



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Colt Industries
File: B-236187
Date: November 1, 1989

DIGEST

1. Protest that solicitation should be for supply contract rather than construction contract is denied where agency, to meet congressional limitation on construction in Philippines, obtains proposals to supply generators with option for construction of power plant and includes clauses applicable to both supply and construction contracts and protester fails to show how it was prejudiced thereby.

2. Allegation that solicitation requirement that materials and supplies be Philippine sourced conflicts with a Balance of Payments Clause which establishes a ceiling of \$156,000 for non-qualifying country items is denied, since the clauses read together require Philippine products, then U.S. products and if such items are not available, non-qualifying country products up to \$156,000 in value.

DECISION

Colt Industries protests solicitation No. N62864-85-R-0059, issued by the Naval Facilities Engineering Command, as ambiguous and violative of the Federal Acquisition Regulation (FAR).

We deny the protest.

The solicitation is for three diesel engine generators with options for an additional generator and the construction of a power plant building at the Navy Public Works Center, Subic Bay, Philippines. Colt's first basis of protest is that the solicitation has elements of a construction contract but, in reality, is for a supply contract for the generators with an option for the construction of the power plant to house them, which option may never be exercised.

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The Navy, agreeing that the solicitation does encompass some construction contract provisions, states that the procurement is for a supply contract and that the hybrid solicitation was utilized so that it could comply with congressional policy regarding military construction in the Philippines. The funds for this procurement were appropriated by the 1988 Department of Defense Appropriations Act, Pub. L. No. 100-447, 102 Stat. 1829 (1988). The conference report, H.R. Conf. Rep. No. 912, 100th Cong., 2d Sess. 6, contained the following language:

"The conferees continue to recognize the importance of the United States military presence in the Philippines; however, there is concern with the apparent negotiating posture of the Philippine Government regarding possible unreasonable concessions in exchange for base rights. Therefore, the Department is directed to defer obligation of funds until such time as the Secretary of Defense has provided to the Committees on Appropriations a report on the status of base rights negotiations and a certification that based on the negotiation status, it is prudent to proceed with the projects."

Regarding this specific project, the report at page 13 reads:

"Philippines-Navy Public Works Center Subic Bay: Power Plant.-The conferees understand that over \$20,000,000 of the \$27,770,000 for this project is for generators which can be relocated if necessary. Because of the long-lead time for procurement of such generators, the conferees have no objections to early obligation of funds; however, for the construction portion of the project, obligation of funds should be contingent on certain conditions being met as cited earlier in this statement."

Therefore, the Navy states it is procuring the generators, the long lead-time item, and plans to exercise the construction option, which is valid for 365 days, if the congressional requirements are met.

While Colt contends that the solicitation is for a construction contract and the Navy argues it is for a supply contract, the request for proposals clearly contains FAR clauses which are applicable to both types of procurement. For example, Section E contains reference to FAR § 52.242-2, "Inspection of Supplies" and FAR § 52.242-12, "Inspection of

Construction." However, we fail to see the impact of the distinction which Colt is arguing. Whether the RFP is considered for a supply or a construction contract solicitation has not been shown by Colt to disadvantage it. Moreover, the structure of the RFP is consistent with the Navy's need to acquire the long lead-time article and to comply with the congressional mandate regarding construction. Our Office is aware of no prohibition in the FAR concerning the use of both types of clauses where necessary to meet the agency's needs in a particular situation, as here. Therefore, this basis of protest is denied.

Colt also protests that Clause H-12 of the solicitation is ambiguous. That clause reads as follows:

"H.12 PHILIPPINE SOURCE REQUIREMENTS

The Contractor shall, in the performance of this contract, use Philippine sources to the maximum extent feasible for the items required to perform this contract including labor, materials, supplies, services, and equipment provided such items meet the contract specifications and standards, will be available at the required locale within the required time limits and are equal or lower in cost than those from other sources. The contractor must be prepared to demonstrate compliance with this requirement upon request."

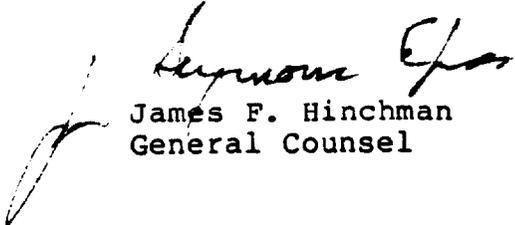
Colt argues this clause is ambiguous because what constitutes "feasible" is undefined and if this solicitation was properly to result in a supply contract the clause would be inapplicable. Colt contends the matter is further confused by the Navy's establishing a dollar threshold of \$156,000 in the "Buy American Act, Trade Agreements Act and the Balance of Payments Program" solicitation clause, Department of Defense Federal Acquisition Regulation Supplement § 252.225-7006(b). The clause allows nonqualifying country end products to be supplied up to the inserted dollar limit.

Initially, we note that clause H-12 would apply whether the solicitation was for a supply or a construction contract since it covers labor and materials as well as supplies. Moreover, while Colt argues that "feasible" is undefined, we find it adequately defined by the statement "[items] available at the required locale within the required time limits and . . . equal or lower in cost than those from other sources." Additionally, the clause requires proof of

compliance by the contractor. We find this to be a definite test which allows an offeror to determine what items are acceptable.

Also, we fail to see any basis for Colt's confusion regarding the latter clause and the \$156,000 limitation. The dollar limitation on nonqualifying country end products applies only when no Philippine source is available and purchases are made from other than a domestic source or a qualifying country source, as is stated in paragraph (b) of the clause.

The protest is denied.



James F. Hinchman
General Counsel