

**DECISION**



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

**FILE:** B-217304 **DATE:** September 9, 1985  
**MATTER OF:** The Ted Trump Company

**DIGEST:**

1. Allegation that awardee's proposed equipment does not strictly conform to the RFP's technical requirements is denied since strict compliance was not required and agency's technical evaluation and determination that proposed equipment will satisfy agency's requirements is not found unreasonable.
  
2. Allegation that awardee's proposed commercial equipment will not comply with RFP's technical requirements is denied where agency evaluation of awardee's proposal indicates that equipment will satisfy contract requirements. Allegation that proposed equipment will be nonconforming to contract requirements is a matter of contract administration which is the responsibility of the procuring agency not our Office.

The Ted Trump Company (Trump) protests the award of a contract to Landoll Corporation (Landoll) under request for proposals (RFP) No. F41608-83-R-0250, issued as a small business set-aside by the San Antonio Air Logistics Center, Kelly Air Force Base, Texas (Air Force), for truck-mounted deicers.

We dismiss the protest in part and deny it in part.

The solicitation was issued to replace the Air Force's current fleet of truck-mounted deicers which are utilized by the Air Force to remove ice and/or snow accumulations from aircraft surfaces. Amendment No. 0002 to the RFP advised offerors that the evaluation was to be based on the Air Force's "lowest evaluated price" method and listed the evaluation criteria which would be utilized in descending order of importance as follows: (1) Price, (2) Item

Conformance, (3) Company Stability, (4) Production Plan, and (5) Experience. The RFP further indicated that each offeror's relevant past performance, understanding of the requirement, soundness of approach and compliance with the requirements would be considered in the scoring of the specific evaluation criteria. Under the RFP's evaluation scheme, award would be made to the offeror with the highest total weighted score.

The Air Force indicates that four proposals were received in response to the solicitation. Technical evaluations were conducted and Landoll received the highest overall score. The Air Force awarded a contract to Landoll, and Trump filed this protest objecting to the award.

Trump alleges that the Landoll deicer does not conform to the RFP's technical requirements and will not meet the Air Force's minimum needs. Trump asserts that the Air Force's acceptance of Landoll's proposed equipment amounts to a relaxation of the RFP's specifications and that the Air Force should have issued an amendment advising all offerors of the relaxed requirements.

In addition, Trump contends that Landoll is not a small business and that Landoll lacks the capability to perform the solicitation requirements. Trump further alleges that the use of Landoll equipment will result in an infringement of Trump's patented "Hot Water Deicing" method. Finally, Trump asserts that all offers had expired by the time of award and that all offerors were not treated equally since the Air Force only obtained an extension of Landoll's proposal.

The Air Force states that the technical evaluation was conducted in accordance with the RFP's evaluation scheme, and that the Landoll deicer satisfies the Air Force's requirements. The Air Force indicates that in response to Trump's allegation that the Landoll deicer failed to meet the RFP's technical requirements in 24 specific areas, the Air Force evaluation team reevaluated the Landoll proposal and determined that it conformed to the RFP's purchase description requirements in 20 out of 24 instances. With regard to the remaining four areas, the Air Force found that the Landoll deicer met the Air Force's minimum requirements or met the RFP's requirements as clarified by amendment No. 0002 to the RFP.

In addition, the Air Force argues that Landoll is fully capable of meeting the contract's requirements. The Air Force states that Landoll's production plan and experience were evaluated as part of the agency's technical evaluation and that, in addition, a preaward survey was conducted which found Landoll responsible. Also, the Air Force indicates that the question of Landoll's small business status was forwarded to the Small Business Administration (SBA) which ruled that Landoll was, in fact, a small business. Finally, the Air Force states that both Trump and Landoll were asked to extend their offers. Landoll extended its offer and the Air Force argues that the contract was properly awarded the firm well within the acceptance period.

The procuring agency has the primary responsibility for determining its needs and for drafting requirements that reflect those needs since it is most familiar with how the supplies or services have been or will be used. The agency is also responsible for evaluating an offeror's proposal and determining whether the equipment offered meets the agency's requirements. We, therefore, will not disturb either an agency's decision as to the best method of accommodating its needs, or the agency's technical decision that an offered item meets those needs, absent a clear showing by the protester that the decision was unreasonable. Venram, Inc., B-214657, July 2, 1984, 84-2 CPD ¶ 7.

In our view, Trump has not established that the Air Force's evaluation of Landoll's equipment was not in accord with the RFP's evaluation scheme or that the acceptance of the equipment represented a relaxation of the solicitation requirements. We point out that strict compliance with RFP's purchase description was not required by the solicitation. At the preproposal conference, the Air Force clearly stated that it did not expect every manufacturer to meet every requirement to the letter, but to come as close as possible. In addition, the RFP required offerors to compare their proposed equipment with the purchase description, paragraph by paragraph and explain any differences. This requirement, in effect, also notified offerors that strict compliance with the RFP's purchase description was not required. See Western Graphtec, Inc., B-212971, May 14, 1984, 84-1 CPD ¶ 517. Since strict compliance was not required, we find Trump's allegation that the Air Force relaxed the RFP's purchase description requirements without merit. To the extent Trump is objecting to the use of such an evaluation scheme, we find

the allegation untimely since this matter should have been raised prior to the closing date for receipt of proposals. See 4 C.F.R. § 21.2(b)(1) (1984).

Concerning the Air Force's evaluation of Landoll's proposal, the record indicates that the Air Force determined that Landoll's proposed equipment conformed to the RFP's purchase description and that in the few instances where a deviation existed, the deviation was immaterial to the agency's needs. Although Trump asserts that Landoll's proposed equipment, as commercially produced, cannot satisfy the RFP's requirements, we have no basis to question the Air Force's determination that, as proposed, the Landoll deicer will meet the RFP's requirements and the agency's needs. Moreover, whether Landoll ultimately supplies an item conforming to the contract requirements is a matter of contract administration, which is the responsibility of the procuring agency and not this Office. Osawa & Co., B-210368.2, Aug. 23, 1983, 83-2 CPD ¶ 233.

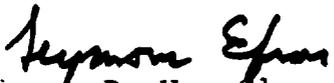
With respect to Trump's allegations concerning Landoll's ability to perform, we note that Landoll's production plan and experience were evaluated by the Air Force as part of the technical evaluation. Although Trump may disagree with the results of the evaluation in this regard, nothing in the record supports a finding that the Air Force's scoring of Landoll's proposal in these areas was unreasonable. In addition, the record indicates that preaward survey of Landoll's plant, facilities and equipment production control, materials, purchased parts and subcontracting, and personnel and technical capability was conducted and Landoll was found responsible. Responsibility refers to a prospective contractor's ability to perform a particular contract and our office will not question a contracting officer's affirmative determination of responsibility absent a showing of possible fraud or bad faith or misapplication of definitive responsibility criteria. Beta Construction Co., B-216176, Dec. 11, 1984, 84-2 CPD ¶ 648. We see no basis to question the Air Force's determination concerning Landoll's ability to perform this contract.

Concerning Trump's remaining contentions, we also find them without merit. Under the provisions of the Small Business Act, 15 U.S.C. § 637(b)(6) (1982), the exclusive

authority to determine small business size status is vested in the SBA, and our Office will not consider Trump's allegation that Landoll is not a small business. Durham Mfg. Co., B-216366, Nov. 30, 1984, 84-2 CPD ¶ 614. Also, the Air Force states that both Trump and Landoll were requested to extend their offers. Although Trump denies that the Air Force made such a request, where there is conflicting evidence between the protester and agency personnel, we have consistently held that the protester has not met its burden of proof. Oakwood Industries, B-216665, Dec. 17, 1984, 84-2 CPD ¶ 677. Accordingly, we are unable to conclude that Trump was treated unfairly in this regard.

Finally, we note that Trump has filed a suit in the United States Claims Court regarding its allegation that the Air Force use of Landoll's equipment will result in an infringement of Trump's "Hot Water Deicing" patent. That court has exclusive jurisdiction over lawsuits involving patent infringements by a government contractor and our Office does not consider such protests. Industrial Co-Generation Systems, B-216511, Oct. 9, 1984, 84-2 CPD ¶ 396.

The protest is dismissed in part and denied in part.

*for*   
Harry R. Van Cleve  
General Counsel