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DECISION



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

FILE: B-220157 **DATE:** January 13, 1986
MATTER OF: Engine & Generator Rebuilders

DIGEST:

1. Where protest is against alleged impropriety in solicitation and was filed prior to closing date for receipt of initial proposals, protest is timely and for consideration.
2. Contracting agency's burden of providing rational support for restriction that engine rebuilding services be provided by the manufacturer or its authorized affiliates has not been met where the agency has not shown that the capabilities to provide the services are limited to those sources. An agency must use advance planning and market research to prepare specifications that achieve full and open competition and include restrictions only to the extent necessary to meet its needs.
3. Protest that restriction for rebuilding truck engines to engine's manufacturer and its authorized affiliates unduly restricts competition lacks merit where the protester was extended an opportunity to submit an explanation of its capabilities at the planning stages of the procurement, but declined to do so.
4. Where the protester is ineligible for award under a solicitation for engine rebuilding services, GAO need not consider protest of the solicitation's requirement that the contractor use a specific brand of parts.

Engine & Generator Rebuilders (EGR) protests any award under the Army Tank-Automotive Command's request for

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proposals (RFP) No. DAAE07-85-R-J453 for the rebuilding/reconditioning of certain Cummins Engine Company (Cummins) diesel engines in 5 ton trucks that are essential to the Army's mobility. The RFP limits competition to Cummins, its authorized dealers, distributors and subsidiaries and required the use of Cummins' parts. EGR protests that these limitations unduly restrict competition and preclude EGR from consideration for the contract.

We deny the protest.

As a preliminary matter, the contracting agency believes that the EGR protest should be dismissed as untimely because our Bid Protest Regulations require protests to be filed within 10 working days after the basis is known or should have been known, whichever is earlier. The agency states that before the RFP was issued on August 1, 1985, the contracting officer discussed restricting the procurement to Cummins and its authorized affiliates with the protester, and also had a synopsis of the intended procurement, including the restrictions, published in the Commerce Business Daily (CBD). EGR did not file its protest with our Office until August 30.

The cited provision of our Bid Protest Regulations applies only in cases other than those covered by section 21.2(a)(1), which states that protests based upon alleged solicitation improprieties apparent prior to the closing date for the receipt of initial proposals must be filed prior to the closing date for the receipt of initial proposals. The EGR protest is based upon such an impropriety and was filed prior to the closing date, October 31, 1985. The protest therefore is timely.

When a protester challenges specifications as being unduly restrictive, the contracting agency must make a prima facie showing that the restriction is needed to meet its actual needs. If it does so, the burden shifts to the protester to show that the requirement is clearly unreasonable. Superior Boiler Works, Inc., B-216472, Mar. 25, 1985, 85-1 CPD ¶ 342. We will not upset an agency's decision as to its needs and the best method of accommodating them absent a clear showing that the decision was arbitrary or unreasonable, since officials of the contracting agency are most familiar with the conditions under which supplies or services will be used. ASC Pacific Inc., B-217188, May 3, 1985, 85-1 CPD ¶ 497.

The Army basically asserts that the restriction to Cummins and its authorized affiliates is necessary to assure quality and reliability since the Army lacks detailed rebuilding/reconditioning instructions as well as reliable testing and inspection procedures. The Army explains that while it is in the process of developing a Depot "Maintenance Work Directive" including detailed specifications, apparently based on Cummins' published manuals and its training programs, more time is needed to complete the directive, as the sections regarding inspection criteria and quality standards need refinement. In their absence, the Army maintains, it must rely on Cummins' good reputation and specialized quality assurance procedures to assure that the rebuilt engines will be acceptable. Cummins and its authorized dealers have provided these services in the past.

The RFP provides for the acceptance of the rebuilt engines based on a certificate of conformance executed by the contractor in lieu of a government inspection. A certificate of conformance may be used in circumstances where because of the contractor's reputation or past performance, it is likely that the furnished items will be acceptable and any defective work would be replaced, corrected or repaired without contest. Federal Acquisition Regulation (FAR), 48 C.F.R. § 46.504 (1984).

Regarding necessary repairs, the Army states that Cummins provides an extensive warranty and maintains a worldwide network of service facilities that honors the warranty. The Army considers the worldwide network an important consideration since many of the trucks are located in Europe.

The Army states, and the protester does not refute, that during the contracting officer's conversation with the protester, the contracting officer requested that EGR submit an explanation of the firm's capabilities for evaluation by the Army's technical personnel. The protester never did so. Without such a submission, the Army maintains, it has no way of ascertaining whether any firm besides Cummins and its affiliates can meet the agency's needs. Additionally, the Army notes that there are many Cummins' affiliates capable of competing under the RFP as issued. Restricting the contract to these sources therefore does not deprive the government of the benefits of competition.

We believe the Army's explanation fails to support its position that the restriction to Cummins and its affiliates is necessary to meet the agency's needs, and does not indicate why the Army could not satisfy its needs by requiring that any diesel engine rebuilding source demonstrate its capabilities to perform the services. In this regard, we see no reason why the RFP could not require offerors to demonstrate a previous record of satisfactorily meeting similar requirements and providing warranty protection, either as a matter of responsibility or under listed technical evaluation criteria as a matter of technical acceptability.

We note that EGR states, without disagreement from the Army, that the Cummins engine is rebuilt in the normal course of business by others than those permitted to submit proposals and with the same standards of workmanship. Regarding the Army's lack of rebuilding/reconditioning directive, EGR asserts that the latest published Cummins service and shop manuals, with which the RFP requires compliance, are available to any interested offeror. The protester states that under circumstances similar to this procurement, the Department of the Navy referenced another engine manufacturer's manuals in the solicitation without restricting competition to the manufacturer. Additionally, the protester alleges that the Army has a technical manual for engines that contains two chapters on engine overhaul and the engine system. The protester also contends that it can match the scope of Cummins' warranty coverage, but does admit that it would be unable to service the engines in Europe. EGR states it could pay to have the work done there or transport the engines to the United States where it could do the work.

In preparing for the procurement of supplies or services, a contracting agency must specify its needs and solicit offers in a manner designed to achieve full and open competition, so that all responsible sources are permitted to compete. 41 U.S.C.A. § 253a(a)(1)(A) (West Supp. 1985). A solicitation may include restrictive provisions only to the extent necessary to satisfy the needs of the agency or as otherwise authorized by law. 41 U.S.C.A. § 253a(a)(2)(B). To develop specifications that achieve full and open competition, the agency should use advance procurement planning and market research. 41 U.S.C.A. § 253a(a)(1)(B).

The Army did not advise the extent to which it used advanced planning and market research in determining how to meet its needs. In the absence of any indication that the Army engaged in the planning and research activities required by law and that such activities warranted the restriction to Cummins and affiliates, we must conclude that the restriction is not justified. It is undisputed, however, that before the restriction was imposed, the protester was extended the opportunity to demonstrate its ability to provide the needed rebuilding services at the planning stages of the procurement, and declined to do so. Since the protester was in fact given an opportunity to show that it could meet the Army's needs but declined to do so, we deny the protest. (No other firm has protested the restriction to Cummins and its affiliates in response to the RFP or the CBD synopsis notifying the procurement community of the intended procurement.) In light of this record, however, we are recommending by separate letter that the Secretary of the Army take appropriate action to insure that full and open competition is achieved on future procurements.

Since EGR is ineligible for award under the current RFP, we need not consider its objection to the RFP's requirement that the contractor provide Cummins' parts.

Accordingly, the protest is denied.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel