

# DECISION



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

FILE: B-217376

DATE: October 29, 1985

MATTER OF: Advance Machine Co.

## DIGEST:

1. GAO will not object to specifications required by the agency for sweepers and sweeper/scrubbers where the agency has shown that it has a reasonable basis for its requirements and the protester has not presented any evidence which would establish that such specifications are arbitrary or unreasonable.
2. Protest which alleges that certain specifications should be made more restrictive will not be considered since such specifications violate no laws or regulations.
3. Solicitation requirement that offered equipment have Underwriters Laboratories, Inc. seal of approval attached to each item is unduly restrictive of competition and, therefore, improper.

Advance Machine Co. (Advance) protests under request for proposals (RFP) No. 700-84-R-7613, as amended, issued by the Defense Logistics Agency for industrial type sweeper/scrubbers and sweepers. Advance asserts that the solicitation's specifications are unduly restrictive because they incorporate features which are proprietary to one of Advance's competitors.

The protest is denied in part and sustained in part.

The RFP was issued on September 17, 1984, by the Defense Construction Supply Center (DCSC), Columbus, Ohio, to fulfill a purchase request by the Naval Construction Battalion Center (Center) at Port Hueneme, California, for four industrial type, rider-operated sweeper/scrubbers and four industrial type, rider-operated sweepers. The specifications for both types of machines were originally set forth as Federal Specification 00-S-870D "SWEEPERS, ROTARY, SELF PROPELLED, INDUSTRIAL TYPE, RIDER-OPERATED,"

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with options and deviations as set forth in section "C" of the solicitation. In its initial protest letter to this Office, Advance objected to these "options and deviations" on the basis that these modifications of the federal specification "are almost totally proprietary in nature" because they are based on a product offered by the Tennant Company. Effective February 27, 1985, DCSC issued amendment No. 0005 to the RFP which deleted Federal Specification 00-S-870D and substituted revised Federal Specification 00-S-870E, together with "options and deviations" to that specification. Advance protests that the specifications set forth in amendment No. 0005 are unduly restrictive, particularly the "options and deviations," which Advance views as proprietary in nature. By amendment No. 0006, effective March 29, 1985, the agency postponed the closing date for the receipt of proposals until further notice in order to consider further revisions to the specifications.

Basically, Advance asserts that the RFP incorporates features which are unique to the Tennant Company and that this procurement is really a sole-source procurement in the form of a competitive negotiation. Advance contends that some of the "options and deviations" to specification 00-S-870E are overly restrictive. One such provision is paragraph 3.13.11.4, entitled "scrubber operations," which is applicable to the sweeper/scrubber units. This paragraph provides in part that the sweeper shall be equipped to operate as an automatic scrubber-vacuum unit through the use of an integrated or attachment assembly. Advance, in part, objects to the agency's requirement for a sweeper with a scrubber assembly and contends that ideally the best results for sweeping and scrubbing tasks would be obtained from separate sweeper and scrubber machines.

Advance also objects to paragraph 3.12.3.2.6 of the sweeper specification, as added by the options and deviations. This paragraph provides that unless otherwise specified, the sweepers shall conform to the applicable requirements of UL (Underwriters Laboratories, Inc.) 558 for type GS (gas) trucks; that electrical wiring and equipment shall be at least 18 inches above the floor; that the supplier shall certify that the sweeper furnished meets these requirements; and that acceptable evidence of compliance shall be a UL seal of approval attached to each sweeper. Advance objects to the imposition of the UL 558 safety standard and the additional requirement that all electrical wiring and equipment be at least 18 inches above

the floor. Advance appears to question whether the sweepers will be used in hazardous situations which require the safety standards set forth in the solicitation.

Advance also has objected to a number of other specifications which have not been addressed by the Center in its recommendations for amending the RFP nor by DCSC in its report. In several instances, Advance alleges that the specifications could, and should, be made more stringent. For example, paragraph 3.13.11.3 of specification 00-S-870E provides that the sweeper's hopper must retain sweepings up to 80 percent of the applicable rated capacity whereas Advance believes that the applicable standard should be 100 percent. Advance also contends that paragraph 3.13.10.1 of the federal specification, concerning the suction fan, should be revised to provide that controls will be easily accessible to the operator so that the operator can shut off the air flow through the dust filter when sweeping in wet areas; the present specification contains no such requirement. Additionally, Advance objects to the fact that amendment No. 0005 removed the requirement that sweepers be equipped with batteries which "conform to W-B-131." Allegations that a solicitation's specifications are not restrictive enough, however, will not be considered by our Office since such specifications violate no statute or regulation and their use is not subject to legal objections. Pikes Peak Water Co., B-211984, Mar. 16, 1984, 84-1 C.P.D. ¶ 315.

In addition it is not clear whether other specification provisions to which Advance objects affect its ability to compete under the solicitation or merely reflect its preference or the desire to provide an option. For example, Advance has objected to paragraph 6.2(m) of the "options and deviations" to specification 00-S-870E, which provides that manufacturer's standard pneumatic tires are required. Advance states that the new "state of the art" solid "cushion tire" gives pneumatic performance without the accompanying tire maintenance and service problems and it argues that cushion tires should be deemed at least equal to pneumatic tires. There is no indication in the record, however, that Advance cannot offer pneumatic tires. Similarly paragraph 3.13.8 of the federal specification, as modified by the RFP's "options and deviations," requires one red rotating beacon light on each scrubber/sweeper

whereas Advance contends that a "safety flashing beacon" also should be allowed.

Finally, we note that by letter to the agency dated March 29, 1985, Advance objected to some of the solicitation's specifications including the requirement that there be two cylindrical brushes in the scrubber assembly. Advance did not specify the basis for its objection to the brushes except to categorize this requirement as "proprietary." It was not until after receipt of the agency report that Advance, by letter dated May 22, 1985, elaborated on its objection to the requirement for cylindrical brushes.

Under the circumstances, the agency's report on the protest submitted by Advance addressed only the two basic objections raised by the protester in its protest correspondence to our Office--the requirement for a scrubber assembly for the sweeper/scrubbers and the requirement that the sweeper meet the specified safety standards including those represented by UL 558.

The agency urges our Office to deny the protest with regard to Advance's objections to the scrubber assembly on the basis that the protester has not met the heavy burden of clearly demonstrating that the agency's determination of its minimum needs has been arbitrary or unreasonable. Concerning the protester's allegations that the scrubber assembly and the UL 558 rating requirements are proprietary, the agency points out that our Office has held that while agencies should formulate their requirements so as to maximize competition, restrictive requirements which limit competition are not improper where the requirements reflect the government's legitimate minimum needs. The agency urges that the remainder of Advance's objections to the specifications be dismissed as premature on the basis that the contracting officer did not have sufficient time to closely review the Center's response to the protester's objections to the specifications and that it was still considering amendments to the specifications.

Subsequent to the submission of that report, the agency issued amendment No. 0007, on July 16, 1985. This amendment changed some of the solicitation's specifications and extended the closing date for receipt of offers to July 31, 1985.<sup>1/</sup> Under the solicitation, as thus amended, the specifications continue to require scrubber assemblies

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<sup>1/</sup> A copy of Amendment No. 0007 was recently furnished to us by the agency.

for the sweeper/scrubber units and that the sweepers meet the specified safety standards, including those represented by UL 558. Subsequent to the issuance of this amendment, Advance, by letters to the agency dated July 25 and August 2, 1985, advised that it continued to object to the solicitation's specifications, without specifying the precise basis therefor. While the protester forwarded to us copies of its letters addressed to the agency, it did not further correspond directly with us. Thus, on the basis of this record the only two issues clearly before us for decision are the propriety of the requirement for scrubber assemblies and the required safety standards.

The determination of the government's minimum needs, the method of accommodating them and the technical judgments upon which those determinations are based are primarily the responsibility of the contracting agency. We have recognized that the agency is most familiar with the conditions under which supplies, equipment, or services have been used in the past and will be used in the future. Consequently, we will not question an agency's determination of its minimum needs unless there is a clear showing that the determination has no reasonable basis. See Eaton Leonard Corp., B-215593, Jan. 17, 1985, 85-1 C.P.D. ¶ 47. However, when a protester challenges specifications as unduly restrictive of competition, the procuring agency bears the burden of presenting prima facie support for its position that the restrictions imposed are necessary to meet its actual minimum needs. Id. Such support should consist of an explanation establishing a reasonable basis for the agency's determination that the restriction is needed to meet the agency's needs. Lista International Corp., 63 Comp. Gen. 447 (1984), 84-1 C.P.D. ¶ 665. If prima facie support is submitted, the burden then shifts to the protester to show that the specifications in doubt are arbitrary or otherwise unreasonable. Champion Road Machinery International Corp. et al., B-211587 et al., Dec. 13, 1983, 83-2 C.P.D. ¶ 674.

The agency justifies the requirement for scrubber assemblies for the sweeper/scrubber units on the basis of the Center's position that the requirement for scrubber assemblies results in cost savings to the government by eliminating the need to purchase an additional machine for scrubbing. The agency also has adopted the Center's justification for the UL 558 requirement for some of the sweepers on the basis that the Navy's policy is to procure all required safety features commercially available to prevent expensive modifications after delivery. The Center

further states that the requirement that the sweepers meet the requirements of UL 558 is particularly critical where the sweepers being procured are for use in hangar areas at naval air stations.

We believe that the agency has shown that it has a reasonable basis for requiring that the sweepers have scrubber assemblies and be able to meet the specified safety standards, including those represented by UL 558. Advance has not presented any arguments or evidence which would establish that the scrubber assembly and safety requirements are arbitrary or unreasonable. These aspects of Advance's protest are denied.

We note, however, that the specification provides that acceptable evidence of compliance with the required safety standards shall be a UL seal of approval attached to each sweeper. Although we have generally not objected to an agency's requirement that a product of a procurement conform with a set of standards adopted by a nationally recognized organization in the field or to a requirement for independent laboratory certification that such standards are met, we have held that a requirement that the articles offered bear a specific label demonstrating approval by a particular testing laboratory is unduly restrictive and improper. Worcester Electrical Associates, B-193064, Apr. 5, 1979, 79-1 C.P.D. ¶ 236. However, we do not believe that this aspect of an otherwise proper specification relating to safety standards warrants disturbing the procurement, under which proposals were received over two months ago. We do recommend that in similar future procurements the specifications be modified to permit offerors to show conformity with safety standards either through UL approval or by independent evidence which shows that the product equally conforms to the solicitation. See Arctic Marine Inc., B-182321, May 14, 1975, 75-1 C.P.D. ¶ 311, and Stabbert and Associates Inc., B-218427, June 17, 1985, 85-1 C.P.D. ¶ 692.

In accordance with the above, the protest is denied in part and sustained in part.

*Harry R. Van Cleve*

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