



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Navistar Marine Instrument Corporation

File: B-262221

Date: November 20, 1995

Steven J. Nadel for the protester.

Stephen Stastny, Esq., and Benjamin G. Perkins, Esq., Defense Logistics Agency, for the agency.

C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of sole source solicitation is denied where agency complied with requirements of Competition in Contracting Act of 1984 by executing a justification and approval authorizing the use of other than full and open competition procedures, because agency did not have in its possession sufficient, accurate, or legible data to purchase the part from any source other than the one known source.
2. Protest of a solicitation's qualification procedures, filed after receipt of initial proposals, is not only untimely but fails to state a valid basis of protest, where protester fails to take issue with agency's need to assure equivalent functioning of parts and fails to identify the precise procedures that it considers unduly restrictive.

DECISION

Navistar Marine Instrument Corporation protests the terms of request for proposals (RFP) No. SP0440-95-R-3832, issued by the Defense General Supply Center (DGSC) for aneroid barometers. Navistar challenges the solicitation as unduly restrictive and improperly limited to a sole source.

We deny the protest in part and dismiss it in part.

DGSC issued the solicitation on July 24, 1995, for a fixed-price contract for a quantity of 17 aneroid barometers, described by part number FA112150 manufactured by the Wallace and Tiernan Division of the Pennwalt Corporation. The solicitation contained the standard clause at Defense Logistics Agency Regulation (DLAR) § 52.217-9002, Conditions for Evaluation and Acceptance of Offers for Part Numbered Items. This clause advises offerors that the agency has determined the Wallace and Tiernan barometer to be acceptable but permits and provides procedures for firms to offer alternate products.

On June 30, 1995, prior to issuing the solicitation, the contracting officer executed a justification and approval (J & A), authorizing the use of procedures other than full and open competition. This J & A states that the barometer is identified only by the manufacturer's part number. The J & A states further that the government does not possess sufficient, accurate, or legible data to purchase the barometer from other sources and therefore has no data to include or reference in the solicitation. The agency has certified that it has exhausted all means to obtain a technical data package (TDP) adequate for manufacture of the item.

Despite the overriding mandate of the Competition in Contracting Act of 1984 (CICA) for achieving "full and open competition" in government procurements through the use of competitive procedures, 10 U.S.C. § 2301(a)(1)(A) (1994), CICA does permit noncompetitive acquisitions in specified circumstances such as this one, when only one known responsible source is available to provide the supplies that the agency needs. 10 U.S.C. § 2304(c)(1); Federal Acquisition Regulation (FAR) § 6.302-1; Kollsman, A Div. of Sequa Corp; Applied Data Technology, Inc., B-243113; B-243113.2, July 3, 1991, 91-2 CPD ¶ 18. Where, as here, the agency has substantially complied with the procedural requirements of CICA, 10 U.S.C. § 2304(f), for approval of the contemplated sole source action and publication of the required notice in the Commerce Business Daily (CBD), we will not object unless a protester shows that there is no reasonable basis for the award. Rotek, Inc., B-240252, Oct. 26, 1990, 90-2 CPD ¶ 341. Navistar has submitted nothing to show that the agency's determination was unreasonable.

The agency advises our Office that the barometer performs a critical function in testing of numerous aircraft engines, including those for the Kiowa OH-58A, Cobra/TOW, Blackhawk UH-60A and Apache AH-64 helicopters, as well as the Mohawk OU-01D airplane. Testing involves measurement of performance at various levels of barometric pressure, along with humidity and temperature, to determine the performance envelope of each engine installed. The barometer that the agency is acquiring fits into a pre-existing opening on the instrument panel of the engine test cell used to calibrate engine performance. DGSC therefore requires a barometer interchangeable with that designed by Wallace and Tiernan in order to ensure proper functioning during calibration.

Navistar takes no issue with the agency's need for the barometer to be interchangeable with the Wallace and Tiernan barometer. Since the record shows that no other firm has demonstrated the required interchangeability, we have no basis to consider unreasonable the basic premise of the J & A—that without sufficient data, and absent an attempt by any other firm to qualify its product,

Wallace and Tiernan is the only source for the barometer.¹ See Alfa-Laval Separation, Inc., B-250065, Jan. 4, 1993, 93-1 CPD ¶ 1.

In its response to the agency report, Navistar disputes the agency's assertion that it cannot obtain drawings sufficient for competition. The protester contends that if the agency will provide it with basic information on the physical dimensions and electrical interfaces, it can develop test and inspection procedures as good or better than those used by Wallace and Tiernan.²

In essence, Navistar challenges the agency procedures for qualifying alternate products, which were evident from the RFP. Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1995), allegations of improprieties in a solicitation apparent prior to the time set for receipt of initial proposals must be filed prior to that time. Thus, these arguments, first raised in the protester's comments of September 15, 3 weeks after the receipt of initial proposals on August 24, are untimely. Moreover, to the extent that Navistar's initial protest can be read to allege that the qualification procedures of DLAR § 52.217-9002 are "restrictive," it fails to state a valid basis of protest.³

¹The protester does question whether DGSC conducted a market survey. CICA, 10 U.S.C. § 2304(f)(3)(D), requires that the J & A include a description of the market survey conducted or a statement of the reasons a market survey was not conducted. Although the J & A did not address this requirement, the agency published a notice of the acquisition in the CBD and provided a procedure for potential offerors to qualify their barometers. Thus, the essential purposes of a market survey were served. See FAR § 7.101; Coulter Corp. et al., B-258713; B-258714, Feb. 13, 1995, 95-1 CPD ¶ 70.

²The agency subsequently provided the protester with the drawings that it has. The agency asserts that the drawings are not adequate for purposes of competition, since they contain no test procedures, no tolerances, no face value scale information, and no information on materials.

³The initial protest stated only that the solicitation was "restrictive and sole source." In its response to a request by DGSC that we dismiss the protest, Navistar for the first time made reference to the DLAR clause. The protester's argument at that time was that the clause did not identify the "salient characteristics" of the barometer. Our Office has held that where a solicitation contains a clause similar to DLAR § 52.217-9002, there is no requirement for a statement of "salient characteristics." Fantasy Lane, Inc., B-254072.3, June 23, 1994, 94-1 CPD ¶ 377 (involving the Products Offered predecessor clause to DLAR § 52.217-9002). Further, to the extent that the protester asserts that the solicitation contained no

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The version of DLAR § 52.217-9002 used here advises potential offerors that the agency has no data available for use in determining the acceptability of products other than the named product. Any product offered must be either identical to or physically, mechanically, electrically and functionally interchangeable with the Wallace and Tiernan barometer. To demonstrate such interchangeability, an offeror must submit a TDP describing the alternate product being offered. Further, offerors must obtain a TDP on the named product. These TDPs must contain information on design, materials, performance, function, inspection and testing, interchangeability, and other characteristics sufficient to allow DGSC to determine that the alternate product is equal to named product.

Where a solicitation provision is challenged as overly restrictive, we will review the adequacy of an agency's justification for the provision through examining whether the agency's explanation appears reasonable. See Craigrick's, Inc., B-261356, July 5, 1995, 95-2 CPD ¶ 2. As noted above, the protester does not contest DGSC's assertion that it needs any offered product to be interchangeable with the Wallace and Tiernan barometer. We therefore have no basis to conclude that the use of the clause is unreasonable. To the extent that Navistar considers certain portions of the clause to be restrictive—that while DGSC needs a degree of interchangeability, there is no need for an offeror to demonstrate equality for every characteristic of the product offered—the protester raises no specific objection to the requirements of that clause. Navistar has not attempted to demonstrate how the clause exceeds the agency's needs, or how DGSC should modify the clause to make it acceptable. Based on the record before our Office, the protester therefore has not established a likelihood that the DLAR § 52.217-9002 procedures for qualifying alternate products exceed the agency's minimum needs. Navistar thus has failed to state a valid basis for protest, and we therefore have no basis for considering the matter. See 4 C.F.R. § 21.3(m)(5); Bombardier, Inc., Canadair, Challenger Div., B-244328, June 17, 1991, 91-1 CPD ¶ 575.

The protest is denied in part and dismissed in part.

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³(...continued)

standards for an offered product to meet, the record shows that assertion to be incorrect, since the clause clearly contains such standards.