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The Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

Matter of: PTI Services, Inc.  
File: B-225712  
Date: May 1, 1987

## DIGEST

1. Protest that specification is in excess of contracting agency's minimum needs and is unduly restrictive of competition is denied where there is no showing that agency lacked a reasonable basis for requiring the contractor's crew to arrive at the site within 2 hours of notification to begin repairs and to stop leaks of hazardous substance leaking from transformers where the transformers are located in a high-rise, densely populated building and where failure to begin work immediately could seriously affect the health and safety of the building's occupants.
2. Contracting officer generally has the discretion to determine whether and under what terms a provision for progress payments should be included in the solicitation.

## DECISION

PTI Services Inc., protests the terms of invitation for bids (IFB) No. IM062640, issued by the General Services Administration (GSA) to procure transformer retrofilling services at a federal building. Since PTI's initial protest, GSA has issued an amendment to the IFB which revised to PTI's satisfaction most of the contract clauses and other terms to which PTI had objected. This decision, therefore, will deal only with the two issues on which PTI and GSA disagree.

We deny the protest.

The IFB was issued to obtain the services of a firm to convert 15 transformers and switches filled with polychlorinated biphenyls (PCBs) to non-PCB status by the retrofill process. The IFB requires a lump-sum base bid for conducting an evaluation of each of the transformers to determine if it is suitable for the retrofill process and a unit price for performing the retrofill process on those transformers suitable for retrofilling.

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The first issue pertains to a requirement that the contractor have crews available to respond within 2 hours after notification of PCB leaks from the transformers to begin repairs to stop the leaks. PTI contends that the 2-hour response time requirement is unrealistic because it requires the contractor to have available on-call crews at considerable expense. PTI argues that as the transformers are in vaults in diked areas with adequate capacity to contain a transformer leak until the clean-up crew arrives, a response time of 24 hours after notification would be more reasonable.

In response, GSA points out that a previous retrofill project leaked 45 gallons of PCBs and that the requirement for a 2-hour response time to stop the leaks and begin repairs was developed by the regional technical personnel in conjunction with GSA's technical personnel in Washington. GSA insists that a response time of more than 2 hours would pose an unreasonable risk of injury to health and safety in the event of a PCB leak and would burden the government personnel with the work necessary to overcome the hazards to health and safety until the contractor's crew arrived. In this regard, GSA states that the required work must be performed on several floors of a high-rise, densely populated building where a contractor's failure to timely perform could seriously affect the health and safety of the building's occupants and otherwise pose unacceptable hazards.

A contracting agency has the primary responsibility for determining its minimum needs and drafting the specifications to reflect those needs. Analytics Inc., B-215092, Dec. 31, 1984, 85-1 CPD ¶ 3. Even burdensome requirements are not objectionable, provided they reflect the government's minimum needs. Id. Our Office will not question an agency's assessment of its needs unless the protester shows that the agency's determination is unreasonable. Gulf Coast Defense Contractors, Inc., B-212641, Feb. 28, 1984, 84-1 CPD ¶ 243. When a protester challenges a specification as unduly restrictive of competition, the burden initially is on the procuring agency to establish prima facie support for its contention that the restrictions it imposes are needed to meet its minimum needs. But, once the agency establishes this prima facie support, the burden is then on the protester to show that the requirements complained of are clearly unreasonable. See Sunbelt Industries, Inc., B-214414.2, Jan. 29, 1985, 85-1 CPD ¶ 113.

We find no basis to question the reasonableness of GSA's requirement to have the contractor's crew on the site of any PCB leaks within 2 hours and to clean up the site as soon as

possible. The hazard of such leaks and spills to people, property and the environment has been widely recognized.<sup>1/</sup> PTI has failed to rebut the agency's justification for the specification in question. It has not demonstrated that GSA lacked a reasonable basis for requiring the contractor to arrive within 2 hours after notification in order to immediately stop PCB leaks. This is especially so because the agency has demonstrated that the requirement concerns the safety of human lives. Further, we think that simply because PTI would be put to the expense of having on-call crews does not establish the unreasonableness of the agency's determination of its minimum needs. Accordingly, we deny this protest ground.

PTI's other objection is that the IFB provides for progress payments for the inspection work to be performed by the contractor but does not provide for any progress payments for the retrofilling of the transformers. Payment for the latter services will be made only when the contractor submits a certificate that the transformer has been processed for reclassification to a non-PCB status and the transformer unit is accepted by the government. PTI contends that the inspection work for which progress payments will be paid represents no more than 2 percent of the total contract price. PTI argues that payment for the retrofilling work only after the transformer is reclassified would delay payment for such work for nearly 1 1/2 years. As GSA is protected against nonperformance by a 100 percent performance bond, PTI believes that the lack of progress payments for the retrofilling services is unreasonable and prejudicial to small firms that cannot obtain financing necessary to take the place of progress payments.

GSA supports this policy by pointing out that the government receives no benefit until the transformers actually obtain reclassification. GSA argues that it is conceivable that if progress payments were authorized for the process of retrofilling, 90 percent of the contract price could be paid before any testing revealed that the retrofill process had in fact resulted in a reclassification of any transformer to

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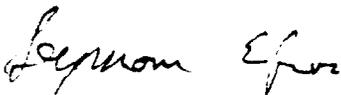
<sup>1/</sup> The Environmental Protection Agency, under the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1982), has issued regulations generally prohibiting the manufacture, processing and distribution of PCBs and PCB items with concentrations of 50 parts per million or greater. 40 C.F.R. § 761.20 (1986). An exception to this general prohibition permits the use of PCBs in existing transformers for the remainder of their natural lives. 40 C.F.R. § 761.30.

non-PCB status. GSA explains that after the retrofill is completed, the transformer must be placed in service and used electrically under loaded conditions before testing of the fluid within the transformers to determine the PCB concentration. Once tested, transformers which cannot be certified for non-PCB status must be totally replaced. GSA states that the government should not be made to pay for an unsuccessful retrofill attempt through progress payments; therefore, progress payments were not authorized and payment will not be made until acceptance which occurs when testing and certification is completed.

We have held that the contracting officer generally has the discretion to determine whether and under what terms a provision for progress payments should be included in the solicitation. 45 Comp. Gen. 809 (1966). This rule is consistent with the Federal Acquisition Regulation (FAR), 48 C.F.R. § 32.502-1(a) (1986), which provides that the contracting officer "may" provide for customary progress payments. As defined in 48 C.F.R. subpart 2.1, the use of the word "may" denotes the permissive.

We find that it was not unreasonable for GSA to determine that protection of the government's interests required that progress payments not be authorized for the retrofilling process and that payments be made only after successful completion of these services, in addition to requiring performance and payment bonds. As GSA points out, the government derives no benefit until successful completion of the retrofill process because unsuccessful attempts merely result in having to replace the transformer at government expense. Therefore, we think that GSA reasonably determined that the only measurable "progress" in the work is the actual certification of the transformer to non-PCB status after completion of the retrofilling services. Accordingly, we find no abuse of discretion by GSA in specifying the payment terms in question.

The protest is denied.

  
for Harry R. Van Cleve  
General Counsel