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

FILE: B-212987, B-212892, B-212718.2 **DATE:** February 27, 1984
MATTER OF: Williams Electric Co., Inc.

DIGEST:

Solicitation requirement in procurement for energy monitoring and control system (EMCS) that offeror have comparable system in operation at time of proposal submission is not unduly restrictive of competition where agency, because of experience of performance failures, seeks to ensure that the contractor is capable of delivering a workable EMCS in a timely fashion. Fact that only few offerors can meet the government's needs does not warrant conclusion that provision is unduly restrictive.

Williams Electric Co., Inc. (Williams), protests identical provisions contained in requests for proposals (RFP) Nos. DACA01-83-R-0065 for Arnold Engineering Development Center, DACA01-83-R-0057 for Homestead Air Force Base and DACA01-83-R-0060 for Maxwell Air Force Base and Gunter Air Force Station. The RFP's issued by the United States Army Corps of Engineers (Corps) are for energy monitoring and control systems (EMCS) for these installations.

We deny the protests.

Williams contends that the clause in the RFP requiring that, in order to be considered technically acceptable, offerors must have installed a user-accepted EMCS with certain listed features comparable to the one being procured at the time of proposal submission unduly restricts competition. The clause provides that proposals shall contain the following:

"(1) Previous EMCS Experience. To be considered technically acceptable, the prospective offeror, rather than potential subcontractors, must have supplied and installed an Energy Monitoring and Control system somewhere in the United States which has been accepted by the contracting authority for that system. The identification and location of the system shall

be submitted with the proposal and must include a thorough description including the name and telephone number of the user. A qualifying system may be in the public or private sector, but must have contained the following features:

"(a) Size. Nine-hundred points with a minimum of 15 distinct and separate buildings.

"(b) Type. Distributed processing with a minimum of three or more FIDS capable of stand-alone operation.

"(c) Application Software. Installed and operable programs which allow the system to perform duty cycling, optimum start/stop, time scheduled operation, demand limiting and outside air shutoff. The applicability of these programs will be judged in light of the requirements for similar programs contained in the contract specifications for this project.

"(d) Command Software. Installed and operable command software which performs as that required by this solicitation."

Initially, the Corps contends that we should dismiss the protest against the Maxwell Air Force Base RFP because Williams is not an interested party under our Bid Protest Procedures, 4 C.F.R. § 21.1(a) (1983). The Corps points out that Williams did not submit an offer and would not be eligible for award. We find that Williams is an interested party.

Where, as here, a protester contends that it was prevented from submitting an offer because of restrictive specifications, the protester has a substantial enough economic interest at stake to be considered an interested party under our Bid Protest Procedures. Contract Services Company, Inc., B-211450, B-211569, July 7, 1983, 83-2 CPD 67.

With regard to the merits, Williams alleges that the use of the clause is unduly restrictive since it necessitates completion of an EMCS project by an offeror at the time of proposal submission. Williams argues this requirement penalizes new companies in a relatively new field and provides no alternative for evaluation of an offeror based on experience gained from an ongoing, but as yet

uncompleted, EMCS project. Williams states it has several ongoing projects under contract, but none that have been user-accepted, and thus it would be excluded from award by this provision.

The Corps responds that it and other government agencies have had difficulties under prior procurements securing a contractor capable of providing a workable system in a timely fashion and that the qualification of offerors is necessary to preclude proposals from firms unfamiliar with highly complex EMCS systems. The Corps reports that numerous failures in Army and Air Force EMCS acquisitions have occurred because contractors lacked the special competence and expertise to ensure the proper integration of control functions and applications/command software. Furthermore, the Corps states that many problems do not become evident until the system is fully operational. The Corps asserts that, based on these past experiences, the clause reasonably reflects the government's minimum needs. Finally, the Corps points out that, in Radix II, Incorporated, B-209476, March 1, 1983, 83-1 CPD 213, this Office held that the complex technical nature of an EMCS acquisition fully justifies the use of an experience clause such as the one employed in these RFP's.

The determination of the needs of the government, the methods for accommodating such needs, and the responsibility for drafting proper specifications which reflect those needs are primarily the responsibility of the contracting agency. Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181; Johnson Controls, Inc., B-184416, January 2, 1976, 76-1 CPD 4. Further, it is proper for a contracting agency to determine its needs based on its actual experience. See Bowers Reporting Company, B-185712, August 10, 1976, 76-2 CPD 144. Though specifications should be drawn so as to maximize competition, we will not interpose our judgment for that of the contracting agency unless the protester shows by clear and convincing evidence that the agency's judgment is in error and that a contract awarded on the basis of such specifications, by unduly restricting competition, would be a violation of law. Joe R. Stafford, B-184822, November 18, 1975, 75-2 CPD 324. In this regard, we have recognized that any specification imposed in a solicitation, by its very nature, will restrict competition to some extent. Kleen-Rite Corporation, B-183505, July 7, 1975, 75-2 CPD 18.

In Radix II, supra, involving a similar clause, we specifically found that the protester had not established that the qualification requirements were unduly restrictive or in excess of the agency's actual needs. Williams, like

Radix, concedes that the specification was written in response to the agency's unsatisfactory experience with prior procurements of EMCS.

In concluding that the provision was not legally objectionable, we stated:

> ". . . we see nothing improper with a requirement that the prime contractor have installed a system comparable with that being procured here, which is a rationally founded attempt to prevent further failures in EMCS procurement. . . ."

We also pointed out that this Office has held that, even if only one firm can meet the specifications, the government does not violate either the letter or spirit of competitive bidding statutes so long as the specifications are reasonable and necessary for the purpose intended. Radix II, supra.

Williams attempts to distinguish the Radix II decision, arguing that it concerns a different clause and a different issue. We disagree. In our view, under the instant procurements, the essential requirement that the offeror have a comparable system in operation at the time of proposal submission and the underlying purpose of the requirement to protect against further failures of EMCS acquisitions are the same as that of the Radix II case, in which we found the provision not unduly restrictive. Accordingly, we reach the same result here.

To the extent that Williams argues the required features of the user-accepted system are unduly restrictive, Williams concedes that it does not have a user-accepted system at this time to offer to meet the threshold requirement which we have found unobjectionable. Since Williams admits it cannot meet this threshold requirement, its proposal could not be considered for award under any of these RFP's. Under these circumstances, we will not consider Williams' allegations that the specific features required to have been part of the user-accepted system are also unduly restrictive. Betakut USA, Inc., B-212586, January 26, 1984, 84-1 CPD___.

Finally, Williams objects to the use of responsibility criteria as a basis for determining technical acceptability. We have long held that, in negotiated procurements, it is appropriate to use traditional responsibility factors as

technical evaluation criteria and to judge technical proposals on that basis. Anderson Engineering and Testing Company, B-208632, January 31,1983, 83-1 CPD 99. If a small business, as Williams apparently is, is found to be technically deficient in such situations, Small Business Administration certificate of competency procedures are not applicable. Electrospace Systems, Inc., 58 Comp. Gen. 415, 425 (1979), 79-1 CPD 264.

Milton J. Socolar

for Comptroller General
of the United States