



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Thermex Energy Corporation

File: B-227034.2

Date: August 17, 1987

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### DIGEST

1. Protest of alleged solicitation defects is untimely since it was not filed before the closing date for receipt of proposals.
2. A competitive advantage accruing to an offeror because of its own position need not be discounted or equalized in favor of the other offerors where the advantage does not result from preferential treatment or other unfair action by the government.
3. General Accounting Office does not consider allegations of possible antitrust violations, since these matters are properly for consideration by the Department of Justice.
4. Unfair or prejudicial motives will not be attributed to an agency's procurement officials simply on the basis of inference or supposition.

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### DECISION

Thermex Energy Corporation protests the award of fixed-price contracts to IRECO, Inc., and Atlas Powder Company, under request for proposals (RFP) DAAA21-86-R-0227, issued by the Department of the Army for the development and fabrication of "blasting agent" explosive subsystems for the Tactical Explosive System (TEXS). The TEXS consists of pipe to be buried in roadways throughout the Federal Republic of Germany; the blasting agent can be pumped into the pipe in the event of an imminent attack, and detonated to create antitank ditches.

Thermex protests several of the solicitation's specifications, and contends that the Army improperly evaluated its proposed prices relative to those of IRECO and Atlas. Thermex also complains about a competitive advantage for

IRECO because of extensive prior involvement in the TEXS project; possible bias by the Army against Thermex; and the possibility of collusion between IRECO and Atlas because their proposed Phase I prices were so close.

We dismiss the protest in part and we deny it in part.

The RFP called for a two-phase procurement. Under Phase I, the blasting agent-based explosive subsystems are to be developed in a 1-year period. Phase II is for the actual production of the subsystems over a period of 5 years through the exercise of 1-year options. The solicitation provided that the government reserved the right to make multiple awards, and that awards would be made to the offerors having technically acceptable proposals and the lowest total prices for both Phases I and II. The RFP further stated the five production options under Phase II would be exercised with only one contractor.

The Army received three proposals in response to the RFP. All three were found to be technically acceptable. However, because Thermex's proposal was evaluated as significantly higher in price than the proposals of IRECO and Atlas, the Army awarded contracts only to IRECO and Atlas.

Thermex asserts that many sections of the RFP were vague and ambiguous, which caused Thermex to submit a high-priced offer because Thermex interpreted the requirements in these sections differently than did IRECO and Atlas. As an example, Thermex cites the portion of the RFP's statement of work entitled "Interim Contractor Support" which, according to Thermex, fails to set out any guidelines as to what this type of support encompasses. Thermex also argues that the RFP requirements for contractor data were listed in such a confusing manner that it was not clear which data was required for Phase II. In Thermex's opinion, this could account for a substantial variance among the offerors in their Phases I and II prices.

In addition, Thermex objects to the fact that the RFP's evaluation criteria made price the most important consideration for award, rather than technical superiority, and did not accord importance to safety considerations. Finally, Thermex contends that the way the Army evaluated the offerors' proposed prices for the blasting agent and pipe significantly understated the ultimate actual cost to the government.

Under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1987), a protest of alleged solicitation improprieties that are apparent prior to the closing date for receipt of initial proposals must be filed before that date. Here, all

the matters with which Thermex is concerned were evident to the firm when it received the RFP. The record shows, for example, that before proposals were due Thermex made telephonic inquiries of the contracting officer as to what "Interim Contractor Support" encompassed. Also, offerors were advised in an amendment to the RFP precisely how the blasting agent and pipe prices would figure in the price evaluation. Thermex, however, did not protest before the closing date for receipt of initial proposals, and we will not now consider the firm's post-award assertions about these matters.<sup>1/</sup>

Thermex also objects to the fact that the Army did not require IRECO and Atlas to justify their proposed overhead rates. Thermex speculates that if IRECO and Atlas had been forced to justify their overhead rates, they would have offered their actual, fully allocated rates instead of the understated ones they did offer. However, because a firm, fixed-price contract is not subject to adjustment based on the contractor's cost experience during performance, the successful offeror bears full responsibility, in terms of profits or losses, for costs above or below the fixed price. See National Veterans Law Center, 60 Comp. Gen. 223 (1981), 81-1 C.P.D. ¶ 58. Thus, the risk is solely upon IRECO and Atlas if it turns out during performance that the actual overhead rates are higher than their proposed rates.

Thermex asserts that IRECO had an unfair competitive advantage because of extensive prior involvement with the TEXS program. Thermex speculates that IRECO must have received preferential treatment from the Army in light of this prior involvement. Thermex further charges that IRECO and Atlas acted in collusion to prepare their proposed prices. Thermex cites as evidence of this alleged collusion the fact that their prices for the Phase I development effort are extremely close.

A competitive advantage accruing to an offeror because of its own position need not be discounted or equalized in favor of the other offerors so long as it does not result from preferential treatment or other unfair action by the

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<sup>1/</sup> Thermex views its protest as timely pursuant to section 21.2(a)(2) of our Regulations, because it was filed within 10 working days after the firm received notice of award. It is section 21.2(a)(1), however, that governs protests of apparent solicitation defects; section 21.2(a)(2) concerns all other protest issues, which must be raised within 10 working days after the basis for protest was or should have been known.

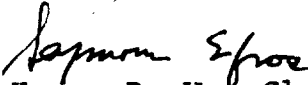
government. See Halifax Engineering, Inc., B-219178.2, Sept. 30, 1985, 85-2 C.P.D. ¶ 559. Thermex's belief that the Army may have been favorably disposed towards IRECO because of the firm's prior association with the TEXS program is based, in our view, on mere speculation. Moreover, although IRECO, by virtue of its prior experience with the TEXS program, may have been able to offer a better price than Thermex, from our review of the record we find no preferential treatment or unfair action on the Army's part.

With regard to Thermex's allegation of collusion between IRECO and Atlas, in our opinion the fact that the two companies' Phase I prices may have been similar is not in itself enough to establish that IRECO and Atlas acted in concert. In any event, this is a matter concerning a potential violation of the antitrust laws, and therefore properly is for consideration by the Department of Justice, not our Office. Moloney Coachbuilders, B-212608, Aug. 25, 1983, 83-2 C.P.D. ¶ 255.

Finally, the protester contends that the Army became biased and prejudiced against Thermex because of false rumors that were spread by IRECO and Atlas that Thermex was in a weak financial condition and going bankrupt.

We will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. A.R.F. Products, Inc., 56 Comp. Gen. 201, 208 (1976), 76-2 C.P.D. ¶ 541. Here, the basis for Thermex's allegation of bias clearly is the firm's own speculation. Moreover, the record shows that the Army conducted a preaward survey of Thermex and found the firm to be responsible and financially acceptable. Thermex has not met its burden of proof to establish bias.

Thermex's protest is dismissed in part and denied in part.

*for*   
Harry R. Van Cleve  
General Counsel