

Halperin

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20540**

28175

FILE: B-212997

DATE: May 2, 1984

MATTER OF: Trailways Manufacturing, Inc.

DIGEST:

Complaint that life cycle cost penalties and credits incorporated in a grant-funded procurement solicitation create unduly restrictive specifications is denied because complainant has failed to show that the penalties and credits do not reflect minimum needs and are not reasonably related to the grantee's intended goal of insuring that the long term cost of the procurement will be minimized.

Trailways Manufacturing, Inc. (Trailways), has submitted a complaint about solicitation No. 1230 issued by the Port Authority of Allegheny County (Grantee) for the purchase of 20 suburban-type motor coaches pursuant to grant No. PA-03-0152 administered by the Urban Mass Transportation Administration (UMTA). Trailways alleges that the amended solicitation is unduly restrictive of competition. We deny the complaint.

In April 1983, the Grantee issued solicitation No. 1230. In May 1983, Trailways submitted its request to receive "approved equal" status for its Eagle model 10 coach. On June 13, 1983, the Grantee responded to the "approved equal" requests and issued addendum No. 4 and appendix "A" that provided penalties or credits in regard to 22 specification items based upon a life cycle cost analysis. If an offered item lacked certain required features, a set dollar amount was added to its life cycle cost calculation.

By letter dated June 22, 1983, Trailways protested to the Grantee against the life cycle cost penalties and credits assigned to various requirements outlined in the specifications (appendix "A"), contending that they unjustly penalized Trailways and favored another source. In its letter, Trailways reiterated its request for "approved equal" status for the drive axle, front axle, and bogie axle to which the Grantee did not previously respond. Trailways

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also restated its request for "approved equal" status for the location and type of the battery and electrical system used in the Eagle coach. On August 11, 1983, in its response to Trailways' protest letter of June 22, the authority granted "approved equal" status to the Trailways drive axle, front axle, and bogie axle, commenting that its previous failure to respond to these requests was due to an oversight. The Grantee responded to the remainder of Trailways' objections by providing another revision of the solicitation, addendum 8.

On August 19, 1983, Trailways protested to UMTA against the life cycle costs outlined in addendum 8, stating that it was precluded from submitting a competitive bid. By letter dated August 26, 1983, and by phone on the same day, UMTA summarily denied Trailways' protest, stating that pursuant to UMTA guidelines and procedures, "the manner in which a Grantee implements life cycle costing, performance and standardization requirements is within the Grantee's discretion."

Trailways' timely complaint to our Office reiterates its earlier positions with the Grantee and UMTA, namely, that the life cycle cost provisions in the solicitation were unduly restrictive and precluded Trailways from submitting a competitive bid.

Trailways' complaint is proper for consideration by our Office, where, as here, the complaint involves the fundamental requirement for full and free competition and the complainant has exhausted its administrative remedies. See Brumm Construction Company, 61 Comp. Gen. 6 (1981), 81-2 CPD 280. Since this involves review of an UMTA decision, our consideration will be limited to whether that decision was reasonable in light of UMTA's regulations, which encourage maximum open and free competition in grantee procurements. UMTA Circular 4220.1A § 16(a). See Brumm Construction Company, supra. We conclude that UMTA's denial of Trailways' complaint was reasonable.

Trailways complains that various life cycle cost elements precluded it from submitting a competitive bid. Life cycle costing is a recognized technique used to guarantee that the longrun cost of a procurement is as low as possible, notwithstanding a potentially higher acquisition

cost of the goods procured. See Eastman Kodak Company, B-194584, August 9, 1979, 79-2 CPD 105; Mor-Flo Industries, Inc., B-192687, June 5, 1979, 79-1 CPD 390. The Urban Mass Transportation Act, 49 U.S.C. § 1608(b)(2) (1976), recognizes that life cycle costing may be used, provided that the bidding documents outline how life cycle costs will be used in determining which bid is lowest. See UMTA Circular 4220.1A § 17.6(2)(d); Dictaphone Corporation, B-200765; B-200765.2, June 10, 1981, 81-1 CPD 475; Eastman Kodak Company, supra. Solicitation No. 1230 and its amendments clearly state how life cycle costs will be used in determining the lowest bid and, therefore, are not defective in this regard.

In denying Trailways' complaint, UMTA properly recognized that its procedures at section 2(e) of attachment "B" of UMTA Circular 4220.1A provide that "the revision of specifications to incorporate the evaluation of life-cycle costing (LCC) factors in connection with any given procurement" is "within the discretionary powers of the Grantee" and that UMTA should not substitute its judgment for that of the Grantee absent arbitrary or capricious behavior.

While Trailways alleges that various elements of the life cycle costing would benefit a specific competitor, it has not shown, or even indicated, that the life cycle costs evaluated are not reasonably related to the expected long-run costs of the procurement. The determination of the government's minimum needs, the method of accommodating them and the technical judgment upon which those determinations are based are primarily the responsibility of the contracting officials who are most familiar with the conditions under which the supplies and services have been used in the past and will be used in the future. Ingersoll-Rand Company; Sullair Corporation, B-207246.2; B-211811, September 28, 1983, 83-2 CPD 385. Therefore, our Office will not question agency decisions concerning those matters unless they are shown to be clearly unreasonable. Ingersoll-Rand Company; Sullair Corporation, supra. 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

28115

specifications, by unduly restricting competition, would be a violation of law. Radix II, Incorporated, B-211884, September 26, 1983, 83-2 CPD 375. In this regard, we have recognized that any specification imposed in a solicitation, by its very nature, will restrict competition to some extent. Radix II, Incorporated, supra.

Trailways has not shown that the solicitation's life cycle cost credits and penalties are unduly restrictive or in excess of the agency's minimum needs. While Trailways states that "[n]o manufacturer can experience the expense of engineering and tooling that would be involved for a quantity of 20 buses to meet the bid specifications and avoid having to bid with the penalties that the Grantee imposed," it has not shown that the life cycle cost credits and penalties are not reasonably related to their intended goal, i.e., to help the agency insure that the long term cost of the procurement will be minimized. Trailways has not met its burden of affirmatively proving its case. See A.B. Dick Company, B-211119.3, September 22, 1983, 83-2 CPD 360.

The complaint is denied.

Milton J. Fourtan
Acting Comptroller General
of the United States