DECISION

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

**FILE:** B-221296 **DATE:** March 21, 1986

**MATTER OF:** Owl Resources Company

**DIGEST:**

1. Protest that agency allowed insufficient time for the preparation of proposals is denied where the time exceeded the statutorily mandated minimum time.

2. Where contract for purchase of high temperature water from contractor-owned, contractor-operated facility, which also permitted production of electricity and required sale to local utility rather than to procuring activity as urged by protester, reasonably was determined to meet minimum needs since government purchase from utility would be more reliable and cost effective.

Owl Resources Company (ORC) protests request for proposals (RFP) No. DACA87-85-R-0202 issued by the United States Army Corps of Engineers, Huntsville Division (Army), for a fixed-price, redeterminable contract to supply high temperature water to be generated from a contractor-owned, contractor-operated (COCO) facility located at Fort Drum, New York. ORC claims that the Army's failure to timely respond to its questions without extending the closing date for the receipt of proposals precluded ORC from submitting a proposal. ORC also contends that the RFP as presently structured is not in the best interests of the government. We deny the protest.

The RFP was issued on July 12, 1985, and proposals orginally were due by October 15. In order to encourage competition and reduce costs, the RFP gave offerors the option to propose a cogeneration facility which would produce electricity in addition to high temperature water. Initially, the RFP required both the high temperature water and the electricity be sold directly to Fort Drum.

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A preproposal conference was held by the Army on August 6, 1985. At that time, ORC asked several questions pertaining to the RFP and specifically questioned the Army as to whether two design firms already involved in this project would be precluded from submitting proposals. The Army's responses were issued on September 5, but the Army indicated that ORC's inquiry concerning the exclusion of those firms would not be answered until a later date. Amendment No. 2, issued on September 6, 1985, extended the closing date to November 15, 1985. On September 27, the Army amended the RFP to require offerors proposing a cogeneration facility to sell the cogenerative electricity to the local utility, Niagara Mohawk Power, rather than directly to Fort Drum. The Army would then purchase its electrical energy for Fort Drum from the local utility at the prevailing industrial rate. That amendment also deleted part of the pricing schedule to make clear that the price evaluation of the proposals would be based solely on the cost to the Army of the high temperature water.

On October 24, the Army extended the closing date to December 6, 1985, and, by letter dated October 29, 1985, the Army advised prospective offerors that the design firms already involved in the project would not be allowed to compete. ORC subsequently requested a 90-day extension of the closing date beginning from the date ORC received the Army's October 29 letter. ORC also requested the Army to amend the RFP to allow the direct sale of the cogenerated electricity to Fort Drum rather than solely to the local utility. The Army refused to extend the closing date or amend the RFP as ORC requested, and ORC filed a protest with our Office.

ORC claims that it was not prudent to begin preparing a proposal until it was assured that the design firms already involved were excluded from the competition and that the time remaining was not sufficient to allow ORC to submit a proposal. By denying its request to extend the closing date, ORC contends that the Army failed to attain maximum competition and act in the best interests of the government.

ORC also argues that the requirement that all electricity produced in cogenerated facilities be sold to the local utility is not in the government's best interests since it precludes the Army from receiving the most technically and cost-effective solution to the Army's requirements. ORC contends that the Army could save approximately $100 million over the contract term if the cogenerated electricity was sold directly to Fort Drum rather than to

the local utility. In addition, ORC complains that an offeror who proposes to build a cogeneration facility might not have a market for electricity outside Fort Drum because of a recent New York State Public Utility Commission ruling purportedly permitting the local utility to decline to purchase any electricity from sources like the COCO facility.

The Army contends that it denied ORC's request to extend the closing date because it determined that a sufficient amount of time had been allowed for the preparation of proposals. The Army states that 38 days remained before the closing date after the answer to ORC's question was issued and that this response time was adequate. The Army argues that it received proposals from a sufficient number of sources to ensure adequate competition and that its decision not to extend the closing date was reasonable.

In addition, the Army states that the decision to require the sale of the cogenerated electricity solely to the local utility was based on anticipated costs and reliability of service. The Army was concerned that if the cogeneration facility ever produced a short-fall in satisfying Fort Drum's electricity needs, it would be necessary to purchase electricity from the local utility. The Army indicates that different rates apply where the local utility serves as a backup source and the result may be substantially higher costs for the installation. Also, the Army argues that the transaction of business with two sources could cause difficulties. Finally, the Army contends that a recent Federal Energy Regulatory Commission decision indicates that a local utility may withhold backup power from a customer of a cogeneration facility and, as a result, there is no assurance that the local utility will provide the Army with electricity when needed. The Army argues that the protester's suggested arrangement therefore would not ensure reliable service and not satisfy its overall need, which is to obtain thermal energy, not electricity.

A contracting agency is required by statute to allow a minimum 30-day response period for all but a limited number of procurements. See 15 U.S.C. § 637(a)(3)(B) (West Supp. 1985). Even assuming that ORC was justified in not beginning the preparation of its proposal until the Army released its response to ORC's question, ORC still had 18 days more than the minimum time required to prepare its

proposal. Since the 38-day proposal preparation period exceeded the minimum period required, we have no basis to question the agency's actions in this regard. Analytics Inc., B-215092, Dec. 31, 1984, 85-1 CPD ¶ 3.

Furthermore, we find ORC's allegation that the Army was required to obtain maximum competition and extend the closing date in order to allow ORC to submit a proposal to be without merit. Since the agency's refusal to extend the closing date was not per se improper, we review the agency's action in this regard to determine whether adequate competition was obtained and whether there was a deliberate attempt to exclude the potential offeror. MISSO Services Corp., B-215544, Oct. 2, 1984, 84-2 CPD ¶ 483. Here, there is no evidence that the allotted time period prevented other prospective offerors from submitting proposals and the record shows that a number of proposals were received. In addition, there is nothing which indicates that the Army's failure to extend the closing date was a deliberate attempt to exclude ORC from the competition. MISSO Services Corp., B-215544, supra. Therefore, we find no basis to object to the Army's refusal to extend the closing date to accommodate ORC.

Concerning the Army's decision to require that any electricity produced by a cogenerated facility be sold to the local utility, we note that we have consistently held that the determinations of the government's minimum needs, the methods of accommodating them, and the technical judgments upon which those determinations are based are primarily the responsibility of the contracting officials who are most familiar with the conditions under which the supplies and services are to be used. We will not upset the agency's determinations of its minimum needs absent clear evidence that the decision was arbitrary or unreasonable. ASC Pacific Inc., B-217188, May 3, 1985, 85-1 CPD ¶ 497. A mere difference of opinion between the protester and the agency concerning the agency's needs is not sufficient to upset the agency's determinations. Hydro-Dredge Corp., B-215873, Feb. 4, 1985, 85-1 CPD ¶ 132.

Although ORC claims that significant cost savings could be achieved by permitting offerors to sell electricity directly to Fort Drum, the Army considered other factors, such as the potential disruption of service, in deciding that this approach would not satisfy its needs. Although ORC disagrees with this determination, we conclude that ORC has failed to meet its burden of showing

that the requirement was clearly unreasonable. Pacific Northwest Bell, B-218049, May 21, 1985, 85-1 CPD ¶ 575.

Furthermore, ORC's allegation that the local utility will not be required to purchase electricity from the COCO facility does not render the agency's determination improper or establish the RFP as being unduly restrictive of competition. The RFP did not require offerors to propose a cogeneration facility, and the evaluation is to be based on the cost to the government of the high temperature water. Although ORC questions the feasibility of proposing a cogeneration facility unless the electricity is also sold to the Army, there exists a reasonable basis for the Army not purchasing the electricity and ORC need not propose such a cogeneration facility in order to compete. Accordingly, we do not agree that this requirement unduly restricts competition. Saxon Corp., B-214977, Aug. 21, 1984, 84-2 CPD ¶ 205.

The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel