



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Container Products Corporation

File: B-234368

Date: June 8, 1989

DIGEST

Protest that awardee's proposal did not meet regulatory testing requirements for containers holding flammable solids is denied where the record does not clearly establish that testing requirements were applicable, the awardee's proposal fulfills the government's actual needs, and the protester has not been competitively prejudiced since it did not offer a container complying with the testing requirements.

DECISION

Container Products Corporation protests a subcontract award to Voyale Corporation under solicitation No. 8E0400, issued by Martin Marietta Energy Systems, Inc., a prime contractor operating and managing the Department of Energy's (DOE) Portsmouth Gaseous Diffusion Plant in Piketon, Ohio. The solicitation, a total small business set aside, sought offers to supply 1,064 steel containers with lids for sludge waste. The protester contends that the containers offered by Voyale do not meet applicable tests for the packaging of flammable solids.

We deny the protest.^{1/}

^{1/} Although our Office generally will not review the award of subcontracts by government prime contractors, we will review such awards where made "by or for" the government. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(10) (1988). We consider contractors that manage and operate DOE facilities to be acting "for" the government, Sygnatron Protection Systems, Inc., B-225441.2, Nov. 19, 1986, 86-2 CPD ¶ 593, which appears to be the case here; the parties do not dispute that Martin Marietta provides large-scale, comprehensive management services to the government with on-going purchasing responsibility.

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The solicitation required containers in compliance with drawing No. BX-761-1275-M, revision 0, included in the solicitation, which required "strong tight" steel containers with a 90-cubic foot capacity, and provided that the containers were to be in compliance with "CFR Title 49 Part 173 requirements for Low Level Radioactive Waste (LLW) Conservation and Recovery Act (RCRA) type (F-001 or F-002) waste." The referenced Department of Transportation (DOT) regulations contained in title 49 generally provide that hazardous materials must be securely packaged in strong, tight packages, and that packages must be constructed to remain effective during transport. These regulations list numerous hazardous wastes, and those considered to be F-001 and F-002 wastes are set forth under Environmental Protection Agency regulations. See 40 C.F.R. § 261.31.

On the April 19, 1988, closing date, Martin Marietta received five offers. Voyale's offer of \$479,066 was low and a purchase order was issued to the firm on June 6.^{2/} Container Products timely protested and timely filed this protest after its agency protest was denied.

Container Products maintains that one of the F-001 hazardous wastes listed in the regulations, chlorobenzene, designated a flammable liquid, becomes a flammable solid when mixed with sludge. As containers for flammable solids must meet certain tests in addition to the general requirements of the DOT regulations, Container Products claims it thus read the solicitation as requiring containers meeting these flammable solid standards. The protester argues that Voyale's offered container, with a design using three straps to close the container, will not meet the drop, vibration, and air/hydrostatic pressure tests for flammable solids, and thus should have been rejected. See 49 C.F.R. §§ 173.154(5), 178.252-3.

DOE responds in its report that the protester's argument is irrelevant because, although the solicitation did not so specify, the procured containers in fact will hold only

^{2/} Container Products' offer of \$532,095.76 was only third low, but the agency informs us that the firm's objections to Voyale's offer are also applicable to the second low offer submitted by Circleville Metal Works at an offered price \$489,000. Thus, Containers Products is an interested party with standing to protest since, if the protest were sustained, Voyale's and Circleville's offers would be rejected and Container Products would be in line for award. 4 C.F.R. § 21.0(a)-1(a); Appleton Food Service and Management Corp., B-231343.2, Sept. 1, 1988, 88-2 CPD ¶ 200.

sludge contaminated with trichloroethylene (TCE), which is not listed in the regulations as flammable; the procured containers thus need not meet the flammable solid tests. DOE maintains that the protester should have been on notice of the agency's intent in this regard through conversations the firm had with a Martin Marietta representative prior to issuance of the solicitation.

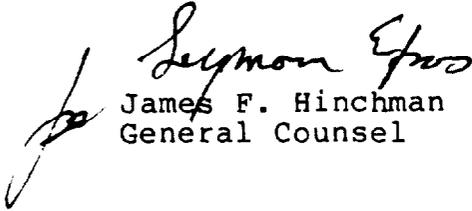
Although not characterized as such by the parties, the determinative issues here are essentially (1) whether DOE's determination that the containers only had to hold TCE-contaminated sludge, and not chlorobenzene and other 001 and 002 hazardous waste, constituted a relaxation of the RFP terms that DOE was required to communicate to Container Products, and (2) whether Container Products was prejudiced by any change in the RFP.

It is not clear from the record that DOE's determination to use the containers only for TCE, and not chlorobenzene, constituted a relaxation of the specifications; that is, while Container Products maintains that a container meeting higher standards is required for chlorobenzene since it becomes a flammable solid in sludge form, it is not clear from the record that chlorobenzene becomes a flammable solid. In this regard, the regulations list chlorobenzene as a flammable liquid, and contain no guidance on whether a flammable solid will result when the chemical is in a sludge mixture. Container Products has presented no documentation supporting its position. Under these circumstances, as there has been no showing that the solicitation required a container meeting the flammable solid testing standards, we have no basis for objecting to DOE's acceptance of Voyale's containers.

In any case, even if the RFP reasonably could be read to require containers meeting the flammable solid standards, it does not appear that Container Products was prejudiced by any relaxation of the requirement. In this regard, DOE reports that it found Container Products' offered container to be a strong, tight containment package suitable for nonflammable material, that did not meet the flammable solid standards. While Container Products asserts generally that its offered container would meet the solicitation requirements, it does not specifically rebut DOE's reported determination to the contrary, and does not specifically state that its container meets the tests for flammable solids. Further, we find nothing in the firm's offer (including product description and drawing) indicating compliance with the flammable solid standards. Since the record thus indicates that the protester's container did not satisfy the flammable solid testing standards, and thus

would not be acceptable if these standards were imposed, the firm could not be prejudiced by a relaxation of the standards. See generally, Tampa Shipyards, Inc., B-231802, Sept. 30, 1988, 88-2 CPD ¶ 304.

The protest is denied.


James F. Hinchman
General Counsel