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N. Eastern Proc II

DECISION

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

FILE: B-190421 DATE: July 14, 1978

MATTER OF: Die Mesh Corporation

DIGEST:

1. Protest concerning modification alleged to be beyond scope of contract will be considered by GAO, since execution of modification could be viewed as attempt to circumvent competitive procurement statutes.

2. Agency's determination to restrict development and construction of electric vehicles to firms previously selected under competitive procurement for preliminary stages of program is sustained, even though scope of work has been greatly expanded since award of initial contracts, since unacceptable delay in program would result from award to any new source.

Die Mesh Corporation (Die Mesh), a small business, has protested modifications of contracts between the Department of Energy (DOE, formerly the Energy Research and Development Administration, ERDA), and two large corporations, General Electric Company (GE) and the AiResearch Manufacturing Company of California, a division of Garrett Corporation (Garrett).

Die Mesh argues that the modifications, which involve nearly $6 million per firm and require production of two electric vehicles by each, were improper and that DOE should have procured the vehicles on a competitive basis. Die Mesh therefore urges that the contracts be declared null and void.

DOE, on the other hand, contends that it properly expanded contracts held by GE and Garrett for preliminary electric vehicle design studies, and that negotiation with only those two firms was fully justified. DOE states that the matter was treated as if it were a new procurement and that the contracts were modified, rather than new contracts executed, purely for administrative convenience.

A protest concerning contract modification ordinarily is not for resolution under our Bid Protest Procedures, 4 C.F.R. 20 (1977 ed.), since it involves contract administration, a matter primarily within the authority of the contracting agency. However, this Office will review such a matter when it is alleged, as here, that the modification went beyond the scope of the contract and should have been the subject of a new procurement, since execution of the modification could be viewed as an attempt to circumvent the competitive procurement statutes. Kent Watkins & Associates, Inc. B-191078, May 17, 1978, 78-1 CPD 377.

Award of the electric vehicle design study contracts to GE and Garrett has not been protested. As background to Die Hesh's protest, however, we will examine the chronology of the entire procurement and the requirements of the Government, as initially set forth in the request for proposals (RFP).

The solicitation, No. E(04-3)-1213, was issued by ERDA's San Francisco Operations Office on March 5, 1976, with an amended closing date of April 16, 1976. Its stated object was the development of preliminary and detailed designs for an urban, electric powered, four passenger vehicle based on state-of-the-art technology. Offerors were required to have demonstrated experience applicable to electric vehicle design and development.

According to the RFP, performance was to be divided into two phases, the second at the option of the Government. During Phase I, contractors were to (1) evaluate design trade-offs, (2) develop a conceptual design, (3) develop a preliminary design, and (4) establish a development plan. During Phase II, if the Government exercised its option, contractors were to (1) perform detailed design analyses and (2) provide drawings and specifications to enable fabrication of a prototype electric vehicle. In addition, offerors were to develop program plans for each phase of performance.

At a preproposal conference on March 19, 1976, offerors were told that the follow-on contractor(s) would be selected on the basis of Phase I efforts. A possible Phase III, involving actual production of electric vehicles, also was discussed.

As a result of an announcement in the Commerce Business Daily and a mailing list, 94 firms were solicited; 18 responded by submitting proposals. Die Mesh was among those solicited and was provided with a transcript of the preproposal conference, but did not submit a proposal.

In May 1976, GE, Garrett, and Advanced Systems Laboratories, Inc. (ASL) were selected for negotiation of Phase I contracts, executed in late June 1976. Costs plus fixed fees were as follows:

	Costs	Fixed Fee	Total
GE	$437,538	$21,947	$459,485
Garrett	89,967	6,298	96,265
ASL	136,475	9,553	146,028

In September 1976, these three firms were provided with a list of evaluation criteria to be used in selecting Phase II contractors, a process which began in January 1977 with the appointment of a Technical Evaluation Committee. The Committee, composed of ERDA evaluators and technical advisors from the National Aeronautics and Space Administration (NASA) and the Department of Transportation, recommended continuation of the GE and Garrett contracts into Phase II; continuation of the ASL contract was not recommended because it was the lowest rated technically and funds were limited. The Committee also recommended "integrated test vehicle development on a proof of preliminary design basis."

Also in September 1976, while preliminary designs were being completed, Congress overrode a Presidential veto and passed the Electric and Hybrid Vehicle Research, Development, and Demonstration Act of 1976, 15 U.S.C. 2506 - 2514 (1976 ed.). DOE argues that this created a sense of national urgency with regard to electric vehicle development, and, at the same time, greatly increased funding.[1]

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[1]The Act requires DOE to initiate and conduct research and development in areas including (1) energy storage technology, including batteries and their potential for convenient recharging, (2) vehicle control systems and overall design for energy conservation, including the

At about the same time, DOE states, Phase I contractors concluded that the Phase II approach originally outlined was of marginal value, because ERDA would not know whether their designs were technically achievable. They recommended "more comprehensive hardware development, fabrication, and evaluation." As noted above, the Technical Evaluation Committee for Phase II had made a similar recommendation. In May and June 1977, ERDA sought and obtained approval from subcommittees of the House and Senate Appropriations Committees to reprogram $20 million in uncommitted funds from nuclear programs and to use most of this amount for accelerated electric vehicle research and development. For these reasons, DOE states, Phase II was redefined to include development of two integrated test vehicles.

Subsequently, justifications for noncompetitive procurement were made for both GE and Garrett, and negotiations were conducted which resulted in the protested modifications. Modification 004 to GE's contract (three earlier modifications are not at issue here) was executed on September 27, 1977, to cover performance from April 1, 1977 through April 28, 1979. (DOE states that the effective date reflected the fact that GE had been performing under interim agreements until final negotiations were completed.)

The scope of work under GE's modified contract included (1) program planning and management, (2) design

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use of regenerative braking, (3) urban design and traffic management, and (4) vehicle design which emphasizes durability, length of practical lifetime, ease of repair, and interchangeability and replaceability of parts.

Performance standards for electric and hybrid vehicles must be established. In addition, under the Act, the Department must buy or lease 2,500 vehicles meeting those standards for delivery by December 1979. An additional 5,000 advanced vehicles must be bought or leased for delivery by September 1982. The Department is to conduct demonstration programs, making these vehicles available to Federal agencies, state and local governments, and individuals and businesses, including farms. Appropriations of up to $160 million are authorized through fiscal 1981. See 15 U.S.C. supra.

analysis, (3) detail design, (4) full-scale model crush and crash safety tests, (5) fabrication of a chassis "mule" vehicle, (6) fabrication of two integrated test vehicles, (7) development and development testing, (8) documentation, and (9) program reviews.

Under the revised contract, DOE's report shows, GE's costs were increased from $437,538 to $5,952,073, and fixed fees from $21,947 to $297,600 for a total of $6,249,673. According to DOE, only about $500,000 was for vehicle fabrication, with the remaining amount for expanded research and development.

Modification 002 to Garrett's contract (an earlier modification is not at issue here) also was executed September 27, 1977, and was effective from March 31, 1977 through March 31, 1979. The scope of work outlined for Garrett was similar to that of GE, and included (1) program planning and management, (2) detail design, (3) fabrication, assembly, and installation, (4) development and development testing, and (5) documentation for and delivery of two integrated test vehicles.

In Garrett's case, costs were increased from $89,967 to $5,489,540, and fixed fees from $6,298 to $456,298 for a total of $5,945,838.

Die Mesh protested the contract modifications to our Office in October 1977. Upon receipt of DOE's report on GE, counsel for Die Mesh argued that GE did not have any unique capability to justify a noncompetitive award: "There are many other qualified companies, who have had far more on-the-road electric vehicle experience who should have had an opportunity to bid on this procurement." Die Mesh's comments on GE were made applicable to Garrett.

During and after a conference at our Office, Die Mesh pointed out that the RFP had called for "design only, and nothing else" and charged that the contract changes made by DOE after award were "unilateral, arbitrary and unjustifiable * * *." Die Mesh asserted that if the 76 firms which had not competed for the design study contracts had known that this would be a $12 million procurement, all would have submitted proposals. Die Mesh further argued that after GE, Garrett, and ASL had submitted their preliminary electric vehicle designs,

DOE should have formulated new specifications and made them the subject of a competitive procurement; instead, Die Mesh concluded, GE and Garrett were favored and all other companies were systematically excluded. In addition, Die Mesh charged that GE and Garrett's contracts were "topheavy and overloaded with subcontractors," so that award funds would be eaten up by administrative costs and subcontractor profits. Die Mesh also argued that DOE had applied a double standard in reprogramming funds from other energy projects for this procurement while telling Die Mesh that its unsolicited electric vehicle proposals could not be accepted because no money was available and competitive procurement was required.

DOE has responded by stating that it always intended, if funds became available, to have Phase II contractors fabricate, test, and deliver the electric vehicles they were designing. The RFP was flexible enough to permit this, DOE argues, and such intentions were made clear during discussions of a possible Phase III at the pre-proposal conference.

DOE concedes that the change was of such a magnitude that it could not be accomplished under the Changes clause of the GE and Garrett contracts. However, the agency argues, it complied with applicable Federal Procurement Regulations (FPR) in making determinations and findings regarding authority to negotiate and to use cost-type contracts. DOE states it also complied with ERDA Procurement Regulations (ERDA-PR), including Temporary Regulation 24 (December 10, 1976), which requires written justification for noncompetitive procurement when a program office concludes that only one source is qualified, and which states that justification also is required where "new" procurements (i.e. outside the contractual scope of work) are initiated through modifications to existing contracts.

Because of the general requirement that procurements be conducted on a competitive basis to the maximum practical extent, see FPR 1-3.101 (1964 ed.) agencies must adequately justify determinations to procure on a noncompetitive basis. Such determinations, while subject to close scrutiny, will be upheld if there is a reasonable or rational basis for them. Precision Dynamics Corporation, 54 Comp. Gen. 1114 (1975), 75-1 CPD 402, and cases cited therein.

Our Office has recognized that noncompetitive awards may be made where the minimum needs of the Government can be satisfied only by items or services which are unique, where time is of the essence and only one known source can meet the Government's needs within the required time frame, where data is unavailable for competitive procurement, or where only a single source can provide an item which must be compatible and interchangeable with existing equipment. On the other hand, we have objected when circumstances did not justify noncompetitive awards. Id. See, for example, Kent Watkins & Associates, Inc., supra, in which we found that a sole source award, in the form of modification of an existing contract, was not justified where the agency relied solely on the incumbent's experience with the project and its own desire to avoid administrative inconvenience and the costs resulting from a change of contractors. In that case, the procuring agency did not establish that the incumbent was uniquely qualified to provide the required services.

In other cases involving contract performance in two phases, we have found that negotiation for the second phase with only those firms which had performed the first phase did not unduly restrict competition. See Hoffman Electronics Corporation, 54 Comp. Gen. 1107 (1975), 75-1 CPD 395, in which we upheld award of production contracts to developmental contractors even when the protester, which had been in the competitive range during competition for the first phase, argued that it had independently developed and could furnish equipment comparable to the prototypes of the developmental contractors. See also Westinghouse Electric Corporation, B-189730, March 8, 1978, 78-1 CPD 181.

The cited cases are distinguishable in that the scope of work during the second phase was clearly contemplated at the time of competition for the first. In the instant case, Phase II was greatly expanded after the award of Phase I contracts. However, in view of the Department of Energy's statement that Phase II in this case was treated as a new procurement, we believe the single issue for our determination is the adequacy of the agency's justification for noncompetitive procurement.

ERDA's Division of Transportation Energy Conservation, in justifications attached to purchase requests

dated April 8 and July 14, 1977, set forth at great length those factors which it regarded as evidence of the expertise and unique capability of GE and Garrett, their proposed subcontractors, professional staff members, and consultants. With regard to negotiation only with the highest-rated Phase I contractors, the agency stated:

> "* * * As a result of the Phase I design effort under this program General Electric [AiResearch] has identified and amassed a necessary work force to carry out the proposed development effort. Also, the necessary analytical tools (including a battery model) have been developed and put on the GE [AiResearch] computers. Few groups in the nation have this capability at present. Engineering development and fabrication of equipment have been carried out in Phase I. Any new contractor at this point would necessitate schedule slips and additional costs. In addition, each contractor of the team brings in-house developments under other programs to the proposed development effort.
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> "* * * This is a follow-on effort to the work accomplished in Phase I. It is unrealistic to obtain competition for the Phase II work since this contractor has developed this project along individual lines and it is now in the interest of ERDA to see the continuation of the work into Phase II. General Electric [AiResearch Manufacturing] therefore is the only source to proceed with the work."

As for use of preliminary design studies by Phase I contractors for specifications for a competitive solicitation for Phase II, ERDA stated:

> "* * * The bases for establishing the 2-year development schedule for this procurement are (a) the minimization of cost by maintaining the work forces over optimum time periods and (b) requirements of Public Law 94-413 to procure advanced electric vehicles in 54 months from September 17, 1976.

"* * * Development and construction of the subject electric vehicle must proceed as quickly as possible so that this proven technology may be available to support the Demonstration Section of Public Law 94-413. An RFP to select a new development team would not be consistent with this tight schedule. Realistically, competitive selection would likely set the program back 1 1/2 to 2 years whereas the 2-year schedule is already the maximum time allowable and a minimum time for even this highly competent team to complete the described program.

"* * * No cost-savings or other benefits would result from a modification of this schedule. Shortening or lengthening the schedule will cause additional costs to be incurred."

ERDA's determination to restrict the development and construction of test vehicles to the highest-rated firms previously selected under a competitive procurement therefore was reasonable, even though the scope of work was greatly expanded following award of the initial contracts, since award to any new source would have prevented meeting statutory deadlines for the electric vehicle program.

For the foregoing reasons, the protest is denied.

Deputy Comptroller General
of the United States