

11176 Proc II

DECISION



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



FILE: B-192783

DATE: August 20, 1979

MATTER OF: Ultraviolet Purification *DLG 02601*
Systems, Inc.

[Protest of Brand Names Use in Specification]
DIGEST:

Protest urging elimination of alternate method for determining whether water purification equipment conforms to specification's minimum radiation dosage requirements is dismissed. Agency determination that alternate method for determining compliance is adequate and will meet Government's needs will not be questioned where purpose for including alternate method was to increase competition.

Ultraviolet Purification Systems, Inc., a supplier of water purification equipment, protests the water purification portion of the Corps of Engineers' specification *DLG 02602* for the construction of a fish hatchery at the Warm Springs Dam and Lake Project, Sonoma County, California, under IFB DACW07-78-B-0031, issued August 4, 1978. Inasmuch as the protester seeks a determination by this Office that the Government's interest as user of a competitor's product is not adequately protected, the protest is dismissed.

The specification calls for an ultraviolet sterilizing system, the purpose of which is to purify the water entering the fish hatchery by means of ultraviolet radiation in order to protect the fish from waterborne diseases. The system is to be designed so that water passing through the system to the hatchery will be exposed to a dosage of ultraviolet radiation sufficient to kill any harmful organisms.

The invitation, as issued, referenced brand name ultraviolet sterilizing systems, including Aquafine or Voltarc ultraviolet lamps, Aquafine sterilization units, and a short-wave ultraviolet meter manufactured by the

~~006199~~

protester, Ultraviolet. By letter of August 29, 1978, Ultraviolet protested to our Office alleging that the use of brand names unduly restricted competition. In subsequent correspondence, the protester urged use of a specification used by the Corps in connection with another water treatment project. The protester urged elimination of the brand name references and in lieu use of a specification requiring that the water be retained in the purification chamber for at least 15 seconds, that the flow rate through the chamber not exceed 0.2 gpm per effective inch of ultraviolet lamp, and that the ultraviolet lamps in the chamber produce 30,000 micro-watts per square centimeter of radiation after penetration of the flow medium. Protester contended that such a specification would meet the required needs and make it possible for other manufacturers of this type of equipment to compete.

On September 12, 1978, Aquafine Corporation wrote ^{DLG 02603} to the Corps objecting to the protester's recommended specification changes. Aquafine contended that the specification favored by the protester would preclude it from competing for an ultraviolet subcontract.

As a result of these protests, the Corps amended its specification several times. The Corps removed all references to brand names in the disputed areas and added a requirement for the 15 second retention time and the 0.2 gpm flow rate. As finally amended on September 25, 1978 (amendment 0005), the Corps provided an "alternate specification" for measuring dosage in order to allow both the protester's and Aquafine's approach. Amendment 0005 provides that:

"4.4.5 Dosage or exposure. A minimum ultraviolet lamp intensity after penetration of flow medium shall be 30,000 microwatt seconds* per square centimeter. This lamp shall meet the requirement for at least 7500 hours. The contractor shall assure adequate dosage or exposure by demonstrating either: (1) that the maximum retention time within the chamber at the above exposure is 15 seconds at a maximum flow rate of 0.2 gpm per effective inch of ultraviolet lamp; or (2) that, under

operating conditions before installation at the hatchery, each cubic centimeter of water passing through the purifier at all flow rates up to 875 gpm receives the minimum dosage of 30,000 micro-watt seconds per square centimeter. The contractor shall provide a written certification that the purifier meets either of the foregoing requirements before installation at the hatchery."

*(The Corps concedes that use of the word "seconds" in this sentence was mistaken and that it should be omitted.)

Aquafine has indicated to the Corps that it is satisfied with the revised specification. However, the protester continues to object to the specification, contending that it is impossible to prove under alternative (2) of paragraph 4.4.5 that a proposed design complies with the dosage requirement of the specification. The protester contends that an adequate ultraviolet specification must specify the number of lamps and the volume of the purification chambers; and that only alternative (1) satisfies this standard since the number of lamps is readily ascertainable from the stated flow rate per inch of ultraviolet lamp, and the volume is ascertainable from the stated minimum retention time of 15 seconds. In the case of alternative (2), the protester states that there is "no scientifically recognized or accepted method for determining or demonstrating the dosage which is received after water has passed through an ultraviolet purification device * * * due to the fact that the ultraviolet process does not bring about any measurable physical or chemical change in the water."

The Corps disputes this contention. It argues that compliance with the specification can be proved mathematically under alternative (2), once the configuration of the unit is known and before the unit is installed. It has provided us with the methodology which it plans to use under the second alternative.

In addition, the Corps argues that in any event the protester is free to offer the prime contractor a unit designed around the alternative (1) specification which it

favours. (A prime contract was awarded on October 20, 1978, while this protest was pending, because of urgency.) In the Corps' opinion, the protester's "real objection" to the alternative specification is that it allows more competition than the protester would like. While the Corps concedes that the protester had a legitimate interest in the draft of the specification as originally written, "such interest was addressed and satisfied with amendment No. 0005 * * * which provided for alternative methodologies for ultraviolet treatment of the water in the fish hatchery." Thus the Corps believes "that the protester's legitimate interests have been considered and addressed in the solicitation, and that [its] protest should now be dismissed."

In response, the protester disputes the validity of the Corps methodology to determine dosage under alternative (2), contends, citing Ultraviolet Purification Systems, Inc., 55 Comp. Gen. 1272 (1976), 76-2 CPD 46, that it has a legitimate interest in pointing out defective specifications to the Government, and argues that the Corps' acceptance of alternative (2) shows discrimination in favor of Aquafine Corporation, as demonstrated by the "highly selective" original specification.

In the cited case the prime contract specifications under a Department of the Interior contract called for ultraviolet purification units manufactured by the protester, "or approved equal." The prime contractor selected an Aquafine unit after repeated examinations of the unit by the Department. We found that the Department had participated in the subcontractor selection process such that Ultraviolet's protest of the selection should be considered on the merits. On the merits we concluded basically, that the Aquafine unit had been properly approved for award.

In this case we are not being asked to review a subcontract award selection in which the Government participated. Here the protester is simply seeking our determination that the Government's specifications are inadequate. It is arguing that the Corps' specifications do not assure that water purification units being procured under the prime contract will be effective. The protester

is asking us to conclude that the specifications should be revised to eliminate the second alternative in paragraph 4.4.5.

We have held that, as a matter of policy, we will not consider protests alleging that more restrictive specifications should be used, absent evidence of fraud or misconduct by the agency. Transtestor Systems and Joslyn Mfg. & Supply Co., B-188921, September 19, 1977, 77-2 CPD 202; Miltope Corporation--Reconsideration, B-188342, June 9, 1977, 77-1 CPD 417, second reconsideration, July 1, 1977, 77-2 CPD 3. Ultraviolet's protest essentially is of this nature. It seeks to restrict the competition by eliminating the Corps' alternative methodology for determining whether the specified dosage will be provided. It may be, as the protester alleges, that alternative (2) does not sufficiently protect the Government's interests. We believe, however, that this is a matter for the agency to decide and not a matter to be resolved in GAO's bid protest forum, absent evidence of fraud or bad faith by the agency. As we explained in Miltope, supra:

"Although this Office will review a protester's complaint that it is prevented from competing in a procurement because the procuring activity has adopted unduly restrictive specifications, we have done so because use of unjustifiable restrictions conflicts with those statutory and regulatory provisions which require the Government to procure needed supplies and services through free and open competition.

"Quite a different situation is presented where, as here, it is asserted that the Government's interest as user of the product is not adequately protected. Here, the protester's apparent interest conflicts with the objective of our bid protest function, that is, to insure attainment of full and free competition. Assurance that sufficiently rigorous specifications are used is ordinarily of primary concern to procurement personnel and user activities. It is they who

must suffer any difficulties resulting by reason of inadequate equipment. We therefore believe it would be inappropriate to resolve such issues pursuant to our bid protest function, absent evidence of fraud or willful misconduct by procurement or user personnel acting other than in good faith."

Finally, we see no basis to the protester's contention that the Corps has discriminated in favor of Aquafine. Rather it seems to us that Aquafine and Ultraviolet were treated equally. The original specification was amended to accommodate the protester's objection and the specification was then further amended as a result of Aquafine's objection. In both instances the Corps' purpose was to increase competition.

The protest is dismissed.

Harry R. Van Cleave

for Milton J. Socolar
General Counsel