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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Aerojet TechSystems Company

File: B-224343

Date: September 5, 1986

DIGEST

1. General Accounting Office (GAO) will dismiss a protest to the extent that it raises an issue which is before a court of competent jurisdiction and the court has not expressed interest in GAO's opinion.
2. Where contracting agency issues a request for proposals (RFP) soliciting offers for comparison with protester's existing options for the same items, protester, as a potential offeror under the RFP, is an interested party to challenge alleged deficiencies in the RFP.
3. When contracting agency decides to issue a request for proposals (RFP) for the purpose of deciding whether to exercise existing options, RFP must advise offerors that their offers will be compared with the options, in order to ensure competition on an equal basis. In view of the discretionary nature of the decision to exercise an option, however, RFP need not describe the factors on which the option exercise decision will be based in the same detail as the evaluation criteria used to compare offers under the RFP with each other.

DECISION

Aerojet TechSystems Company protests any award under request for proposals (RFP) No. N00024-86-R-6246(S) issued by the Navy for acquisition of major components of the MK 65 Quickstrike Mine. Aerojet challenges the Navy's decision to issue the RFP instead of exercising options for the mines under an existing contract with Aerojet. Aerojet also contends that the RFP is defective for failing to specify in adequate detail the criteria the Navy will use in comparing offers received under the RFP with Aerojet's existing options for the mines. We dismiss the protest in part and deny it in part.

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In December 1985, Aerojet was awarded contract No. N00024-86-C-6160 for a basic quantity of mines, with two options for variable quantities exercisable in fiscal years 1986 and 1987. The 1985 acquisition was the subject of a protest to our Office by Aerojet. Aerojet TechSystems Co., B-220033, Dec. 6, 1985, 85-2 CPD ¶ 636. The Navy made award to Aerojet after we sustained the protest based on our finding that the Navy had improperly rejected Aerojet's bid as nonresponsive. On May 5, 1986, in order to decide whether to exercise the options under Aerojet's existing contract, the Navy issued the current RFP for a basic quantity of mines equal to the quantities available under the Aerojet options, plus additional option quantities. The Navy plans to base its decision whether to exercise the options on a comparison of the offers received under the RFP with the Aerojet options. Aerojet did not submit an offer under the RFP.

According to the Navy, the RFP was issued to determine whether the Navy could obtain lower prices for the mines than under the Aerojet options. The Navy's belief that lower prices might be available was based on the prices submitted in connection with the initial procurement, before the first Aerojet protest was sustained and award made to Aerojet under its original bid. Specifically, the original acquisition was conducted as a two-step formally advertised procurement. The Navy received three offers, all of which were found technically acceptable. The three offerors then submitted bids under the second step of the procurement. The contracting officer found all three bids nonresponsive, however, and canceled the solicitation. After the cancellation, the contracting officer decided to complete the acquisition using negotiated procedures. The proposals subsequently received from the three offerors were lower in price than the bids under the original invitation for bids. After the Aerojet protest was sustained, however, award was made to Aerojet under its original bid.

In its current protest Aerojet challenges both the Navy's decision to issue the new RFP and the Navy's failure to include sufficient detail in the RFP regarding the manner in which new offers and the Aerojet options will be compared. On July 11, Aerojet filed suit in the U.S. District Court for the Eastern District of California raising the first issue in the protest, the propriety of the Navy's decision to issue a new RFP. Since that issue is now before a court of competent jurisdiction and the court has not expressed interest in our decision, we dismiss this part of the protest. Bid Protest Regulations, 4 C.F.R. § 21.9(a) (1986); C&M Glass Co., B-218227, Apr. 15, 1985, 85-1 CPD ¶ 430.

With regard to the remaining issue in the protest--whether the RFP adequately describes how offers under the RFP will be compared with the Aerojet options--the Navy contends as a preliminary matter that Aerojet is not an interested party to raise this issue because Aerojet did not submit an offer under the RFP. Aerojet's failure to submit an offer under the RFP, however, is not determinative of its status as an interested party to challenge alleged deficiencies in the RFP.

Both the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551(2) (Supp. III 1985), and our Bid Protest Regulations, 4 C.F.R. § 21.0(a), define an interested party entitled to maintain a protest as "an actual or prospective bidder or offeror whose direct economic interest would be affected" by the award or failure to award the challenged contract. Here, Aerojet characterizes itself as a potential offeror under the RFP and states that the lack of sufficient detail in the RFP regarding how new offers will be compared with the existing options prevented it from making a reasonable decision regarding whether to submit an offer under the RFP. In our view, the alleged prejudice to Aerojet's interest as a potential offeror is questionable, since Aerojet in effect is claiming that there is insufficient detail in the RFP to determine whether to compete against itself as the obligor under the options by submitting a new offer under the RFP. Nevertheless, as a potential offeror, Aerojet technically has the requisite interest to protest alleged solicitation defects, whether or not it eventually submits an offer.^{1/} See Tumpane Services Corp., B-220465, Jan. 28, 1986, 86-1 CPD ¶ 95.

Aerojet argues that the RFP is defective for failing to advise offerors in sufficient detail how the Navy will compare their offers with the Aerojet options in choosing whether to exercise the options or make award under the RFP. Specifically, Aerojet contends that the RFP should, but does not, indicate how the Navy will compensate for the variations in quantities between offers under the RFP and the Aerojet options; how first article and warranty costs will be considered; or to what extent nonprice factors will be considered. We find Aerojet's argument to be without merit.

^{1/} Aerojet also argues that its existing options should be regarded as an offer under the RFP sufficient to confer standing on Aerojet as an "actual offeror" under CICA. We need not address this argument in view of our finding that Aerojet's status as a potential offeror qualifies it as an interested party to protest the alleged RFP deficiencies.

With regard to the comparison between offers under the RFP and the Aerojet options, section M, paragraph D of the RFP provides:

"Offerors are advised that the Government has FY 86 and FY 87 options to acquire quantities of Mine Mark 65 Mod 0 Components and related supplies and services under Contract N00024-86-C-6160. The Government intends to compare these option prices with the prices of the responsible technically acceptable offeror with the lowest evaluated price under the instant solicitation. Prices for both the basic and option quantities under the instant solicitation will be analyzed when determining whether to award under the instant solicitation or to exercise the options in Contract N00024-86-C-6160. The Government evaluation will compensate for variations in quantity between the two procurements and provide a common basis for price comparison. Consequently, offerors should submit their most favorable prices for both firm and option quantities in their price proposals.

"The Government will also consider the price of first article line items under the instant solicitation, as well as the fair market rental value of any Government Production and Research Property intended for use on a rent free basis under the instant solicitation and for the option items under Contract N00024-86-C-6160. Award will be made under either the instant solicitation or Contract N00024-86-C-6160 based upon which under the planned price comparison offers the best overall value to the Government."

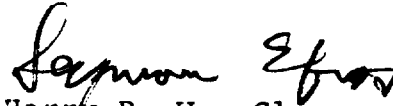
By issuing an RFP to solicit new offers for the items covered by the Aerojet options, the Navy assumed an obligation to advise offerors under the RFP that their offers will be compared with the options, since that comparison will be decisive in whether award will be made under the RFP. See Milwaukee Valve Co., Inc., B-206249, Feb. 16, 1982, 82-1 CPD ¶ 135. This duty to disclose derives from a contracting agency's general obligation to give offerors sufficient detail regarding the evaluation criteria to ensure competition on an equal basis known to all offerors. See Klein-Sieb Advertising and Public Relations, Inc., B-200399, Sept. 28, 1981, 81-2 CPD ¶ 251. Here, as noted above, the

RFP advised offerors that award would be made to the lowest priced, technically acceptable offeror under the RFP only if its offer compared favorably with Aerojet's existing options. The RFP described generally how that comparison would be made, clearly indicating that the Navy would equalize the offeror's prices and the option prices to account for variations in quantity and other factors such as first article costs. We are aware of no requirement that the Navy specify in any further detail how the offeror's prices and the Aerojet option prices will be adjusted for purposes of comparison, since, even where no option is involved, a solicitation need not contain the precise formula to be used. See Prosearch, B-206316, June 30, 1982, 82-1 CPD ¶ 636.

With regard to nonprice factors, we agree that the Navy could have described the factors it will consider, for example, the impact on defense readiness of longer delivery times if award is made under the RFP instead of exercising the options; however, we do not believe that the Navy was required to do so. Aerojet's options, like options generally, are exercisable at the sole discretion of the government, see Federal Acquisition Regulation (FAR), 48 C.F.R. § 17.201 (1985) (option is unilateral right of the government), and the decision to exercise an option is based on a discretionary judgment by the contracting officer as to whether it is the most advantageous method of fulfilling the government's needs, all factors considered. See FAR, 48 C.F.R. § 17.207(c)(3). By notifying offerors that their offers would be compared with Aerojet's options, the RFP put offerors on notice that award under the RFP ultimately would depend on the contracting officer's discretionary judgment regarding the advantages of exercising the options, considering both price and nonprice factors. In our view, the RFP in this way strikes an appropriate balance between advising offerors of the basis on which award will be made and maintaining the Navy's flexibility in determining whether to exercise the Aerojet options. Cf. Cincinnati Electronics Corp., et al., 55 Comp. Gen. 1479, 1484-1485 (1976), 76-2 CPD ¶ 286.

The protest is dismissed in part and denied in part.

Aerojet requested that it be awarded the costs of pursuing the protest. Recovery of costs is allowed only where a protest is found to have merit. 31 U.S.C. § 3554(c)(1); 4 C.F.R. 21.6(d). Since we have not found the protest to have merit, we deny Aerojet's claim for recovery of costs.

for 
Harry R. Van Cleve
General Counsel