



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Dynateria, Inc.

File: B-222773

Date: August 5, 1986

DIGEST

1. Protest that performance standards for maintenance of motor vehicle fleet are commercially impossible to meet and result in excessive contract payment deductions is denied where reduction of excessive downtime of vehicles is critical to the agency's needs and agency's assertion that requirements can be met through more diligent efforts by the contractor is not found unreasonable. Furthermore, solicitation indicates that deductions will be made if performance is unsatisfactory and clearly the contractor's fault so that ample opportunity exists for the contractor to establish mitigating circumstances.
2. Protest that agency should not impose requirement that downtime of nontactical vehicles, primarily cars and trucks, not exceed 5 percent of available time is unreasonable because agency has not complied with its own regulation concerning the replacement of those vehicles is denied since regulation does not require agency to replace vehicles at specified time periods and record shows that agency determined that applying this standard to its fleet of older vehicles is necessary to satisfy its minimum needs.

DECISION

Dynateria, Inc. (Dynateria), the incumbent contractor, protests certain performance standards for motor vehicle maintenance in request for proposals (RFP) No. DAAA03-86-R-0025, issued by the U.S. Army Pine Bluff Arsenal, Pine Bluff, Arkansas (Army) for a 1-year base period with 4 1-year options. Dynateria contends that the performance requirements, more stringent than those in its existing contract, are commercially impossible to meet because of the age and condition of the vehicle fleet; are in excess of what is reasonable and cost effective; and are arbitrary and contrary to requirements at other Army installations.

The protest is denied.

The RFP was issued on February 28, 1986 and two offerors responded by the specified closing date. Under the RFP, the contractor is responsible for the maintenance of more than 1,049 vehicles and other equipment,

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including nontactical vehicles (NTV), material handling equipment (MHE), items of maintenance and service equipment (M&S), railway equipment, tactical vehicles, lifting devices and military engineering and construction equipment. The solicitation includes a motor vehicle maintenance performance requirement summary which requires the contractor to perform specific tasks within prescribed time limits. The Army will review the contractor's performance by evaluating a random sampling of tasks performed under the contract. If the Army finds that the contractor has failed to comply with the RFP standards, which allow for a small percentage of defects in performance, deductions from contract payments will be made.

Dynateria protests many of the new performance standards imposed by the Army. Specifically, Dynateria contends that it is impossible to perform periodic scheduled and unscheduled maintenance on NTV (primarily cars and trucks) in 4 hours from time of request when parts are not required and in 2 or 3 days when parts are required; perform periodic maintenance on MHE (forklift trucks, loaders, warehouse trailers) in 4 or 5 days when parts are required; change the battery in the electric forklift truck in 1.5 hours from the time of request if there are multiple requests; perform periodic scheduled and unscheduled maintenance on railway equipment in 4 to 5 days when parts are required; and complete minor maintenance of NTV, MHE and M&S within 3 hours after receipt of the vehicle or equipment.

The protester argues that because of the age of the vehicles and equipment, many are without any source of new replacement parts. In addition, even if parts are available, Dynateria contends that local sources do not stock these parts because they are slow moving shelf items. Thus, parts must be obtained outside Pine Bluff and often directly from the manufacturer and this makes it impossible to meet the RFP's time requirements.

Also, for many older model vehicles, Dynateria states that the manufacturer will not even start production of the part until enough back orders are received to make their production cost effective. Under these circumstances, the protester states that it may take weeks or months to obtain a part. Moreover, where a manufacturer has gone out of business, salvage yards must be searched or the part custom made by local manufacturers, and Dynateria argues that this is not feasible within the allotted timeframe. With respect to NTV, the protester contends that the 2 to 3 day time limit, when parts are required, is impossible to meet because 55 percent of the vehicles are 10 or more years old and parts are not readily available.

Dynateria has also provided examples of its past experiences to support its arguments. Dynateria indicates that there are five Dodge D-800 for which many engine parts can only be obtained from salvage yards. In addition, Dynateria notes that a catalytic converter for a Dodge Rampage vehicle is unavailable and is on back order and an engine emission control diverter valve for a 1980 Chevrolet was obtained from the manufacturer only after 3 weeks on back order.

The protester states that the Army Supply System is the only source of locomotive parts and that recently it took 2 months to obtain a hose for a locomotive through that supply system and 1 year to obtain filter housing for railway equipment. Dynateria contends that the standards are impossible to meet and should therefore be changed.

The Army states that the performance standards in Dynateria's existing contract do not meet its minimum needs. An Army audit and an internal review identified the problem as stemming from excessive downtime of vehicles resulting from repairs that required ordering parts. Under the existing contract, time limitations apply only after the ordered parts are received and this permitted the contractor to be less than diligent in locating parts since the contractor need only point to the fact that an order for the part was placed within 24 hours to meet its obligations. Consequently, orders could be placed with suppliers known to be out of stock or less costly suppliers without any consideration of the additional delays which may result. Since vehicle availability is critical to the accomplishment of the Arsenal's mission, the installation adopted an internal policy, consistent with the requirement in Supplement 1 to Army Regulation (AR) 58-1 (9 Sept. 1982), under which maintenance downtime in excess of 5 percent of its vehicle fleet is considered excessive. This criteria applies to NTV, MHE and M&S, and resulted in the revised standards incorporated in the RFP.

With respect to Dynateria's specific objections, the Army contends that the protester was not resourceful enough in obtaining parts and that with proper contract administration, such as the establishment of a parts inventory, the performance standards are commercially feasible. The Army argues that although Dynateria has alleged that there have been delays in obtaining many parts, Dynateria has provided no evidence regarding the effort which was expended in attempting to locate the part. While many of the NTVs are older models, the Army asserts that replacement parts are generally maintained in supply channels for 10 years after production is stopped and should be available. With respect to the catalytic converter required for the Dodge Rampage, the Army indicates that there are two other suitable replacements and there is no indication that Dynateria attempted to locate these items. Furthermore, a modification could be made so that a catalytic converter from a source other than Chrysler could be utilized. Similarly, with respect to the emission control item, the Army notes that there is no evidence that the car was not usable without this part and also no evidence of the type of search which was conducted. Concerning the hose for the locomotive, the Army contends that the hose could easily have been custom made locally and that the filters, which Dynateria asserts took more than 1 year to obtain, should be stocked.

Moreover, the Army indicates that if the contractor does encounter some situation where compliance with the RFP requirements is unduly burdensome, the contracting officer can mitigate the burden by making a determination not to make any deductions for the deficiency. In this respect, the Army notes that proof of impossibility is a valid defense

and the Army would not attempt to enforce a deduction under these circumstances. The Army contends that the revised standards are necessary to meet its minimum needs and that, with effort, the performance standards are capable of being met.

Our Office has long recognized that the contracting agency has broad discretion in determining its minimum needs and the best method of accommodating those needs. Marquette Electronics, Inc., B-221334, Mar. 13, 1986, 86-1 CPD ¶ 253. Where, as here, the protester challenges a solicitation's performance standards designed to meet an agency's minimum needs, the agency has the initial burden of establishing prima facie support for the standards that it has developed to meet its minimum needs. Once the agency establishes prima facie support, the burden shifts to the protester who must show that the protested requirements are clearly unreasonable. Id. Furthermore, the mere fact that a solicitation may impose a risk does not render the solicitation defective since some risk is inherent in most types of contract. Dynaelectron Corp., B-219664, Dec. 6, 1985, 65 Comp. Gen. ____, 85-2 CPD ¶ 634. Offerors are instead expected to allow for such risk in formulating their offers. Edward E. Davis Contracting, Inc., B-211886, Nov. 8, 1983, 83-2 CPD ¶ 541.

We find that the Army's explanation clearly establishes prima facie support for the new standards. Furthermore, although Dynateria has provided evidence that meeting the performance standards could be difficult in some circumstances, Dynateria has not shown that the requirements do not reasonably reflect the Army's minimum needs or that compliance with them is so onerous that performance under the contract would be impossible.

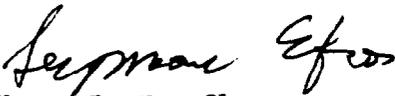
In this respect, we have considered the protester's argument that the Army cannot reasonably require compliance with the 5 percent criteria in Supplement 1 to AR 58-1, supra, without the corresponding compliance by the Army with the regulation which sets forth replacement criteria for many vehicles. Dynateria asserts that had the Army replaced the vehicles at the prescribed age and mileage limitations contained in AR 700-88 (June 22, 1972), the performance standards could perhaps be met. However, there is nothing in AR 700-88 which requires the Army to replace vehicles at specified time periods. Also, assuming that the 5 percent criteria was adopted based on the replacement schedule stated in AR 700-88, we see nothing which would preclude the Army from applying that same standard to a fleet of older vehicles, where as, here, the Army determines that such requirements are necessary to satisfy its minimum needs.

In addition, we point out that, in our view, the solicitation does provide flexibility in making payment reductions for unsatisfactory performance. Under paragraph E.6(d) of the RFP, deductions are to be made if the performance is unsatisfactory and ". . . poor performance is

clearly the fault of the contractor . . ." Consequently, we believe that ample opportunity exists under the RFP for the contractor to establish mitigating circumstances. Dynateria's claim that establishment of a parts inventory, as suggested by the Army, is unreasonable and conflicts with the RFP is not persuasive. Chapter 7 of Technical Manual 38-600, Supply Support, incorporated into the RFP, does state that stockage of repair parts for overage, overmileage vehicles should be avoided but this does not preclude Dynateria from maintaining some inventory of frequently utilized parts.

The Army indicates that it is critical to its needs that the excessive downtime of its vehicles be reduced. In our view, Dynateria has not established that the new performance standards are so stringent that contract performance is impossible. In this respect we note that at the bid protest conference, Dynateria indicated that its performance under its current contract would satisfy the new performance standards approximately 80 percent of the time. With respect to the remainder, we think the Army has presented reasonable alternatives to many of the specific situations posited by Dynateria which, if followed, would permit Dynateria to meet the RFP's performance standards. To the extent a repair part is still unavailable after a diligent and exhaustive search, we believe such evidence would clearly be relevant as to whether the unsatisfactory performance is the contractor's fault and whether a deduction should be made

Accordingly, the protest is denied

for 
Harry R. Van Cleve
General Counsel