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DECISION

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

FILE: B-218356; B-218357 **DATE:** July 8, 1985

MATTER OF: R. R. Mongeau Engineers, Inc.

DIGEST:

Protests of brand name specifications are sustained since agency has not shown that its needs can be met only by restricting awards to firms offering the brand name product.

R. R. Mongeau Engineers, Inc. (Mongeau), protests the specifications used in invitation for bids (IFB) No. F24604-85-B0013 (IFB -B0013) and IFB No. F14614-85-B0019 (IFB -B0019), issued by the Department of the Air Force. Mongeau contends that the restriction limiting the competition to the specified anode well backfill, Loresco DW3 or DW2, is unduly restrictive of competition because it is precluded from offering an "equal" product.

We sustain the protests.

Both solicitations are for the installation of a cathodic protection system. Cathodic protection is used to arrest certain types of corrosion, in these applications by placing anodes (postively charged poles which attract negative ions or electrons) in deep wells adjacent to a negatively charged structure that is to be protected. IFB -B0013 solicits the installation of a system to protect underground metallic structures at the Minuteman missile facilities at Malmstrom Air Force Base (AFB), Montana, while IFB -B0019 involves the protection of underground utility and fire protection systems at McConnell AFB, Kansas. In both cases, the anode wells are to be backfilled with calcined fluid petroleum coke (known generically as "fluid coke") to provide electrical contact between the anodes and surrounding earth. No awards have been made.

The record indicates that the Air Force has used deep well anode beds for many years. In 1978, following the failure of deep well anodes at Barksdale AFB, Louisiana, and Little Rock AFB, Arkansas, the agency retained Cathodic Engineering Equipment Co. (CEE) to develop a deep well anode

system using replaceable components. CEE designed and installed a prototype system at Ellsworth AFB, South Dakota, and in this connection, furnished Loresco fluid coke, a proprietary product that CEE markets. Since 1978, the Air Force has used the CEE design at Minuteman missile sites where, in its view, that design can be economically used.

According to Mongeau, the Air Force, by specifying Loresco, has unnecessarily restricted competition to firms offering a proprietary product. IFB -B0013 specifies that bidders must use Loresco DW3 or DW2 fluid coke and IFB -B0019 calls for Loresco DW3 fluid coke. Loresco DW2 is ordinary fluid coke with carbon lubricants added; DW3 includes wetting agents as well as carbon lubricants. Mongeau points out that CEE holds patents for fluid coke treated with these additives. The protester says, however, that the additives contribute nothing to the effectiveness of the product. It asserts that it has used Loresco as well as competing products in over 100 installations. It states that it can furnish fluid coke manufactured by the same firm that supplies CEE and that there is no difference in performance between Loresco and similarly refined coke excluding CEE's additives.

Generally, when a protester challenges a specification as unduly restrictive of competition, the burden is on the procuring agency to establish prima facie support for its position that the restriction imposed is necessary to meet its minimum needs. Tooling Technology, Inc., B-215079, Aug. 6, 1984, 84-2 C.P.D. ¶ 155. In our review of the issues, we examine the adequacy of the agency's position not simply with regard to the reasonableness of the rationale asserted but also the analysis given in support of these reasons, Cleaver Brooks, B-213000, June 29, 1984, 84-2 C.P.D. ¶ 1, to assure that the agency's explanation will withstand logical scrutiny. Fleetwood Electronics, Inc., B-216947.2, June 11, 1985, 85-1 C.P.D. ¶ ____. Moreover, the Air Force in this instance has restricted its procurement to offers to furnish a brand name product which, because this amounts to a de facto solicitation of a sole source, is subject to close scrutiny. Ampex Corporation, B-191132, June 16, 1978, 78-1 C.P.D. ¶ 439.

The Air Force, in support of its requirement, has identified features of fluid coke that it says are essential for the deep well anode beds in these projects. The features, which the contracting officer describes as salient characteristics of Loresco, are: low electrical resistance, small particle size, good lubrication and minimum air entrapment. Low resistivity, the agency claims, will result in low operating cost over the design life of the system. The carbon lubricants and wetting agents used in the Loresco products should aid, it says, in the construction and quality of the backfilled well and should facilitate repair or replacement of defective anodes if the system fails. Further, the Air Force argues, it has successfully used Loresco in the past.

Initially, we point out that the fact that the Air Force may have successfully used Loresco in the past is irrelevant in applying the legal standards outlined above. The question presented by the product is whether there is a reasonable basis for not considering products other than Loresco that may be able to perform equally well. This has nothing to do with whether Loresco is a good product or whether Air Force personnel like Loresco.

After examining the record before us, we conclude that exclusion of alternative products has not been justified. The Air Force merely states its position in conclusory form. It has not adequately explained its conclusions. The analysis that it has provided is not substantiated on the record.

For example, the Air Force claims that it requires Loresco to assure low resistivity. As support for this claim, the Air Force has submitted a copy of a report of a test performed for the Air Force by an independent testing laboratory. The report is cited as proving that Loresco has the lowest resistivity and thus is the best available product for replaceable anode beds. This establishes, the agency contends, that operating cost would be less with Loresco than with other products.

The test, however, was conducted on but three samples. Only two petroleum coke backfill samples were tested, one of which was Loresco. The difference between the measured resistivity of these samples was relatively small, 0.0475 ohms versus 0.0400 ohms for Loresco, and as Mongeau points out, the size of the particles in these samples were not comparable even though particle size is a significant factor in comparing resistivity. The test results thus are consistent with, and indeed tend to support Mongeau's contention that the additives in Loresco have no bearing on resistivity. Mongeau also points out that CEE markets a Loresco product (DW1) that contains no additives, but for which CEE claims a resistivity equal to that of DW2 and DW3.

Even if the test results were indicative of a difference in resistivity under the conditions in which the testing was conducted, however, the record would not support a finding that those conditions are representative of conditions encountered in deep well anode beds. The protester points out, and the Air Force does not deny, that the test procedure used was developed by a third party to test resistivity of coke in connection with the manufacture of graphite electrodes. Mongeau states that the test, which compares the resistance of dried coke, is of little use in predicting the actual resistance of a completed deep anode bed which, typically, is saturated with water. The Air Force has laid no foundation to establish that the test is relevant.

On the other hand, Mongeau has submitted copies of Air Force documents that indicate that factors such as gas build up around the anodes and increases in resistivity due to loss of chloride and other dissolved materials (that may be converted to gas as a by-product of anode bed operation) play a significant role in the cost of operating deep anode beds and in explaining their eventual failure. The Air Force has not claimed nor shown that the additives used in Loresco make those products less receptive to increases in resistivity than fluid coke that is not treated with those additives.

As to alleged savings in the event of a complete overhaul from using Loresco products, the Air Force does not explain why replacement of the Loresco products would be less costly than replacing other types of similarly refined fluid coke. It merely states that the Loresco products are "believed to" facilitate repair and replacement. Moreover, assuming the additives in Loresco make replacement somewhat easier, there is no evidence in this regard that any potential savings offset the additional cost of buying Loresco in the first place. In this connection, the Air Force documentation obtained by Mongeau indicates that the Air Force has opened failed wells of other designs and was able to remove the contents, evidently without undue difficulty.

Under these circumstances, we conclude that restriction of fluid coke to a specific brand name has not been justified. Consequently, the solicitation should be amended to allow consideration of equal products that can be shown to be capable of meeting the Air Force's actual needs.

The protests are sustained.

for Milton J. Socolar
Comptroller General
of the United States