street, NW.
Washington, D.C. 20006

Attention: Alan Y. Cole, Esquire
William A. Kahn, Esquire

Gentlemen:

This refers to your letter of April 2, 1973, and prior correspondence, on behalf of Weinschel Engineering Co., Inc. (Weinschel), protesting award of a contract to any bidder other than Weinschel under invitation for bids (IFB) F41608-73-B-0037, dated July 18, 1972, issued by Kelly Air Force Base, Texas. The solicitation is for a peak power calibration system and is the second step of a two-step formally advertised procurement, which was initiated by the issuance of the first-step letter request for technical proposals (LRTP) F41608-72-R-G246 on August 10, 1971. The protest is directed at the conduct of both the first and second steps of the procurement. Since the issues concerning each step of the procurement are largely unrelated, we shall consider your step-one arguments independently of the step-two grounds.

Step-One

The main thrust of your argument concerning the step-one proceedings is that Applied Microwave Laboratory (AML), the ultimate low bidder, was unfairly granted additional time to qualify its initially unacceptable proposal. You contend that the Air Force's determination that AML's proposal was unacceptable should have precluded any further discussion between AML and the Air Force, and that, therefore, AML should not have been permitted to participate in step-two.

You state in your letter of November 16, 1972, that Weinschel first became aware of the alleged improprieties in the conduct of step one upon inspection of the IFB, which was issued on July 18, 1972. By letter dated July 28, 1972, Weinschel protested to the contracting officer and requested that AML be disqualified from further competition. During consideration of the protest, the bid opening date was suspended indefinitely. Weinschel's protest was denied in a letter of September 27, 1972, from Philip N. Whittaker, Assistant Secretary of the Air Force. The grounds for the denial of the protest were detailed in a letter dated September 29, 1972, from

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Colonel Thomas Keheley, Chief, Contract Management Division, Headquarters, Department of the Air Force. By amendment dated October 4, 1972, bid opening was set for November 6, 1972.

Thereafter, Weinschel proceeded to contact various Air Force personnel in an attempt to have step two postponed to permit a reconsideration of its protest. Weinschel was advised on November 2, 1972, that the bid opening, scheduled for November 6, would take place as planned and that the Air Force would not reconsider its denial of Weinschel's protest. By telegram dated November 9, 1972 (received November 10, 1972), Weinschel protested to this Office.

The time for filing a protest with this Office is set forth in our "Interim Bid Protest Procedures and Standards", 4 CFR 20. Section 20.2 provides in pertinent part that:

> (a) Protestors are urged to seek resolution of their complaints initially with the contracting agency. * * * If a protest has been filed initially with the contracting agency, any subsequent protest to the General Accounting Office filed within 5 days of notification of adverse agency action will be considered provided the initial protest to the agency was timely filed. * * *
>
> (b) The Comptroller General, for good cause shown, or where he determines that a protest raises issues significant to procurement practices or procedures, may consider any protest which is not filed timely.

In 52 Comp. Gen. 20, 22-23 (1972), we stated that:

> Our bid protest regulations * * * provide that following "adverse agency action" upon a protest, the protestor seeking a decision of our Office must file his protest in a timely manner. * * *
>
> * * * We realize that a protestor may consider an agency's initial adverse action to be ill-founded or inadequately explained, leading the protestor to engage in further correspondence with the agency. * * * it then becomes difficult to identify the "final" adverse agency action. For this reason, we regard it as obligatory upon a protestor to file his protest with our Office within 5 days of notification of initial adverse agency action, if it is to be considered timely.

Weinschel was initially notified of adverse agency action by letter of September 27, 1972, from Assistant Secretary Whittaker, and notified by amendment dated October 4, 1972, that bids would be opened on November 6, 1972. Since its protest was not filed in this Office until November 10, 1972, it is clear that such protest was untimely.

Moreover, we do not agree with your contention that 4 CFR 20.2(b), which permits the Comptroller General to consider untimely protests, is for application here. An untimely protest may be considered for "good cause" or where the Comptroller General "determines that a protest raises issues significant to procurement practices or procedures." "'Good cause' * * * generally refers to some compelling reason, beyond the protestor's control, which has prevented him from filing a timely protest." 52 Comp. Gen. 20, 23, supra. We are not aware of any compelling reason which prevented Weinschel from filing its protest with this Office within the required period. Nor do we think the other exception is pertinent. As we stated in the above cited case, "'Issues significant to procurement practices or procedures' refers * * * to the presence of a principle of widespread interest." We do not think that the issues presented in your step-one protest fall within this category. Accordingly, that portion of the protest dealing with step one is dismissed as untimely.

Step Two

In regard to step two of the procurement, you make four arguments which you contend require the rejection of AML's bid.

First, you contend that the low bid under step two was submitted not by AML but by EPSCO, Inc., and since EPSCO, Inc., was not a participant in step one, the Air Force should not have accepted its bid. You note that on page 1 of EPSCO's bid under item 17, "OFFEROR NAME & ADDRESS," the following is listed:

EPSCO, Inc.
Applied Microwave Division
411 Providence Highway
Westwood, Massachusetts 02090

You also point out that on page II-1, of the bid where bidders were asked to acknowledge that the bid was in accordance with the accepted first-step technical proposal, the name "Applied Microwave Laboratory" appears. Finally, you note that the cover letter transmitting the bid was signed "Applied Microwave, a Division of EPSCO, Inc."

You also contend that AML has not complied with section 26, part 4 of ASPR, which contains special provisions relevant to novation agreements and changes of name agreements. However, ASPR 26-4 is not applicable here because it applies only where there is already a contract in existence.

You also cite 43 Comp. Gen. 353, 372 (1963), for the proposition "that transfer or assignment of rights and obligations arising out of proposals is to be avoided, as a matter of public policy, as well as sound procurement policy, unless the transfer is effected by operation of law to a legal entity which is the complete successor-in-interest to the original offeror." We do not think, however, that this principle is applicable. Counsel for AML states that AML formally became a division of EPSCO on October 3, 1971, and has remained a division of EPSCO throughout the procurement. Since step-one proposals were not submitted until November 12, 1971, we do not perceive how there could be any "transfer of rights and obligations arising out of proposals" involved in the instant case.

Finally, as the contracting officer points out, "* * * the title page of the original step one technical proposal submitted by Applied Microwave Laboratory (AML) contains the following, 'Prepared by AML Division of EPSCO, Inc.' It is clear that the technical proposal and the bid were submitted by the same firm." We concur in the conclusion of the contracting officer that AML and EPSCO are one and the same firm for the purpose of determining the eligibility of the AML-EPSCO bid. Your protest on this ground, therefore, is denied.

You next contend that AML is not entitled to award because it failed to acknowledge, as required by the IFB, that its bid was in accordance with the technical proposal found acceptable by the Air Force. Page II-1 of the IFB states that bids "will be accepted and considered only from those firms who have submitted acceptable Technical Proposals pursuant to Letter Request for Technical Proposals F41608-72-R-G246 issued 71 Aug 10 and Amendments 0001 thru 0005 thereto." The acceptable proposals are then listed as follows:

a. Applied Microwave Laboratory proposal Q-355, dated 71 Nov. 12, as clarified by letter dated 72 Feb 15, and Addendum 1, dated 72 Jun 02, with the remote sensing head housed in a temperature control oven as proposed in Addendum 1.

b. Weinschel Engineering Co., Inc. proposal 9-174, dated 71 Oct 28, as clarified by letters dated 72 Feb 15 and 72 Mar 17.

Finally, the solicitation requires that:

> The bidder will acknowledge in the space provided that his bid is in accordance with his Technical Proposal as submitted.

Beneath this sentence, a space was provided for the bidder to complete the required acknowledgment. AML filled in the blanks in the following manner:

Applied Microwave Laboratory	0355 dated 71 Nov. 12
(FIRM)	(TECHNICAL PROPOSAL NO. & DATE)

It is your position that AML's bid should have been rejected because AML merely listed the technical proposal and date without specifically stating that its bid was in accordance with that technical proposal. You also argue that AML's attempted acknowledgment was ineffective because AML included in the appropriate space only the technical proposal number and date, but omitted the clarifying letter of February 15, 1972, and Addendum 1 dated June 2, 1972. Consequently, you contend that the Air Force could not legally require AML to supply a product in accordance with these subsequent clarifications.

We disagree with these contentions. First of all, we think it would be unreasonable to expect a bidder to conclude that, in the limited space provided, it was required to recite that its bid was in accordance with its technical proposal. The more reasonable conclusion, we think, was the one adopted by AML—simply listing the firm name and technical proposal number and date in the appropriate blanks. This is sufficient to satisfy the requirement for an acknowledgment. Nor do we think that AML was obligated to list its clarifying letter of February 15, 1972, and Addendum 1, dated June 2, 1972. The space in question requires the bidder to fill in the "Technical Proposal No. & Date." It makes no mention of any supplemental material. We think it was clearly the intent of AML to commit itself to perform in accordance with its acceptable amended proposal, as listed on page II-1 of the IFB. Weinschel's protest based on this allegation is, therefore, denied.

You also contend that AML's bid should be declared nonresponsive because of a failure to acknowledge an amendment having a significant impact on price, delivery or quality, citing 42 Comp. Gen. 491, 493 (1963). The instant IFB required bidders to acknowledge receipt of all amendments. AML correctly acknowledged receipt of Amendments 0002 and 0003. Instead of acknowledging receipt of Amendment 0001 to the IFB, however, AML acknowledged Amendment 0001 to the step-one letter request for technical proposals. Since AML attached to its bid copies of the amendments it purported to acknowledge and included a copy of Amendment 0001 to the LRTP, you argue that AML evidently intended to acknowledge that amendment rather than Amendment 0001 to the IFB.

We think that AML's failure to acknowledge the correct Amendment 0001 is clearly waivable. The contracting officer in his statement of facts and findings notes that:

> Amendment 0001 to the IFB added one page of amendment 0001 to the technical proposal [purchase description], which was inadvertently omitted. The purchase description was amended during step one and this three page amendment was distributed to all potential bidders by amendment 0002 to the RFP. This amendment to the RFP was acknowledged by signature of Herbert K. Clark, President of AML, on 9 Nov 1971.

It is reported that the technical proposal of AML specifically addressed paragraphs of the purchase description, as amended, and therefore, it is established that AML intended to be bound by the terms thereof. Therefore, we fail to see how the failure to acknowledge receipt of Amendment 0001 to the IFB requires the determination that AML's bid was nonresponsive. Accordingly, since the material in amendment 0001 to the IFB was a part of step one, the failure of AML properly to acknowledge its receipt may be waived as a minor informality. See 51 Comp. Gen. 293 (1971).

Finally, you contend that AML's bid is nonresponsive because it was "qualified by a condition directly in contradiction to the terms of the IFB." You note that in its transmittal letter, AML stated that:

> The units will be designed to meet the requirements of Paragraph 3.2.3 as amended. Only one (1) unit will be tested to verify that the design is adequate. (Emphasis added by you.)

It is your position that this statement conflicts with the requirements of paragraph 4.2.2, which states in pertinent part:

> The First Article test sample shall consist of four instruments, each representative of production instruments. A minimum of two instruments from the sample shall be subjected to each test required by 4.2.1 (Emphasis added by you.)

You contend that AML has offered to test only one unit for electromagnetic compatibility, whereas paragraph 4.2.2 requires that First Article tests be conducted on a minimum of two units.

The Air Force takes the position that AML's statement in its transmittal letter did not qualify its bid but rather notified the Air Force that AML intended to undertake an additional test in the early

stages of the equipment's development to determine the adequacy of its design for electromagnetic compatibility. This test, according to the Air Force, was not required under the contract but was, in the opinion of the contracting officer, an attempt to inform the Government that AML "would do everything in [its] power to ensure a quality product would be received by the Air Force."

We think there is merit to the Air Force's argument. You note that a bidder in a two-step procurement "expends more effort and resources than a bidder who competes in a single-step advertised procedure." We have recognized, therefore, that a bidder found to be acceptable under step one would not likely disqualify its step-two bid by inserting a condition in contradiction with its accepted step-one proposal and the requirements of the specifications. 45 Comp. Gen. 221, 224 (1965); 50 Comp. Gen. 337, 342 (1970). The alleged qualification in AML's transmittal letter must be read in light of the presumption that it intended to bid in accordance with the requirements of the purchase description. When considered in this light, we feel that we must concur in the contracting officer's determination that AML's transmittal letter did not contain a qualification.

Accordingly, for the reasons set forth above, your protest on behalf of Heinschel Engineering is denied.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States