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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Poly-Pacific Technologies, Inc.

File: B-293925.3

Date: May 16, 2005

Ron Ward for the protester.

James B. Howarth, Esq., and Eric Kattner, Department of the Air Force, for the agency.

Jonathan L. Kang, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's award of a contract is denied where agency reasonably evaluated awardee's technical proposal to provide a product that complies with solicitation requirements. Protester's interpretation of the solicitation as prohibiting awardee's proposed product does not appear reasonable; at most, the protester's interpretation suggests a patent ambiguity in the solicitation which cannot be protested after award.

DECISION

Poly-Pacific Technologies, Inc. protests the award of a contract to U.S. Technology Corporation (UST) under request for proposals (RFP) No. F42650-03-R-A111, issued by the Department of the Air Force for leasing and recycling of abrasive blast media. Poly-Pacific argues that the agency improperly determined that UST's proposal was technically acceptable.

We deny the protest.

BACKGROUND

The RFP was issued on March 3, 2004, as a total small business set-aside, and anticipated the award of a fixed-price, indefinite-delivery/indefinite-quantity contract for an 8-month base period followed by up to four 1-year option periods. The RFP sought proposals to lease "blast media," such as plastic, aluminum oxide, glass, garnet, and other media blends, to Hill Air Force Base, Utah, for use as an abrasive in the removal of organic and other coatings from aircraft, components, and equipment.

RFP, Statement of Work (SOW), at 1. After the material is used as an abrasive and is no longer usable for that purpose, it is deemed “spent blast media” (SBM) and the contractor is responsible for removing it. Id. at 2. The RFP required offerors to propose a means of removing and recycling the SBM that meets Environmental Protection Agency regulations that exclude such recycled products from the definition of “solid waste.” RFP at 37. During the course of the contract the contractor retains legal title to the blast media, as well as liability for its handling and disposal. Id.

Prior to award, Poly-Pacific’s proposal was eliminated from award consideration based on the agency’s determination that its proposal was technically unacceptable. Poly-Pacific subsequently filed a protest challenging the elimination of its proposal. Poly-Pacific Techs., Inc., B-293925.2, Dec. 20, 2004, 2004 CPD ¶ 250. We denied the protest, concluding that the agency reasonably evaluated Poly-Pacific’s proposal. Id. At the time of our decision, the agency had not yet made the award to UST. The agency subsequently awarded the contract to UST on March 16, 2005, and Poly-Pacific’s protest of the award to UST followed.

DISCUSSION

Poly-Pacific primarily contends that the agency unfairly evaluated the offerors’ proposals because the agency determined that Poly-Pacific’s proposal was technically unacceptable based on its alleged failure to meet one of the RFP requirements for recycled materials made from SBM, whereas UST’s proposal was found to comply with the requirement.¹ The RFP stated that offerors’ proposals must demonstrate that the recycled SBM product would not be “applied to the land,” which was explained in the RFP as follows:

The products of the recycling process shall be completely described and documented. They shall meet the criteria at 40 CFR 261.2(e)(2) as follows. (i) Recycled products shall not be “Applied to the Land.” Specifically, Hill AFB interprets “applied to the land” to mean without limitation such items as fence posts, blocks or concrete block like products or other items that are used underground and/or that are used in contact with the earth. The offeror shall accept this interpretation and shall not propose or use recycling processes that produce such items.

¹ Poly-Pacific raised a number of additional challenges to the award to UST in its protest. We previously dismissed these additional grounds because they amounted to challenges to UST’s responsibility, and because the Small Business Administration had addressed these concerns by issuing a certificate of competency that found UST capable of performing the contract.

RFP at 37, ¶ j.

UST proposed to produce a “SEALTECH Block,” which is a “Split Face Block,” made from “SBM having a toxic.” Agency Report (AR), Tab 8, UST Proposal, at 135. UST stated that its products “are not used in foundation walls or retaining walls due to their higher cost and open face that cannot be sealed.” *Id.* UST also explained that “[b]lock packaging and literature further describe that they are not ‘Applied against the land in a manner constituting disposal.’ The International Masonry Institute (IMI) training program, certification of which is required to validate SEALTECH product guarantee, teaches installers approved use in above ground application and insured that block are not installed in contact with the earth.” *Id.* The agency determined that UST’s proposed product was acceptable. AR, Tab 9, Initial Technical Evaluation, at 4.

Poly-Pacific argues that UST’s proposal was technically unacceptable under the “applied to the land” RFP criterion based on Poly-Pacific’s interpretation that the RFP “prohibited the SBM from being made [into] concrete blocks or concrete block like products.” Comments at 1. Poly-Pacific’s understanding of the RFP, however, ignores the explanatory context of the “applied to the land” criterion: although Poly-Pacific argues that the criterion casts a blanket prohibition on any “fencepost, block or concrete block like product,” the RFP prohibits production of those products only when they are “used underground and/or . . . used in contact with the earth.”

At most, therefore, Poly-Pacific suggests a potential ambiguity in the RFP regarding the “applied to the land” criterion. Solicitation specifications must be sufficiently definite and free from ambiguity so as to permit competition on a common basis. An ambiguity exists if a specification is susceptible to more than one reasonable interpretation that is consistent with the solicitation, when read as a whole. Astro Quality Servs., Inc., B-280676, Nov. 5, 1998, 98-2 CPD ¶ 107 at 4. To establish an ambiguity, the protester’s interpretation need not be the most reasonable one; the protester must show, however, that its interpretation is reasonable. *Id.* In light of the full context of the “applied to the land” RFP criterion discussed above, Poly-Pacific’s interpretation of the criterion does not appear reasonable.

In any case, even if Poly-Pacific’s interpretation of the RFP as prohibiting all blocks were reasonable, any resulting ambiguity would be patent, *i.e.*, clear or obvious on the face of the RFP, and thus cannot now, after award, be the basis of a timely protest. Dix Corp., B-293964, July 13, 2004, 2004 CPD ¶ 143 at 3. Where, as here, a patent ambiguity is not challenged prior to the submission of proposals, we will dismiss as untimely any subsequent protest assertion that is based on an alternative interpretation. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2005); U.S. Facilities, Inc., B-293029, B-293029.2, Jan. 16, 2004, 2004 CPD ¶ 17 at 10.

Because the RFP reasonably supports an interpretation of the “applied to the land” criterion that does not prohibit UST’s proposed product, which is a block that will be

used above ground, we find no basis to challenge the agency's evaluation of UST's proposal.²

The protest is denied.

Anthony H. Gamboa
General Counsel

² Poly-Pacific also argues that UST's proposal could not have demonstrated the ability to comply with the RFP prohibition on "speculatively accumulating" SBM, as UST has only recently begun production of its proposed product. The RFP requires the contractor to recycle or dispose of all SBM removed from Hill AFB as it is collected, without accumulation. RFP § L, ¶ 4.2.3.j.iii. In the prior protest, we concluded that the agency reasonably evaluated Poly-Pacific's proposal as failing to demonstrate compliance with this requirement because Poly-Pacific did not provide information in response to the agency's requests, despite multiple opportunities during discussions. Poly-Pacific Techs., Inc., *supra*, at 8. In contrast, the record here shows that UST provided the requested information to the agency during discussions, and that the agency reasonably determined that UST's proposal met the RFP requirement. See AR, Tab 10, UST Discussions and Revised Technical Evaluation.