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DECISION



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

FILE: B-190678

DATE: April 3, 1978

MATTER OF: Murphy Pacific Marine Salvage Company

DIGEST:

Protest alleging that requested salvage services are required to be ordered from protester under its basic ordering agreement (BOA) is denied, since BOA is not contract but merely understanding as to provisions to be used in future procurements; further, protested solicitation does not conflict with statutory authority to procure salvage services, 10 U.S.C. § 7361 (1970).

Murphy Pacific Marine Salvage Company (Murphy) protests the potential award by the Department of the Navy, Naval Sea Systems Command (Navy), under request for proposals (RFP) N00024-77-R-4349(Q) (spill control RFP), of a contract for (1) manning and maintenance of two emergency ship salvage material (ESSM) bases in the United States, (2) maintenance of Government-owned salvage and spill control equipment at two overseas bases, and (3) a basic ordering agreement (BOA) for performance of certain oil and hazardous material spill control operations.

Murphy presently holds Navy BOA N00024-76-A-2079, pursuant to which it performs offshore salvage, salvage-related engineering and marine, and harbor-clearance and rescue tow services in the Northeast and Southeast zones, in accordance with task orders issued by the Navy contracting officer. Murphy's protest alleges that (1) the spill control RFP contemplates services which should be performed under its existing BOA and (2) the Navy's issuance of the spill control RFP is inconsistent with the purpose of the authorizing legislation, 10 U.S.C. § 7361 (1970), to foster and protect

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the commercial salvage industry. For the reasons stated below, we reject Murphy's contentions and deny the protest

As an initial matter, the Navy has argued that this protest is untimely because it challenges a solicitation issued on June 23, 1977, but was not filed within 5 days after Murphy learned of the basis therefor. The Navy, apparently unaware of the issuance of our final Bid Protest Procedures on April 24, 1975 (40 Fed. Reg. 17979), cites our Interim Procedures in support of this contention. However, section 20.2 (b)(1) of our final Procedures provides that a protest based upon alleged improprieties in an RFP should be filed not later than the closing date for receipt of proposals--in this case, November 14, 1977. Since Murphy's protest was filed on that date, it is timely.

Turning to the merits, Murphy's first argument is that the services called for in the spill control RFP could also be encompassed by its BOA, and that the Navy is therefore obliged to contract with Murphy for the additional services. This argument ignores the fact that a BOA is not a binding contract, but simply:

"* * * a written instrument of understanding executed between a Department or procuring activity and a contractor which sets forth the negotiated contract clauses which shall be applicable to future procurements entered into between the parties during the term of [the BOA]* * *."

Armed Services Procurement Regulation (ASPR) § 3-410.1 (1976 ed.). See also ASPR § 3-410.2 (1976 ed.); B-159245, November 29, 1966.

"* * * Such arrangements have uniformly been held to be unenforceable for lack of certainty, mutuality, and consideration, except to the extent

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executed by the placing of orders thereunder and the acceptance thereof." Mysook H. Whitcomb, 69-1 BCA ¶ 7473 at p. 34670 (1969), and cases cited therein.

Murphy fails to allege any circumstances, such as an oral or written task order under the BOA, which would lead us to conclude that a valid binding contract existed obligating the Government to call upon Murphy to perform the services contemplated in the spill control RFP. Indeed, ASPR § 3-410.2(c) (1976 ed.) specifically provides that:

"(1) Basic ordering agreements shall not in any manner provide for or imply any agreement on the part of the Government to place future orders or contracts with the contractor involved, nor shall they be used in any manner to restrict competition.

"(2) Supplies or services may be ordered under a basic ordering agreement only under the following circumstances:

"(i) If it is determined at the time the order is placed that it is impracticable to obtain competition by either formal advertising or negotiation for such supplies or services * * * ."

The Navy's issuance of the spill control RFP implies that it could not make the determination required by ASPR § 3-410.2(c)(2)(i), quoted above. In such circumstances, it would be improper to order the services contemplated in that RFP from Murphy under its BOA, unless after competitive solicitation Murphy was the successful offeror, the terms of its BOA were either identical with or insubstantially different from the solicitation, and it was determined that

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issuance of a BOA order as opposed to a new contract would not be prejudicial to the other offerors. ASPR § 3-410.2(c)(2)(ii) (1976 ed.).

Murphy's remaining argument is that the Navy's statutory authority to procure salvage services, 10 U.S.C. § 7361, et seq., embodies a requirement to support the commercial salvage industry, and that issuance of a contract under the spill control RFP to a contractor other than Murphy would adversely affect its anticipated revenues and financial viability. In support of this contention, Murphy points to its significant outlay for maintenance of personnel and equipment required to perform task orders under its BOA.

The statute in question, 10 U.S.C. § 7361 (1970), provides in pertinent part that:

"(a) The Secretary of the Navy may provide, by contract or otherwise, necessary salvage facilities for public and private vessels upon such terms as he determines to be in the best interest of the United States.

* * * * *

"(c) Term contracts for salvage facilities may be made under this section only if--

* * * * *

"(2) public notice of the intention to enter into the contracts has been given in a manner and for a period that will, in the Secretary's judgment, provide the maximum competition for such contracts among commercial salvage organizations." (Emphasis added.)

Contrary to Murphy's argument, the act expressly requires maximum competition among commercial organizations for term salvage contracts. There is no evidence that the Congress contemplated use of the act to support any particular salvage operators. Such a course would be inconsistent with established tenets of Federal procurement policy. The House Report on the Bill that became 10 U.S.C. § 7361, et seq., stated in pertinent part:

"If it is found that existing commercial facilities in a given area are not adequate, the Navy will enter into a contract with a private company to provide the services required--both to public vessels and private shipping. Such contracts will be awarded on a competitive basis, after careful investigation of existing facilities, to the company best qualified to do the job, taking into consideration his equipment, the experience of his personnel, and his willingness to meet the minimum standards prescribed by the Navy. All companies will have equal opportunity to compete for these contracts." H.R. Rep. No. 80-1005, 80th Cong., 2d Sess. 2 (1948). (Emphasis added.)

It appears to us that 10 U.S.C. § 7361, et seq., was intended to permit the Navy to encourage the development of private salvage capability by contracting, on a competitive basis, for services, where they are not otherwise commercially available. The act is thus an incentive measure rather than a subsidy.

Murphy alleges that clause J-23 of the spill control RFP contravenes United States salvage law which establishes the rights of various parties to salvage. However, the clause does not purport to deny the right of salvage award to the crew of a salvage vessel; it merely shifts the burden of paying any such award from the Government to the contractor.

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Accordingly, the protest is denied.

R. G. K. 1/14
Deputy Comptroller General
of the United States