



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Envirodyne Systems Inc.

File: B-279551; B-279551.2

Date: June 29, 1998

Robert E. Sheker for the protester.

Alton E. Woods, Esq., and Justin P. Patterson, Esq., Department of the Interior, for the agency.

Christina Sklarew, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that solicitation is overly restrictive of competition is untimely when filed after award.
2. Protest that qualification in protester's quotation, taking exception to solicitation requirements, would not have affected performance and therefore should not have been considered material, is denied where the agency reasonably supports its conclusion that the exceptions taken would adversely affect performance.

DECISION

Envirodyne Systems Inc. protests the rejection of its quotation as technically unacceptable under request for quotations (RFQ) No. 1500-8-0003, issued by the Department of the Interior, National Park Service for a sludge dewatering solids bagging system for the water treatment facility at the Mount Rushmore National Memorial. Envirodyne contends that the agency improperly concluded that Envirodyne's quotation did not satisfy material solicitation specifications. Envirodyne also challenges the Park Service's selection of Aero-Mod/Waterlink, Inc., alleging that the firm's quotation took exception to the solicitation's performance requirements.

We deny the protest.

The Park Service posted a notice in the Commerce Business Daily (CBD) on February 19, 1998, described as a combined synopsis/solicitation.¹ The solicitation required vendors to submit complete assembly, foundation, and installation

¹The CBD synopsis stated that further information would be provided upon written request. The Park Service made a standard form 1449 and a more detailed solicitation available to the offerors.

drawings, together with detailed specifications and data covering materials, parts, devices, and accessories forming a part of the equipment being furnished. The solicitation also advised vendors that, while the agency intended to evaluate quotations and award the contract without conducting discussions, it reserved the right to conduct discussions if they were later determined necessary by the contracting officer. The solicitation generally described the agency's requirement as:

one self-contained wastewater solids dewatering system capable of automatically pumping a sludge stream, injecting it with solution polymer, discharging it into an enclosed pressure hood, funneling it into a series of porous filter bags, air charging the hood to enhance water removal, and then repeating the cycle until the bags are full and ready for changing. This type of equipment is manufactured by Aero-Mod Inc., Manhattan, Kansas.

Interested vendors were required to submit quotations. Envirodyne and Aero-Mod were the only firms that responded.

Envirodyne offered to supply its ALL-AMERICAN Bagger Model SBS-6 as an "alternative product," and included a "quotations submittal package" providing further details. In the cover letter to its quotation, Envirodyne described its product as an "equal" to the product specified in the solicitation, and stated that it would "meet or exceed the functional, performance and level-of-quality requirements of the Specifications." However, in its submittal package, Envirodyne reproduced the solicitation and inserted its "comments, deviations & exceptions" to the stated requirements, in effect qualifying its quotation. For example, next to the solicitation description of the dewatering equipment, Envirodyne noted that the required air pressurization feature is covered by a patent, and quoted the patent holder as stating that the bagger could "operate perfectly well" without the pressurization feature; in connection with a requirement that filter bags were to be nonwoven polypropylene, Envirodyne noted that its filter bags are woven polypropylene; in connection with a requirement for a static mixer to be located inside the tank, Envirodyne stated that its mixer is located outside its tank; and next to the requirement for air pressurization, the protester stated expressly that this feature is not used on the ALL-AMERICAN bagger being quoted by Envirodyne. The protester quoted a price of \$25,160.

Aero-Mod offered the pressurized, 6-bag DRAIMAD dewatering equipment described in the solicitation. Aero-Mod's quotation included technical literature that described performance features of the air pressurization system and nonwoven polypropylene filter bags and quoted a price of \$34,700.

The contracting officer forwarded the two quotations to an architect/engineering (A/E) firm that was to conduct the technical analysis for the Park Service. The A/E

firm concluded that Envirodyne's quotation did not meet the specifications and, in addition, that its price did not include certain required costs, such as system installation, start-up, and the operation and maintenance manuals. The reviewing firm found "no apparent evidence to support the belief that the Envirodyne unit can match the specified performance of the Aero-Mod type unit without also incorporating air assist," and recommended selection of Aero-Mod. The contracting officer concurred with the A/E firm's conclusion that Envirodyne's equipment did not meet material solicitation specifications and rejected Envirodyne's quotation. The Park Service then held discussions with Aero-Mod, as the vendor quoting the only technically acceptable solution. Aero-Mod subsequently lowered its initial \$34,700 price to \$30,950, and the contracting officer entered into a contract with this firm. On March 9, Envirodyne filed an agency-level protest, essentially arguing that by specifying a patented feature, the solicitation was unduly restrictive of competition; that the air pressurization feature was not critical to performance and therefore was not necessary to meet the agency's needs; and that its own product would meet the performance requirement established in the solicitation without the air pressurization feature. On March 18, Envirodyne filed its protest in our Office.

Envirodyne protests that the solicitation fails to provide for full and open competition, citing a number of provisions--including listing a single manufacturer and specifying a feature of a product peculiar to one manufacturer--as being overly restrictive. This basis of protest is untimely filed. Under our Bid Protest Regulations, protests based upon alleged improprieties in the RFQ which are apparent prior to the time set for receipt of quotations must be filed before that time. 4 C.F.R. § 21.2(a)(1); SWR, Inc., B-276878, July 29, 1997, 97-2 CPD ¶ 34 at 4. Based on the advice of the A/E firm that analyzed the Park Service's needs, the agency specified certain features, such as the air pressurization system, in the solicitation. To the extent Envirodyne disagrees with the conclusion that this system (and other specifications to which it took exception in its quotation) were not necessary to meet the agency's needs, Envirodyne was required to file its protest against those requirements prior to the deadline that was established for the submission of quotations. Since the protest against the allegedly restrictive requirements was not filed until after Aero-Mod had received the contract award, we dismiss it as untimely.

Envirodyne characterizes its quotation as "an unqualified performance bid," alleging that the exceptions it took would not have affected performance. In essence, the protester contends that, while its quotation did not meet the letter of the specifications, its product would meet the intent of the procurement by meeting the performance requirements. The protester contends that the air pressurization feature does not perform as represented by Aero-Mod and does not provide any performance advantage, concluding, in essence, that its own system should have been considered functionally equivalent to the specified system.

It is an offeror's responsibility to affirmatively demonstrate that its offered product meets all of a solicitation's material requirements. Working Alternatives, Inc., B-276911, July 2, 1997, 97-2 CPD ¶ 2 at 4. The contracting agency is responsible for evaluating the data supplied after ascertaining if it provides sufficient information to determine the acceptability of the offeror's item. JEOL USA, Inc., B-277160, July 2, 1997, 97-2 CPD ¶ 3 at 3. Particularly where simplified acquisition procedures are used, the contracting agency has broad discretion in fashioning suitable evaluation procedures. FAR § 13.106-2(b)(1). In reviewing an agency's technical evaluation, we will not reevaluate the proposals; we will only consider whether the agency's evaluation was reasonable and in accord with the evaluation criteria listed in the solicitation. Herndon Science and Software, Inc., B-245505, Jan. 9, 1992, 92-1 CPD ¶ 46 at 3. A protester's disagreement with the agency's judgment is not sufficient to establish that the agency acted unreasonably. Id.

Here, the protester took explicit exception to several features that were required by the solicitation. While Envirodyne argues that the requirements at issue were not material because they would not affect performance, the agency has reasonably supported its conclusion to the contrary. The record shows that the Park Service relied on the analysis submitted by the reviewing A/E firm which had specifically considered Envirodyne's claims in its quotation concerning the performance of its product. The A/E firm's report provides the following analysis:

Sludge is pumped into the bag filling hood until the hood level sensor stops the sludge filling pump. At his point, either gravity (Envirodyne) or gravity supplemented by air surcharge pressure (Aero-Mod) causes water to seep/ooze from the bags. After a period of time, generally controlled by a timer or level sensor, the sludge pump starts up and refills the header and the bags. The entire cycle repeats itself until the bags are determined to be full, which is about 6 fill and seep cycles.

My professional [judgment] is that the air assist will be able to more effectively and quickly fill the porous bags to capacity, and that the material in the bag will have a higher percentage of solids and therefore a lower percentage of water.

Further, the report advises:

If Envirodyne is not able to attain the required 20 pounds of sludge per bag, it would force [Park Service] personnel to operate on a maximum 3 shift/24-hour a day schedule rather than a maximum 2 shift/16-hour a day schedule as for Aero-Mod.

Similarly, the report indicates that the woven-type filter bags that Envirodyne offered to provide are less effective and allow more solids to escape and return to the treatment basin, thus casting doubt on the ability of Envirodyne's system to achieve the required 20 pounds of sludge in its bags.

The record shows that the agency rejected Envirodyne's proposal on the basis of a rational analysis of the ability of the offered product to meet material solicitation requirements. The review was based on a careful assessment of how the deviations indicated in Envirodyne's offered product would affect performance, and the rejection was not simply based on the fact that the protester's quotation was noncompliant with the solicitation's terms on its face. Accordingly, this portion of the protest is denied.

Envirodyne also alleges that Aero-Mod's quotation took exception to the specifications, and therefore should not have been considered. In its original quotation, Aero-Mod noted:

Under the proposed loading rate of 150 lb/day of biosolids, Aero-Mod would normally supply a larger unit. Therefore, instead of the (6) BCAP, we propose a (12) BCAP be provided for the Mount Rushmore project.

The firm's submission then quoted an additional price for upgrading the equipment in this way. Envirodyne characterizes this portion of Aero-Mod's quotation as a qualification of the performance requirements, essentially arguing that Aero-Mod's product should have been considered noncompliant with the material terms of the solicitation. We disagree. Aero-Mod never stated in its submission that the basic equipment described in its quotation would not meet the stated needs or otherwise took exception to the performance requirements. The contracting officer considered Aero-Mod's offer to upgrade the equipment as a recommendation to further enhance performance--in essence, a sales pitch--not a disclaimer of the standard product's ability to meet the stated requirement without the upgrade. We think the contracting officer's conclusion was reasonable and consistent with the solicitation requirements.

Envirodyne also alleges that the Park Service improperly permitted Aero-Mod to modify its quotation and lower its price after the closing date for receipt of

quotations. The agency had before it only one vendor whose quotation was found compliant with the material solicitation requirements, and therefore its decision to conduct discussions with that firm is unobjectionable.

The protest is denied.²

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²In addition to the protest issues discussed above, Envirodyne raised several other issues in its original filing--e.g., that the Park Service failed to include specific evaluation criteria in the solicitation; that the procurement should have been conducted as a small business set-aside; that the Park Service was required to refer the rejection of Envirodyne's quotation to the Small Business Administration under its certificate of competency procedures; and that the Park Service's determination to proceed with performance notwithstanding the protest was improper--which were not addressed by the protester in its comments on the agency report. As a result, to the extent that any of the issues are timely or cognizable, we consider them to have been abandoned. Appalachian Council, Inc., B-256179, May 20, 1994, 94-1 CPD ¶ 319 at 8 n.8.