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DECISION



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

FILE: B-214180

DATE: May 18, 1984

MATTER OF: Allis-Chalmers Corporation

DIGEST:

1. GAO dismisses a protest alleging that the contracting agency's interpretation of a solicitation requirement is inconsistent with a Determination by the Undersecretary of Defense establishing the conditions for such procurements. Since the protester was aware that the solicitation language clearly differed from that in the Determination it should have requested clarification from the agency prior to bid opening. In addition, the matter is now essentially academic because a subsequent modification to the Determination establishes that the agency's interpretation, which expanded the field of competition, was proper.
2. Protester's contention that a solicitation requirement should be interpreted more restrictively than intended by the agency will not be considered since it is contrary to the purpose of the bid protest function to assure that full and free competition is attained.

Allis-Chalmers Corporation protests that two bids under solicitation No. DACW21-84-R-0001, a two-step formally advertised procurement conducted by the United States Army Corps of Engineers for hydraulic pump turbines, are nonresponsive. We dismiss the protest.

The Corps received four proposals under Step I of the procurement, and all were found technically qualified. The low bid under Step II was submitted by Dominion Engineering Works (DEW), and the second low bid by Dominion Bridge-Sulzer, Inc. (DBS). The third low bidder was found nonresponsive because it qualified its bid. Allis-Chalmers was the high bidder. No award has been made.

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Allis-Chalmers' protest focuses on the Step I solicitation requirement that "the prototype designer's engineering department shall . . . be experienced in the prototype design of custom turbo machinery for hydroelectric power plants." Allis-Chalmers asserts that DEW and DBS were nonresponsive to this requirement and that the contracting officer's decision to the contrary is based on an illegal interpretation of the requirement.

The protester points out that an Undersecretary of Defense for Research and Engineering (USDRE) Determination, issued under 10 U.S.C. § 2304(a)(16) (1982) and Exec. Order No. 11,490, 34 Fed. Reg. 17,567 (1969), as amended,¹ establishes the requirements applicable to the procurement of hydraulic turbines and pump turbines. This Determination was based on a technical analysis of hydraulic turbine defense mobilization needs performed by the Corps. It specifies that "The engineering department shall . . . be normally engaged in the prototype design of hydraulic turbines and pump turbines" (emphasis added). Allis-Chalmers contends that the contracting officer was legally bound to apply this requirement to the instant procurement. Therefore, the protester argues, the solicitation requirement for experience "in the prototype design of custom turbo machinery for hydroelectric power plants" must have the same meaning as the language in the USDRE Determination, which requires experience in the prototype design of both hydraulic turbines and pump turbines. Allis-Chalmers charges that neither DEW nor DBS has experience in the prototype design of pump turbines.

Both the Corps and DEW argue that the protest is untimely under our Bid Protest Procedures. They assert that Allis-Chalmers was aware of the USDRE Determination and its contents at the time the solicitation was issued.

¹10 U.S.C. § 2304(a)(16) authorizes procurement by negotiation when the head of an agency determines that it is in the interest of national defense that a facility or supplier be kept available to furnish services in case of a national emergency. Exec. Order No. 11,490 assigns the Secretary of Defense responsibility for maintaining the mobilization base.

Since the protester also knew the solicitation language differed from that in the Determination, DEW and the Corps argue that the protester was faced with an apparent solicitation impropriety which it had to protest prior to the closing date set for receipt of proposals under Step I. See 4 C.F.R. § 21.2(b)(1) (1984). Allis-Chalmers did not protest until shortly before the date set for bid opening on Step II of the solicitation.

The protester contends that it was not required to protest prior to the closing date for Step I because it did not know then that the contracting officer would interpret the solicitation contrary to the USDRE Determination. Allis-Chalmers argues that it simply assumed that the language in the solicitation meant the same thing as that used in the USDRE Determination, and contends that in fact the two requirements must be identical. The protester also asserts that only after it learned which proposals were found qualified under Step I, and conducted market research on the firms that had submitted those proposals, did it realize that the solicitation was not being interpreted consistent with the USDRE Determination.

We do not believe that the protester was entitled simply to assume that the solicitation language meant the same thing as that in the USDRE Determination, which was not part of the solicitation. Allis-Chalmers admits that, on its face, the language used in the solicitation does not require experience in the prototype design of both hydraulic turbines and pump turbines.² Rather than ignoring the apparent discrepancy between the solicitation and the USDRE Determination, Allis-Chalmers at least should have sought clarification from the agency.

In addition to our concern about the timeliness of the protest, we note that the proper interpretation of the solicitation language essentially has become an academic question at this point. After Allis-Chalmers filed its

²In a telex to the Army sent 1 working day prior to the date it filed the protest here, Allis-Chalmers requested clarification of the discrepancy between the solicitation and the USDRE Determination. The firm stated that "[B]eing experienced in the prototype design of custom turbo machinery may not include the specific requirement contained in the USDRE Determination that the engineering department be engaged in pump turbine design as well as other hydraulic turbine design."

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protest here, the Corps requested the Assistant Secretary of the Army (Research, Development and Acquisition) to modify the USDRE Determination. The Corps stated that it was not the intent of the Corps' technical analysis, on which the USDRE Determination was based, to require experience in both hydraulic and pump turbine design, and that such an interpretation placed undue restrictions on full and free competition. The Assistant Secretary concurred with this position and clarified the USDRE Determination to require experience in the prototype design of either hydraulic turbines or pump turbines.

Allis-Chalmers contends that the modification can have no effect on this procurement since it was issued several months after bid opening. Nevertheless, we cannot overlook the fact that the modification expresses the Corps' actual requirement, which is less restrictive of competition than the solicitation interpretation Allis-Chalmers would have us require. Allis-Chalmers would, of course, benefit from such a restrictive interpretation because it would then be the only competitor capable of meeting the solicitation requirement. That apparent interest, however, is not a protectable one under our bid protest function, the purpose of which is to assure that full and free competition is attained. See Gentex Corporation, B-209083, April 13, 1983, 83-1 CPD ¶ 394.

Accordingly, we conclude that Allis-Chalmers' protest is inappropriate for our consideration. The protest is dismissed.

Harry R. Van Cleve
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Acting General Counsel