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Decision

Matter of: Engineered Electric Company d/b/a DRS Fermont

File: B-295126.4

Date: June 14, 2007

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Brian E. Toland, Esq., Frank V. DiNicola, Esq., and William J. Kampo, Esq., U.S. Army Materiel Command, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly relaxed specification for fuel efficiency in acquisition of mobile generators is denied where agency relaxed specification based on determination that no offerors were able to meet prior, more stringent requirements; fact that protester claims now to be able to meet more stringent specification does not require that agency use more stringent specification, since relaxed specification meets agency's needs and enhances competition.

DECISION

Engineered Electric Company d/b/a/ DRS Fermont (DRS) protests the terms of solicitation No. W15P7T-04-R-A001, issued by the U.S. Army Materiel Command for tactical quiet generator sets and military standard generator sets. DRS argues that the agency improperly relaxed the solicitation's fuel efficiency standards.

We deny the protest.

BACKGROUND

The solicitation contemplated the award of up to three indefinite-delivery, indefinite-quantity contracts to design, build, and furnish to the Army a new set of generators (variously sized and configured, and ranging from 5 to 60 kilowatts (kW)). The RFP contemplated performance in three phases. During phase I, the contractors were to develop prototype generators, complete a maintenance demonstration,

conduct limited testing, and provide limited logistics data. At the conclusion of phase I, the solicitation and resulting contracts provided that the agency will perform a "downselect" among the phase I contractors, awarding a delivery order for the remaining phases to a single contractor. During phase II, the contractor will engage in further developmental and operational testing, perform a logistics demonstration, and develop additional logistics data. During phase III, the contractor will engage in production of the generators and associated documentation (such as technical manuals). This downselect is the subject of this protest.

In 2004, the agency awarded two phase I contracts, one to the protester and one to Onan Corporation.[1] When performance of phase I was sufficiently complete, the agency solicited proposals from the two contractors to select a single concern to perform phases II and III. After receiving and evaluating those proposals, the agency established a competitive range comprised of Onan's proposal, and DRS filed a protest with our Office complaining that its proposal improperly had been excluded from the competitive range. In response, the agency advised that it would include DRS in the competitive range; we therefore dismissed DRS's protest. (B-295126.2, B-295126.3, Aug. 26, 2006.)

Subsequent to including DRS in the competitive range, the agency issued a solicitation amendment that relaxed the specifications relating to the generators' fuel efficiency. That amendment is the subject of the current protest.

The firms' contracts, at clause H-13, provide for the procedures and evaluation criteria to be followed in the agency's downselect decision. That clause provides that the agency will award the phase II and III work to the contractor submitting the proposal deemed to offer the "best value" to the government, considering cost/price and the following non-cost/price factors: technical, integrated logistics support (ILS), and small business participation plan. The technical factor (which includes several subfactors) is slightly more important than ILS (which also includes subfactors), which is slightly more important than cost/price, which is slightly more important than small business participation plan. Fuel efficiency is to be evaluated under the third subfactor of the technical factor, other key operational performance parameters.

DRS objects to three aspects of the changed fuel efficiency specifications. First, DRS cites the relaxation of the fuel consumption requirements. In this regard, the agency changed the fuel consumption requirements to allow the generators to burn

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[1]A third offeror, L-3 Communications Westwood Corporation, filed a protest with our Office complaining that it also should have received an award. We denied the protest. L-3 Communications Westwood Corp., B-295126, Jan. 19, 2005, 2005 CPD ¶ 30.

between 7.7 and 9.9 percent more fuel (depending on the size of the generator) than previously allowed. Agency Report (AR), exh. 32. Second, whereas, previously, the contracts provided for testing each size generator individually for compliance with the fuel efficiency standards, the amended specifications provide for meeting the fuel consumption requirements on the basis of a fleet weighted average, id.; the failure of one size generator to meet the fuel consumption requirements can be offset by enhanced fuel efficiency achieved by another size generator. Third, whereas, previously, the contracts provided for testing fuel efficiency using several types of fuel, including so-called battlefield JP-8 fuel, the revised specifications delete the requirement to test the generators for fuel efficiency using JP-8 fuel. Id.

DRS complains that this relaxation of the fuel efficiency requirements is inconsistent with section 317 of the National Defense Authorization Act (NDAA) for Fiscal Year 2002, 10 U.S.C. § 2865, note (Supp. II 2002), Federal Acquisition Regulation (FAR) § 11.101, and Executive Order (E.O.) No. 13,423, 72 Fed. Reg. 3919 (Jan. 24, 2007). According to the protester, the relaxation of the efficiency standards is inconsistent with these authorities, all of which require agencies to acquire energy efficient products "to the maximum extent practicable." The protester maintains that the agency's relaxation of the fuel efficiency requirements here is especially unreasonable because it has been working to design its generators to meet the earlier, more stringent, requirements for the past 2 years.

The agency responds that it relaxed the fuel efficiency requirements because neither DRS nor Onan has been able to meet the more stringent requirements included in their contracts. DRS disputes the agency's position, maintaining that it has, in fact, achieved compliance with the earlier fuel efficiency requirements. In support of its position, the protester has tendered portions of its proposal that it submitted shortly after filing its protest; the protester maintains that, since it has been able to achieve compliance with the stricter requirements, the agency is required to continue using those standards because this is the only way for the agency to acquire generator sets that are energy efficient to the maximum extent practicable. The agency states that it is in the process of evaluating the protester's proposal and cannot say whether or not it includes information showing that the firm actually has met the stricter standards.

The protest is without merit. Initially, we note that, while the protester claims to have provided evidence in its proposal that it can meet the stricter standard, there is no indication that this purported evidence was available to the agency at the time it issued the amendment relaxing the requirement.

Further, the requirements of the NDAA do not appear applicable here. Subsection B of the statute specifically provides that it is intended to establish a program to improve the energy efficiency of Department of Defense (DOD) facilities; subsection C of the statute establishes specific goals for energy efficiency improvement for varying types of facilities; and subsection D outlines strategies (including, for example, the purchase of energy efficient products) for achieving the goals outlined

in subsection C. Thus, by its terms, the statute appears to be limited to activities designed to improve the energy efficiency of DOD facilities, as opposed to mandating the purchase of energy efficient products for all purpose. Since the subject acquisition is for mobile generators that will be used in the field--and thus are not related to the establishment or maintenance and operation of a DOD facility--it follows that the relaxed specification here is not inconsistent with the statute.

Similarly, E.O. No. 13,423 appears limited in its scope and, by its terms, is not intended to afford an enforceable right to any party outside the government. Section 10 of the order specifically provides that it is intended only to improve the internal management of the federal government, and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States. Where an E.O. includes limiting language such as this, the remaining terms of the order do not provide a basis for protest. Saber Indus., Inc., B-276077, May 9, 1997, 97-1 CPD ¶ 174 at 2.

In any event, there is no indication in the NDAA[2] (or the E.O. or the FAR) that the energy efficiency requirements were intended to override the requirement for full and open competition articulated in the Competition in Contracting Act (CICA), 10 U.S.C. § 2302 et seq. (2000), or otherwise to take precedence over an agency's other legitimate needs. Rather, agencies are required to meet the efficiency requirement only "to the maximum extent practicable." Here, the agency determined that neither DRS nor Onan can meet the original fuel efficiency requirements, and that the requirement therefore had to be relaxed in order for the competition to proceed. There is nothing in the NDAA to suggest that relaxing a fuel efficiency requirement for this reason is impermissible.

Moreover, even if the evidence is as the protester claims, we think the agency nevertheless could properly relax the requirement in order to ensure that there would be more than a single potential source; again, there is nothing in the NDAA providing that agencies must apply stringent fuel efficiency standards at the expense of competition. In this regard, where, as here, an agency determines that a relaxed specification will both meet its needs and afford enhanced competition for the goods or services being acquired, we will not object to the relaxation. See Virginia Elec. and Power Co; Baltimore Gas & Elec. Co., B-285209, B-285209.2, Aug. 2, 2000, 2000 CPD ¶ 134 at 7-8 (the role of our Office in reviewing bid protests is to ensure that the statutory requirements for full and open competition are met, not to protect any interest a protester may have in more restrictive specifications). Thus, even if, as the protester alleges, its generator design is able to meet the earlier, more

[2] The legislative history of the NDAA also contains no indication there that the statute was intended to override CICA's requirement for full and open competition. H.R. Rep. No. 107-333 at 636 (2001), reprinted in 2001 U.S.C.C.A.N. 1,021, 1,059.

stringent fuel efficiency requirements, the agency's decision to relax the specification in order to include Onan in the competition is unobjectionable.

The protest is denied.

Gary L. Kepplinger
General Counsel