

McArthur



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Phillips Cartner & Company, Inc.

File: B-235666; B-235667; B-235668

Date: September 6, 1989

DIGEST

1. Protest that solicitation requirements concerning insurance and use of government-owned equipment bias cost comparison against potential contractors is denied where the agency determined that requirements were necessary, and protester presents no evidence that this determination was unreasonable.

2. Protest that agency did not provide sufficient information for protester to submit competitive technical proposal is denied where solicitation provided sufficient information to allow offerors to compete intelligently and where protester did not comply with agency direction to request additional information under the Freedom of Information Act.

DECISION

Phillips M. Cartner & Co., Inc., protests the terms of invitation for bids Nos. DTMA91-89-B-90011, DTMA91-89-B-90012 and DTMA91-89-B-90013, issued by the Maritime Administration for maintaining three national defense reserve fleets. The protester complains that the solicitations, which were issued as the first step of two-step solicitations for the purpose of conducting a comparison between the cost of contractor and in-house performance by government employees, are biased in favor of in-house performance.

We deny the protest.

On March 10, 1989, the agency issued three solicitations, for step-one technical proposals for fleet maintenance activities at the James River Reserve Fleet, Ft. Eustis, Virginia, the Beaumont Reserve Fleet, Beaumont, Texas, and the Suisun Bay Reserve Fleet, Benicia, California. Each solicitation advised prospective offerors that in step two, the agency would invite all offerors who had submitted

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technically acceptable proposals during step one to submit bids, and that the agency would select the lowest bid for comparison with a previously prepared estimate of the cost of in-house performance, in accordance with Office of Management and Budget (OMB) Circular No. A-76. Cartner protested to the agency prior to the closing date and then filed this protest with our Office, on May 23, 1989, essentially contending that the agency had designed the solicitations to thwart competition and to bias the cost comparisons toward in-house performance.

The protester argues that the solicitation provisions for insurance are unfair, since a contractor is expected by their terms to assume unlimited liability for any loss, causing a potential contractor to incur such high insurance premiums as to preclude its competing with a self-insurer such as the government.

Initially, we note that in the context of a cost comparison under OMB Circular No. A-76, competition on a common basis means that the government and bidders must compete based on the same statement of work; there is no requirement for an agency to take steps to equalize inherent disparities between the government and contractors. Bay Tankers, Inc., B-227965.3, Nov. 23, 1987, 87-2 CPD ¶ 500.

Regarding the indemnity requirements, the agency points out that despite the contractor's obligation to indemnify and hold the government harmless against damage or injury to third parties, the insurance requirements carry specific limits^{1/}. Absent a showing that insurers have denied coverage or quoted a prohibitive premium rate, we have no basis for concluding that the insurance requirements significantly restrict the protester's ability to submit a competitive bid. Even assuming that the insurance requirements will restrict the field of competitors, this does not demonstrate the insurance requirements are unreasonable, where, as here, performance of the contract involves the use of government property with a significant value, and the agency in good faith determines that insurance is necessary to protect the government's interest. Crown Management Servs., Inc., B-234563, May 5, 1989, 89-1 CPD ¶ 429.

^{1/} Contractors are required to provide certificates of insurance after award as follows: port risk hull and machinery and protection and indemnity insurance, \$50 million; comprehensive general liability, \$50 million; asbestos exposure, \$500 thousand per employee.

The protester also asserts that the agency's refusal to allow contractors the use of existing government-owned equipment (such as tools, tugs and barges) will force potential offerors to incur significantly higher costs to buy, lease or transfer equipment that must then be moved to the site of operations.

Concerning the agency's decision not to make available to contractors the equipment on site, OMB Circular A-76, Supplement, Part I, Chapter 3, paragraph A(1), requires that the agencies make such decisions based on an informal cost-benefit analysis of what is most cost advantageous to the government. That analysis, which has been reviewed by our Office, shows the agency's concern that much of the on-hand equipment would have to be renovated or replaced to pass Coast Guard inspection if supplied to a contractor; in addition, the agency believes that the poor condition of the equipment will generate disputes and appreciably increase the burden of contract administration. The agency believes that the equipment involved is not specialized, but rather that it is widely available in the commercial market. We therefore conclude that it was within the agency's discretion to decide not to make government equipment available to contractors because of concerns over responsibility for its maintenance and replacement. Intermodal Management, Ltd., B-234108, Apr. 20, 1989, 89-1 CPD ¶ 394.

Accordingly, we are unable to find that the terms of the solicitation are unreasonable or were imposed in bad faith; nor do we have any basis for concluding that they were designed to bias the cost comparison in favor of the in-house estimate.

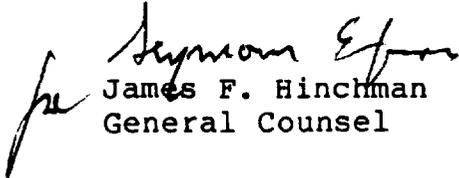
The protester also alleges that the agency refused to provide potential offerors with information necessary to prepare competitive technical proposals. The protester cites the agency's refusal to answer questions submitted during the three site visits, complaining that the agency merely referred questioners to the solicitation terms or directed them to submit their requests for information under the Freedom of Information Act (FOIA). Further, the protester objects to the agency's refusal at the preproposal conference to allow questions and also objects to its advice to attendees that it would supply no further information absent a FOIA request. The protester argues that FOIA was not intended as a barrier to deny offerors the information necessary to prepare their proposals.

The agency denies using FOIA as a barrier, but asserts that its procedures require the notification of third parties prior to release of certain technical, commercial or

financial information and that its FOIA specialist is responsible for coordinating such notification; the agency insists that it processes such requests on an expedited basis when they relate to a pending procurement.

We have reviewed the protester's requests for information and cannot find that the information requested was necessary for the preparation of proposals; furthermore, the protester made no effort to follow the agency's instructions to submit its request to the FOIA officer and therefore presents no evidence that the agency unreasonably denied offerors access to such information. Absent any evidence that the agency unreasonably denied or delayed the protester access to specific information requested, we find no basis for objecting the agency's insistence that requests for information be directed to its FOIA officer.

The protest is denied.


James F. Hinchman
General Counsel