

R. Buck



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Fluid Engineering Associates

File: B-234540

Date: May 31, 1989

DIGEST

1. Even though Bonneville Power Administration is engaged in contracting activities pursuant to its own procurement authority, it is nonetheless subject to General Accounting Office's (GAO) bid protest jurisdiction pursuant to the Competition in Contracting Act of 1984 (CICA), since Bonneville comes within the statutory definition of a federal agency subject to GAO's CICA jurisdiction.

2. Protest that specification is unduly restrictive is denied where agency offers reasonable justification for specification and protester fails to rebut agency's showing.

DECISION

Fluid Engineering Associates (FEA) protests the terms of invitation for bids (IFB) No. DE-FB79-89BP96843 issued by the Bonneville Power Administration (BPA) for the acquisition of a quantity of skid-mounted vacuum pump systems. FEA argues that a portion of the IFB's specifications overstate BPA's minimum needs and are unduly restrictive of competition.

We deny the protest.

The IFB called for bids on two skid-mounted vacuum pump systems comprised of a "roughing/backing" pump and a "booster" pump. The systems are portable and are used to maintain electrical equipment. Specifically, the pumps are used in a cryogenic drying process employed to remove moisture from cellulose-based insulation in high voltage electrical equipment. The electrical equipment is essential to the transmission by BPA of electric power throughout the pacific northwest. The specifications provide that the roughing/backing pump shall be capable of operating independently from the booster pump and that, when operating alone, the roughing/backing pump shall be capable of

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producing a 10 millitorr pressure differential which provides the minimum vacuum to ensure that the insulation will be dried properly. Since the maintenance of the electrical equipment requires the shut-off of power for a period of time, the BPA requires, in order to avoid protracted power interruption, that the pump perform the drying in the event the booster pump mechanism fails. The specifications also permit the use of either a piston type or vane-type roughing/backing pump.^{1/}

FEA had originally filed a letter of protest with the BPA on January 27, 1989, requesting that BPA revise the specifications to eliminate the requirement for the roughing/backing pump's independent operation. On February 10, the protester received a facsimile transmission from the BPA stating that the protest review board had met and denied FEA's protest and that the BPA protest review board's written decision would be immediately forthcoming. FEA's letter of protest to our Office followed on February 17, and the BPA protest review board issued its written decision on March 13.

As a threshold matter, the BPA argues that our Office does not have "subject matter" jurisdiction to consider BPA bid protests. In this connection, BPA argues that, while the Competition In Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-3556 (Supp. IV 1986), conferred jurisdiction upon our Office to consider bid protests filed against "federal agencies," that jurisdiction is limited to a consideration of whether a federal agency has violated "procurement statutes or regulations." In this latter regard, BPA argues that, under CICA, Congress intended only that we review bid protests which allege a violation of particular "procurement statutes or regulations," specifically the Federal Property and Administrative Services Act (FPASA), as amended, 40 U.S.C. §§ 471-474 (Supp. IV 1986), and the Armed Services Procurement Act (ASPA), as amended, 10 U.S.C. §§ 2301-2305 (Supp. IV 1986). According to the BPA, its unique procurement authority which is contained primarily in its organic legislation, 16 U.S.C. §§ 832a(f) and 832g (1982), vests it with plenary power regarding all aspects of its contracting, including the exclusive, non-judicial resolution of its bid protests.

We disagree. As we noted in International Line Builders, 67 Comp. Gen. 8 (1987), 87-2 CPD ¶ 345, the enactment of

^{1/} The specifications of a previous solicitation which was canceled permitted only the use of piston-type pumps. FEA had protested that specification requirement to BPA because the firm manufactures vane-type pumps.

CICA has rendered Bonneville's position regarding its exclusive bid protest jurisdiction untenable. Under the provisions of 31 U.S.C. § 3551(3), our bid protest authority extends to federal agencies as that term is defined in section 3 of the Federal Property and Administrative Services Act of 1949 (Property Act), 40 U.S.C. § 472 (1982). The Property Act defines a federal agency as "any executive agency," and, in turn, defines an executive agency as "any executive department or independent establishment in the executive branch of the Government, including any wholly-owned Government corporation." 40 U.S.C. § 472(a). The office of the Administrator of the Bonneville project is an office in the Department of Energy, 16 U.S.C. § 832(a), and the Department of Energy is an executive department. 42 U.S.C. § 7131 (1982). Therefore, since Bonneville, albeit a separate and distinct organizational entity within the department, 42 U.S.C. § 7152(a)(2), falls within the above definition.

In addition, we have consistently held that our bid protest jurisdiction under CICA is based upon whether the protest concerns a procurement of property or services by a federal agency, and not whether an agency has violated the provisions of the FPASA or the ASPA. See Gino Morena, 66 Comp. Gen. 231 (1987), 87-1 CPD ¶ 121; River Salvage, Inc., B-228896, Dec. 15, 1987, 87-2 CPD ¶ 596. Thus, while BPA conducts its procurement activities pursuant to its own statutory authority, as implemented by the Bonneville Acquisition Guide, we think the protest issue raised here is clearly within the scope of our review. We recognize that the BPA is not subject to the requirements of the FPASA or the ASPA in the conduct of its procurements. Nonetheless, it is, in our view, subject to our bid protest jurisdiction which, by virtue of the enactment of CICA, extends to a consideration of bid protests arising in circumstances where a federal agency is procuring property or services, regardless of the statutory authority relied upon, absent an express exemption from federal procurement laws. Here, we do not read BPA's statute, which gives BPA basic contracting authority, as providing an affirmative exclusion from our CICA jurisdiction, as was granted, for example, to the Postal Service. See 39 U.S.C. § 410 (1982). Consequently, our Office has jurisdiction to decide bid protests involving Bonneville procurements.

Turning to the merits of the protest, FEA argues that the requirement that the roughing/backing pump operate independently, that is, without the booster pump, at 10 millitorrs, is unduly restrictive of competition and overstates the BPA's minimum requirements. FEA also argues that no vane-type roughing/backing pump, such as the one it supplies, can

produce the required 10 millitorr pressure differential when operated alone.

The BPA responds that the requirement of independent operation of the roughing/backing pump at a 10 millitorr pressure differential is necessary to meet its essential needs. According to BPA, pumps previously used in the field have experienced failure of their booster pumps and such failure is unacceptable given the extremely tight schedule of operation of the pumping systems to perform the cryogenic drying of the electrical equipment which requires temporary power shut-off. In this latter regard, BPA points out that limited power outages are scheduled far in advance throughout the Bonneville power system for purposes of performing cryogenic drying on equipment and that pump system failure may result in unacceptable protracted power outages throughout the power system.

The Bonneville Acquisition Guide, § 10.002, requires BPA to draft specifications in a manner designed to achieve "maximum effective competition" while at the same time allowing BPA to acquire goods and services which will satisfy the BPA's essential needs. We read this standard as basically the same as that articulated in Federal Acquisition Regulation (FAR) § 10.002 (FAC 84-39), which requires agencies to issue specifications that promote full and open competition and reflect agency minimum needs. Thus, we see no reason not to adopt an analysis similar to that employed in our cases involving allegedly restrictive specifications under the FAR. In those cases, we have required contracting agencies to establish support for their position that the specifications, as written, are necessary to fulfill the agency's minimum needs. See, e.g., Abel Converting, Inc., B-224223, Feb. 6, 1987, 87-1 CPD ¶ 130. Once the agency establishes such support for its position, the burden of proof shifts to the protester to show that the challenged specification is unreasonable. Information Ventures, Inc., B-221287, Mar. 10, 1986, 86-1 CPD ¶ 234. In addition we have consistently noted that the determinative consideration of whether a challenged specification is unduly restrictive is not whether it is per se restrictive of competition but whether it reasonably relates to an agency's minimum needs. See G.S. Link & Assocs., B-229604 et al., Jan. 25, 1988, 88-1 CPD ¶ 70.

We think that the BPA has reasonably justified its requirement that the roughing/backing pump be independently operable and FEA has failed to rebut that showing. The stringency of BPA's schedule for the employment of the equipment, coupled with the past failures of booster pumps in systems currently utilized is, in our opinion, sufficient

to justify the requirement. Since the record shows that any delay in performing the required drying could affect the overall delivery of power, we think the agency reasonably can require what is, in effect, a workable back-up system in the event of booster pump failure. The fact that the requirement may potentially restrict competition does not provide a valid basis of protest where, as here, the agency has established that the specification is reasonably related to its minimum needs. Repco, Inc., B-227642.3, Nov. 25, 1987, 87-2 CPD ¶ 17. Under the circumstances, we cannot conclude that the challenged specification is improper.

The protest is denied.


James F. Hinchman
General Counsel