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DECISION

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

[Protest of Solicitation Provision]

FILE: B-193789 DATE: July 18, 1980

MATTER OF: Varo, Inc.

DIGEST:

1. Solicitation provision requiring offeror to propose lump sum price for correcting deficiences in technical specifications in lieu of receiving equitable adjustments after award under changes clause is not objectionable. Purpose of provision is to discourage offerors from buying in with very low price and then getting well with equitable adjustments when, during contract performance, changes are required.

2. Protester's contention that solicitation provision could require contractor to absorb cost of major redesign is without merit since requirement, particularly as interpreted by courts and boards of contract appeals, contemplates only limited design effort.

Varo, Inc. (Varo) protests request for proposals (RFP) No. DAAA09-78-R-0185, issued by the U.S. Army Armament Materiel Readiness Command (Army). Varo contends the RFP's requirement that the contractor perform a preproduction evaluation (PPE) of the technical data package (TDP), which consists of the technical specifications and drawings, and certify the TDP as suitable for use in complying with all performance requirements, constitutes an unauthorized deviation from the standard Changes clause. Varo further contends the PPE requirement exceeds the Government's minimum needs, unduly restricts competition, gives an unfair advantage to the competitor which prepared the TDP, and is unreasonable and unconscionable. Varo asks that these provisions be deleted from the RFP. For the reasons discussed below, we do not agree with Varo's contentions.

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The RFP called for firm fixed-price offers to manufacture and deliver proximity fuzes in accordance with the TDP as it might be changed as a result of the PPE clause. Motorola, Inc. (Motorola) had prepared and furnished the TDP without warranty or certification to the Army. The RFP was sent to 25 firms of which 6 attended the preproposal conference. Only Motorola and Varo submitted offers and after notification to this Office, the Army made an award to Motorola while this protest was pending.

The PPE clause requires the offeror to quote a lump sum price to cover correction of the TDP within 120 days after award. During this period, the contractor must propose those changes which are essential to meet the performance specifications, insure compatibility among the specifications, correct impossible or impractical specifications and permit the procurement of suitable parts. Such engineering change proposals are identified as Class II ECP's and, if approved by the Army, must be implemented by the contractor without adjustment in contract price or delivery schedule. Upon completion of the PPE, the contractor must certify the TDP as suitable for meeting all performance requirements and thereby assume risks for any subsequent redesign and correction efforts resulting from any changes made, or which should have been made, without further adjustment in price or schedule.

At the preproposal conference, the potential offerors were told that the price for the PPE would cover any redesign that may be required to meet the performance requirements. They were also told, however, that the Army had no information indicating the TDP was not feasible for production. Thus, the price offered for the PPE effort was to include all costs for material, engineering and manufacturing associated with the accepted changes. Also the Government reserved the right to reject any Class II ECP.

The PPE clause states that upon approval, or in the absence of a rejection, of a Class II ECP, the contractor's obligation will be discharged to the extent the deficiency is corrected, but there is no specified time within which the Army must respond. In the preproposal conference memorandum, the Army recognized its ability

in most instances to respond within 15 working days of submission of the ECP but refused to obligate itself to consider requests for equitable adjustments for delays where it could not.

The PPE clause also permits the contractor to propose Class I ECPs for changes outside the scope of the PPE clause and if these ECPs are approved, the contracting officer will implement them under the Changes clause with equitable adjustments in price or delivery schedule as warranted. Throughout the duration of the contract, the Army may, under the Changes clause, order any necessary changes which are within the scope of the contract but are outside the scope of the PPE clause.

Provisions similar to this PPE clause have been in use for many years. Their obvious purpose is to discourage offerors from "buying in" with very low competitive offers and then "getting well" with equitable adjustments negotiated on a sole source basis when, during the contract, changes almost inevitably are required.

Provisions similar to this PPE clause have been approved by us in the past. See 48 Comp. Gen. 750 (1969); B-165953, October 27, 1969; B-169838, B-169839, July 28, 1970, affirmed upon reconsideration on October 30, 1970. The essence of these cases is that where the TDP is basically sound the agency may reasonably require the contractor to assume responsibility for all design and data deficiencies which arise after the preproduction evaluation period.

We see no significant difference in the purpose and content of this PPE clause and that to which we found no legal impediment in 48 Comp. Gen. 750, supra. In that case, the solicitation required potential contractors to include in their proposal prices the cost of the preproduction evaluation to determine, identify and correct any discrepancy, error or deficiency in design or technical data and the cost of implementing any resulting changes and performing under the changed specifications. We stated that, in effect, this required a predetermination of costs to the contractor in remedying the discrepancies, errors or deficiencies in the TDP and provided for contractor reimbursement on this predetermined basis rather

than under the equitable adjustment provision of the Changes clause. We cautioned that in view of the risks being shifted to the contractor, it was essential for the agency to act promptly in its consideration of ECPs and within the 15 day calendar period specified in that PPE clause. We stated that its failure to do so should, under the Government Delay of Work clause, which is also present here, result in an adjustment under the Changes clause for increased costs of performance and/or extension of delivery.

Varo contends the PPE clause as explained in the minutes of the preproposal conference is unreasonable in that a major design change could be required at no cost to the agency. We believe this position arises from a misinterpretation. The minutes indicate the Army stated it was unaware of any basic design deficiencies and that pilot production had been successfully completed. It then stated the contractor would have full responsibility for meeting the performance requirements including any required design changes. We believe this language clearly indicates the Army did not contemplate the need for a major redesign and the "additional design effort" would be limited to that generally to be expected when moving from pilot production to high volume production.

Varo contends that because the Army stated it has no obligation to approve the first viable ECP submitted by the contractor with respect to a TDP deficiency, it would have "unbridled power to upgrade the delivered article at the contractor's expense." We do not accept this interpretation of the PPE clause. See Therm-Air Manufacturing Company, Inc., ASBCA Nos. 15842, 17143, August 21, 1974, 74-2 BCA 10,818 where the Armed Services Board of Contract Appeals stated:

> "In our opinion Article 11 [the PPE clause] modified the usual warranty of adequacy of Government-prepared designs to the extent that appellant undertook financial responsibility for the time and effort needed to detect drawing errors, component unsuitabilities, etc., and propose feasible solutions from the standpoint of satisfying

> the performance specifications. However, appellant under Article 11, did not incur the risk of expense incident to unreasonable delay on the part of the Government in acting upon a proposed solution, or once a feasible solution was suggested, nevertheless requiring considerable additional research before determining the course of action it desired."

Varo states the PPE clause and the certification requirement exceed the Government's minimum needs because they convert a fixed-price production contract into a more expensive fixed-price research and development contract. Varo argues that if the design and field testing of the pilot production fuzes are as good as the Army claims, the contractor's costs will be minimal and windfall profits will result. Nevertheless, Varo states the cost of a possible redesign effort would be so substantial that offerors cannot afford to eliminate this risk from their pricing. Varo has not, however, presented any evidence to demonstrate that the windfall profits, if any, might exceed the amount the Army could reasonably expect to disburse by way of equitable adjustments under the Changes clause if there were no PPE clause. In 48 Comp. Gen. 750, supra, we recognized that some proposals may contain excessive cost contingency factors for the PPE requirement but we agreed with the agency that if adequate competition were obtained, such excessive contingencies would be self-eliminating.

In 48 Comp. Gen. 750, we stated that only experience with use of the clause would reveal whether the ultimate costs to the Government are excessive or whether these costs are more than offset by the costs incident to the resolution of claims for defective or erroneous specifications under the Changes clause. Varo cites Therm-Air Manufacturing Company, Inc., supra, to support its contention that such experience indicates constructive change litigation has not been eliminated but has shifted its focus to whether the clause covers particular contingencies. However, as most claims for equitable adjustments are settled by negotiation, the cost of the litigation for those which are disputed may account for

only a small portion of the total amount an agency disburses in settling all such claims. Varo presents no evidence, and we are aware of none, which shows whether the amounts paid for equitable adjustments not involving litigation have been more or less when a PPE clause has been used than could have been expected otherwise. In the absence of such information, we are in no position to conclude the costs to the Government which may result from this PPE clause will be excessive.

Varo states that as the contractor must certify the TDP as "suitable for use in complying with all end item performance requirements", it purports to obligate the contractor for all follow-on production contracts. In our view, the certification requirement imposes only a requirement to document obligations the contractor already has under the PPE clause. An intention to hold a contractor responsible for the producibility of the fuze under the TDP by any contractor in the indefinite future would require clear and unmistakable language to this effect and even then might be subject to question as to its pracical enforceability and its propriety. The courts and the Armed Services Board of Contract Appeals (ASBCA) have generally construed PPE and similar clauses which relieve the Government of its normal obligations under standard contract clauses very narrowly. See cases cited in Bethlehem Steel Corporation, ASBCA No. 13341, November 19, 1972, 72-1 BCA 19186.

Moreover, U.S. Army Materiel Command pamphlet entitled "Preproduction Evaluation (PPE) Contracts" (AMCP 715-6, May 1970), discourages extended liability of data warranties with the following statement:

> "The valid risks imposed by a PPE contract are in themselves considerable without adding to them the risk of warranting the future suitability of the technical data for production by a unknown contractor, where the warrantor would have control of neither the conditions of contractor selection, nor of the administrative processes for insuring the timely and least costly implementation of a needed change."

In addition, the record indicates that the draft solicitation which was distributed for comments on April 24, 1978 contained the standard Technical Data Warranty clause in DAR § 7-104.9(o)(1). This clause establishes a warranty period of three years from delivery of the data "or any longer period specified in the contract." The official solicitation, dated September 22, 1978 which contained no data warranty or certification provision, was amended to include the certification provision challenged by Varo. Thus, aside from the literal meaning of the language used, we believe these factors clearly show no intention by the Army to extend the effects of the certification beyond the completion of this contract.

Varo contends the PPE clause and the certification requirement unduly favor the offeror which prepared the TDP. This argument was also presented in 48 Comp. Gen. 750; we stated that a natural competitive advantage is one which the procurement laws do not recognize as unlawful or even undesirable. There is no requirement that solicitations be so structured as to eliminate or reduce the competitive advantages of incumbent or past contractors unless such advantages result from a preference or unfair action by the agency. ENSEC Service Corp., 55 Comp. Gen. 656 (1976), 76-1 CPD 34. Although Varo implies the Army deliberately used the PPE clause to favor the past contractor, nothing in the record supports this implication or indicates use of the PPE requirement resulted from a preference or unfair action by the Army.

Varo also contends the inclusion of the PPE clause exceeds the minimum needs of the agency and unduly restricts competition. We have consistently held that the determination of the needs of the Government and the methods of accommodating them is primarily the responsibility of the procuring agencies. 38 Comp. Gen. 190 (1958). Moreover, though specifications should be drawn to permit the broadest range of competition within an agency's minimum needs, we will not disturb an agency's determination in this respect unless it is clearly shown to be without a reasonable basis. Honeywell Information Systems, Inc., B-191212, July 14, 1978, 78-2 CPD 39. The record before us demonstrates the PPE clause was designed

as a partial solution to what the Army considered were the excessive costs of equitable adjustments resulting from minor errors and omissions commonly found in new TDPs. We believe this was a reasonable approach to the problem and that the Army was not required to compromise its need in this regard in order to obtain additional competition. Winslow Associates, 53 Comp. Gen. 478 (1974), 74-1 CPD 14.

Finally, Varo argues the PPE clause constitutes a deviation from the standard Changes clause and therefore, should have been authorized as provided in Defense Acquisition Regulation § 1-109. This issue was also raised by Varo with respect to a similar clause in B-169838, B-169839, supra, where we rejected Varo's contention. We find nothing in the record or in the interpretations given PPE clauses by the courts, the ASBCA and the Army since that time to warrant reaching a different conclusion in this instance.

This protest is denied.

Milton J. Socolar

For the Comptroller General
of the United States