

Protest of)
AIR COMPRESSOR DISTRIBUTORS, INC.) Date: March 24, 1992
Solicitation No. 204788-92-A-0022) P. S. Protest No. 92-09
)

DECISION

Air Compressor Distributors, Inc. ("ACD") protests the terms of Solicitation No. 204788-92-A-0022 for two air compressors, one coalescing filter and one refrigerated air dryer, issued by the Office of Support Services ("OSS"), Louisville, KY, on February 3, 1992, with an original offer due date of February 18. ACD claims that the specifications are unduly restrictive of competition. The contracting officer states that no award will be made prior to the issuance of this protest decision.

This requirement was solicited previously pursuant to simplified purchase procedures wherein quotations were sought from four vendors. A letter which contained the specifications was issued on January 13, 1992, with an offer due date of January 16. The specifications required the offeror to provide "two (2) 50 hp, air-cooled rotary air compressors, 480 VAC, 3 phase motor, 1780 RPM, 1.15S.F., 60 Hz., direct drive, capable of producing 238 SCFM @ 100 PSIG; Gardner-Denver Electra-Saver II, with enclosures, Model ECHJGAQ or equal." The specifications further stated that "[t]he compressors shall be controlled to operate one machine continuously with the second machine operating only to maintain system pressure during peak loads." The solicitation did not set out the essential characteristics of the brand-name item and did not specify the basis for award.

Four offerors responded: ACD, Air Systems, Inc. ("Air Systems"), Atlas Machine Co., ("Atlas") and Louisville Air Center ("LAC"). ACD, the low offeror, offered as an "equal" product, a Quincy AMA50. Air Systems, the second low offeror, proposed a different "equal" product, the Ingersoll-Rand XF50. Atlas offered the Gardner-Denver ECHJGAQ unit and LAC offered a Sullair 12-50L model. On January 22, the contracting officer issued Purchase Order No. 204788-92-P-0171 to Air Systems, having found ACD's product to be not in compliance with the specifications. On January 27, the contracting officer terminated Air System's purchase order for convenience, due to the discovery that award had not been made in strict conformance with the specifications, which were determined to be faulty.^{1/}

^{1/} The contracting officer does not identify the deficiencies in the unit offered by ACD, nor does he relate the defects in either the specifications or the award that led to the termination of Air System's purchase order.

On February 3, the Louisville OSS issued the instant solicitation with specifications which no longer identified a brand-name. Offerors were cautioned that "[e]quipment quoted must conform to the specifications listed. Alternate proposals will not be considered for award." The air compressor specification called for the following:

50 horsepower
Air Cooled
Rotary Screw Type
480 VAC 3 ph
1.15 Service Factor on Motor
1800 Maximum Motor RPM
Direct Drive (not direct coupled)
Capable of producing 225 scfm @ 100 psig
Capable of using either synthetic or mineral based oil (ship with mineral based oil).
Full enclosure
Must be "skid mounted", capable of [being] mounted without an auxiliary [sic] pad.
Any integral pressure vessels must meet ASME standards.
Maximum [sic] 80db with enclosure.
Heavy duty filter (capable of 99% filtration at 5 microns).
Microprocessor control allowing, at a minimum, the following features:

- *Ability to sequence up to 4 machines and pre-program an alternating lead/lag schedule.
- *Monitor system performance [sic] and maintenance functions.
- *Provide safety interlocks.

ACD did not submit an offer, filing this protest, dated and received by the contracting officer on February 14, instead. The contracting officer referred the protest to this office. The protester alleges that the compressor it offered under the original solicitation was "more than equal" to the specified Gardner-Denver unit and was priced lower. ACD states that on January 24, it met with the contracting officer and the drafter of the specifications to "verbally protest the issuance of the purchase order to Air Systems." ACD claims that at that meeting, it pointed out several areas where the Air Systems unit did not meet the specifications. At that meeting, ACD sought to rebut the contracting officer's conclusion that its offered model was not equal to the brand-name item. ACD pointed out that: its model was "direct drive," while the XF50 was gear driven; its model had a 3-year warranty, where the XF50 had a 2-year warranty; and that its model utilized analog gauges instead of a microprocessor to monitor the operation of the compressor.

ACD claims that before it could file a written protest against the award to Air Systems, the contracting officer terminated Air Systems' contract and issued the instant solicitation. ACD maintains that it "was entitled to receive the Purchase Order under the original solicitation and demands that it be issued forthwith."

Next, ACD contends that Solicitation -0022 is unduly restrictive, designed to "systematically exclude any compressor that does not use a microprocessor." ACD

claims that the analog gauge is superior because a failure will not render the compressor totally inoperable, whereas failure of a chip in a microprocessor will. ACD also claims that repair parts for a microprocessor are much more costly and that the unit must be rebuilt every two years. In addition, it alleges that the specifications are otherwise so flawed that the Postal Service will be unable to purchase any compliant rotary screw compressor. Specifically, ACD alleges that no unit made is "direct drive (not direct coupled)" stating that a "Direct Drive Rotary Screw Air Compressor, by anyone's definition is one whose air end drive rotor runs at drive motor RPM." Additionally, it contends that there is no rationale for requiring: an 1800 maximum motor RPM; a unit capable of using either synthetic or mineral based oil; a unit capable of delivering 225 CFM @ 100 PSIG; or microprocessor control. As set out above, ACD maintains that microprocessor controls have proven to be unreliable and expensive to replace, adding no value. ACD states that if it cannot be awarded a contract as bid in the original solicitation, solicitation -0022 should be canceled and reissued with amended specifications that allow for competitive bidding.

In his report to this office, the contracting officer states that any protest against the first solicitation is untimely pursuant to Procurement Manual ("PM") 4.5.4 b.^{1/} As for the protest against solicitation -0022, the contracting officer states that a microprocessor is necessary "because it gives the ability to sequence up to four air compressors and pre-program an alternating lead/lag schedule; monitor system performance and maintenance functions; and provide safety interlocks." He states that this requirement was not intended to exclude any vendor arbitrarily. He concedes that the rest of the specifications appear to be unduly restrictive based on the lack of response. Four vendors were solicited and three, including the protester, claim that they cannot meet the specifications. LAC declined to submit an offer because "the specifications are so tight around only one supplier that no other bids can be considered." Although Air Systems submitted a proposal, when asked by the contracting officer to verify the motor RPM, it admitted that their offered unit did not meet the specification. Only one offeror, Atlas, proposing the Gardner-Denver unit, stated that it could meet all the specifications.^{1/}

Atlas submitted comments, contending that ACD is incorrect in concluding that microprocessor controls are unreliable, stating that they "offer advanced safety shutdowns, monitoring, performance control, and diagnostics not available with analog gauges." Atlas also alleges that its equipment does meet all of the specifications, contrary to ACD's contention.

Air Systems also submitted comments, claiming that the benefits and reliability of microprocessor controls have been proven. It suggests that this requirement is not unduly restrictive in that most suppliers offer microprocessors, many as standard

^{2/} PM 4.5.4 b. states that: "[p]rotests based upon alleged deficiencies in a solicitation that are apparent before the date set for the receipt of proposals must be received by the date and time set for the receipt of proposals."

^{3/} ACD claims that even the Gardner-Denver unit does not meet the specification for "direct drive (not direct coupled)," because it utilizes a "[d]irect drive non-g geared air end with permanent alignment of the flexible coupling between air end and motor" Furthermore, ACD contends that the Gardner-Denver drive motor's maximum RPM is 1770, not the required 1800.

features. Air Systems claims that microprocessor controls offer many advantages over analog gauges such as allowing adaptation to changing requirements while maintaining optimal efficiency. Air Systems also disagrees that the specifications are written so as to preclude any offeror from meeting them. Air Systems contends that in standard industry nomenclature, direct drive can refer to many different mechanical systems "designed to deliver power to the air-moving end of the machine without the loss of efficiency and reliability exhibited by the older v-belt and pulley arrangement." Air Systems maintains that some manufacturers use gears and some use flexible couplings, both of which are considered to be "direct drive." Air Systems alleges that it is not true that a direct drive rotary screw air compressor is one where the air end drive rotor runs at drive motor RPM. It concludes by claiming that all the units offered, except for ACD's, which lacked a microprocessor, met the intent of the specifications.

In rebuttal comments, ACD, on the one hand, states that it is not protesting the original solicitation, but maintains, on the other hand, that it is entitled to award because its unit is "equal to the Gardner-Denver Model ECHJGAQ." ACD contends that the original award was not canceled due to faulty specifications, but because award had not been made to the low priced offeror.

ACD claims that the contracting officer's rationale for a microprocessor is insufficient, as it is lifted directly from Gardner-Denver sales literature, which fails to point out any maintenance difficulties and the high cost of replacement parts. ACD maintains that the Gardner-Denver unit is not a "direct drive (not direct coupled)" unit, as required.

Replying, the contracting officer reiterates that the purchase order was canceled due to faulty specifications, not because award had not been made to the lowest priced offeror. The contracting officer continues to defend the requirement for a microprocessor as necessary to the overall operation of the system, regardless of the source of the language for the reasons.

Discussion

As an initial matter, ACD appears to be challenging the award to Air Systems under the initial solicitation and we must determine whether such protest is timely. PM 4.5.4 d. states that "[p]rotests must be received not later than ten working days after the information on which they are based is known or should have been known, whichever is earlier; provided that no protest will be considered if received more than 15 working days after award of the contract in question." The timeliness requirements imposed by our regulations are jurisdictional and we cannot consider the merits of any protest that has been untimely raised. Owens Roofing, Inc., P.S. Protest No. 91-75, December 3, 1991; QMC, Inc., P.S. Protest No. 91-52, December 27, 1991.

ACD complains that it should have received a purchase order under the first solicitation, as its price was the lowest. However, it knew that a purchase order had been issued to Air Systems at least by January 24, when ACD met with the contracting officer. Therefore, its protest on this issue was untimely as filed more than ten working days after the basis for the protest was known.

We turn to ACD's protest against the terms of the second solicitation. Where a

protester alleges that a solicitation is unduly restrictive:

[I]t is incumbent upon the procuring agency to establish prima facie support for its contention that the restrictions it imposes are reasonably related to its needs. But once the agency establishes this support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable.

Equipment Marketing Consultants Corporation, P.S. Protest No. 90-07, April 17, 1990, quoting Amray, Inc., Comp. Gen. Dec. B-208308, January 17, 1983, 83-1 CPD & 43. Once the Postal Service establishes prima facie support for the allegedly restrictive requirements, the protester must present an extremely high level of proof to show that those restrictions are clearly unreasonable. Pacific Bell, P.S. Protest No. 90-51, December 21, 1990.

The determination of what constitutes the Postal Service's minimum needs is properly to be made by the requiring activity, and is not subject to being overturned in the absence of a clear showing that the determination lacks a reasonable basis.

Crown Industries, Inc., P.S. Protest No. 82-83, January 6, 1983 (citations omitted).

Regardless of the source of the contracting officer's rationale, he has set forth prima facie support for the requirement for a microprocessor, stating that it is necessary for the overall operation of the system to have the sequencing, monitoring and safety features. See Imtec, Inc., P.S. Protest No. 91-26, July 5, 1991 (even where the contracting officer failed to explain his choice of one technological concept over another, since operational requirements were considered, the preference was held to be reasonably related to the Postal Service's actual needs).

As to the rest of the specifications, the contracting officer has admitted that they are unduly restrictive. Therefore, we instruct the contracting officer to cancel the solicitation and issue a new solicitation that accurately reflects the minimum needs of the Postal Service.

The item sought in this solicitation appears to fall into the category of a commercial product, which should be procured using a product description. See Sircle Spring Company, et. al., P.S. Protest Nos. 91-86 & 91-91, January 21, 1992. Therefore, we direct the contracting officer's attention to PM 2.3.2 c., which states:

1. Whenever standard or modified commercial products will meet Postal Service requirements, product descriptions must be used instead of specifications.
2. Product descriptions must include:
 - (a) A common generic identification of the item;
 - (b) Known acceptable brand-name products, identified by model or catalog number, and the commercial catalogs in which they

- appear;
- (c) The name and address of the manufacturer, or distributor of each brand-name product referenced; and;
 - (d) A description of any required modifications.
3. If at least three acceptable brand names are specified, the solicitation may provide that only proposals for those products will be considered.
4. Except for construction specifications, if fewer than three acceptable brand-name products are specified, or if proposals for equivalent products other than those specified will be considered:
- (a) The product description must include a description of the item's essential characteristics, such as material, size or capacity, the equipment with which the items will be used, and any restrictive operating environmental conditions;
 - (b) The brand names in the product description must be followed by the words 'or equal;'
 - (c) Space must be provided for offerors to identify the manufacturer's brand names and models or catalog numbers proposed (see A.2.3.b.8);
 - (d) The solicitation must include Provision 2-4, Brand Name or Equal.
5. If the estimated price of the item exceeds \$50,000, the product description must be sent to the General Manager, Technical Review Division, for review and recommendation before a solicitation is issued. This should be done as early as possible in the procurement planning process.

The contracting officer should make sure that only the features of the brand-name item that can be shown to reflect the actual minimum needs of the Postal Service are listed as essential characteristics. If the brand-name product has features or functions that are not required, they should not be listed.

This protest is sustained.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law