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Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** McDermott Shipyards, Division of  
McDermott, Inc.

**File:** B-237049

**Date:** January 29, 1990

## DIGEST

1. Protest that solicitation's procedural specifications relating to the processing of various contractor requests are unduly vague is denied where solicitation is clear as to the procedural requirements, and protester's "evidence" is comprised of information as to how agency handled such requests under predecessor contract. Agency's previous actions as well as possible future actions concern contract administration matters which are not for review by the General Accounting Office.

2. Protest that "performance type" specifications for construction of Navy vessel are restrictive of competition is denied where solicitation design risks involved are apparent and obvious to all experienced offerors. Risks are inherent in procurements, and offerors are expected to use their professional expertise and business judgment in taking these risks into account in computing their offers.

## DECISION

McDermott Shipyards, Division of McDermott, Inc., protests the terms of request for proposals (RFP) No. N00024-89-R-2187, issued by the Department of the Navy, Naval Sea Systems Command, for the detail design and construction of the T-AGOS 23 (SWATH-A) world-wide ocean surveillance ship and options for the construction of an additional three ships. McDermott argues that various portions of the specifications are unduly vague, defective and do not provide sufficient information to offerors other than itself

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to enable the proper preparation of proposals.<sup>1/</sup> We dismiss the protest in part and deny it in part.

#### BACKGROUND

The T-AGOS series vessels are world-wide ocean surveillance ships which operate in support of the integrated undersea surveillance system, serving as a platform for the surveillance towed array sensor. The first versions of these ships, T-AGOS 1-18, are traditional monohull ships. In contrast, the T-AGOS 19-22 series and the prospective T-AGOS 23-26 series of ships are small waterplane area twin hull (SWATH) ships resembling large catamarans. Apparently, the unique SWATH design permits these vessels to operate in unusually severe weather and/or "seastates." To date, only one of the SWATH vessels (the T-AGOS 19) is near completion, and the Navy has exercised its option for an additional three vessels. The TAGOS 19 series (SWATH) and T-AGOS 23 series (SWATH-A) are similar in design except that the latter series are to be dimensionally larger in order to deploy a second acoustic system, thereby enhancing the ship's surveillance capabilities.

Of particular significance for purposes of the protest, the SWATH hull design presents unique maritime engineering requirements. Specifically, the design creates unusual high and low stress areas in the hull, many of which have penetration prohibitions and restrictions. The prohibitions and restrictions, in turn, impact significantly upon the design and routing of the ship's distributive systems (e.g., piping systems, electrical systems and heating, ventilation and air conditioning (HVAC) systems). In addition, the ship's surveillance mission requirements impose unusually strict noise and vibration suppression requirements in order to allow surveillance equipment to properly function.

The RFP, as amended, calls for the submission of initial offers on February 15, 1990. Firms submitting proposals are required to do so on a fixed-price incentive fee basis with a projected ceiling price equal to 130 percent of the target cost. The RFP specifies that offerors are to submit pricing for detail design and construction of the ship as well as a variety of spare parts packages, technical manuals, data items, and additional government requirements. Firms are

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<sup>1/</sup> McDermott is the incumbent contractor for the T-AGOS 19 series of vessels. McDermott complains that other offerors, not having the knowledge and experience McDermott possesses, might "underbid" McDermott by relying on RFP data at "face value."

also required to provide option pricing to the government for the additional ships contemplated under the RFP along with related items.<sup>2/</sup>

McDermott's allegations concern two types of specifications. The first group of specifications to which McDermott objects are in the nature of "procedural" specifications, that is, those specifications dealing with the Navy's requirements as they relate to particular administrative tasks which may arise or be required under the contract. In this group of objections is, for example, McDermott's concern regarding the RFP's procedural requirements relating to the Navy's approval of "equivalent" equipment for use where the RFP calls for a particular brand name product. The second group of specifications to which McDermott objects are substantive specifications which relate to the actual construction of the vessel. In this latter group of objections is, for example, McDermott's objection to the terms of the HVAC distributive system's specifications.

#### PROCEDURAL SPECIFICATION DEFECTS

McDermott's objects to procedural aspects of the RFP's specifications, in particular, the procedures for the processing of deviation, waiver and equivalency requests, the procedures for the review and approval of contract drawings and the procedures for the review and approval of testing procedures. In each of these areas, McDermott bases its allegations upon the premise that the RFP generally provides that the ship construction project will be consistent with "commercial standards" which, in practice, are implemented by the Navy as though they are more exacting "military standards." In support of this allegation, McDermott directs our attention to certain specifications which provide generally that review and testing procedures, as well as materials and workmanship, shall conform to the standards and requirements specified by regulatory bodies such as The American Bureau of Shipbuilding (ABS) and The United States Coast Guard (USCG) for the construction of commercial vessels, unless otherwise specified. Also in support of these allegations, McDermott relies upon the actual practices engaged in by the Navy during the firm's past and current performance of the T-AGOS 19-22 contract which McDermott outlines extensively in its protest. According to McDermott, the specifications outlining procedures in the areas noted above are insufficient to alert other offerors to the actual practices of the Navy in

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<sup>2/</sup> For the optional vessels, the ceiling price is to be no more than 120 percent of the target cost.

implementing those requirements which, according to McDermott, are far more onerous and costly than actual commercial practices and in fact more properly resemble military procedural requirements.

As to the processing of deviation, waiver and equivalency requests, the specifications in this case provide generally that where the contractor wishes to propose equipment "equivalent" to that specified, or where the contractor wishes to seek a deviation from the specifications or a waiver for work performed at variance with the specifications, the firm is required to submit a written request. Where the contractor is seeking to use "equivalent" equipment, the request must provide detailed information regarding dimensions and performance capabilities, and the firm must await the approval of an "equivalent equipment certificate" prepared in connection with the request. Approval will either be granted or denied (explicitly or implicitly) within 45 days. Where the contractor is seeking a deviation or waiver, a request must be submitted in writing and include a statement justifying the request.

According to McDermott, these requests in the past have been processed in an onerous fashion by the Navy. In particular, McDermott points to its experience under its present contract and states that the Navy's demands for excessive information and documentation before approval of such requests has led the firm to incur substantial cost overruns for processing those requests in the form of excessive man hours. In short, McDermott alleges that no firm can reasonably project the potential costs associated with the processing of equivalency waiver and deviation requests because the terms of the RFP fail to alert other offerors to the excessive demands placed upon it by the Navy's implementation of these provisions. According to McDermott, these provisions should be implemented consistent with the "commercial standards" of the shipbuilding industry.

As to drawing review and approval, the RFP here provides that the government reserves the right to "inspect" all drawings related to the contract effort and provides as well that the government's project supervisor will select from the contract's drawing schedule those drawings which will be subject to government "approval."<sup>3/</sup> In addition, the Navy has informed prospective offerors that, for purposes of

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<sup>3/</sup> The RFP also provides that no deviation from certain types of drawings is permissible without specific government approval.

estimating the costs of drawing approval, firms should assume that approximately 50 drawings will require approval.

McDermott argues that the specifications and information provided by the Navy regarding drawing review and approval fail to sufficiently apprise offerors of the extent to which the Navy will in fact engage in review and approval of drawings. In support of this allegation, McDermott alleges that under the T-AGOS 19 contract, the Navy reviewed virtually all of the drawings produced under that contract, often making extensive quality deficiency report (QDR) comments to which McDermott was required to respond. According to McDermott, the burden imposed by this review process could not be contemplated under the T-AGOS 19 contract and cannot be anticipated under the current RFP. McDermott also argues that the Navy's implementation of the review and approval process for testing procedures requirement also will prove to be far more onerous than what would be required under "commercial standards." McDermott concludes that offerors under the current RFP (other than itself) will not be able to reasonably formulate the cost of compliance with the terms of the specifications.

We are of the view that McDermott's allegations relating to the procedural requirements of this RFP essentially relate to matters of contract administration. The information upon which McDermott relies to support its allegations regarding procedural specification defects is derived from the Navy's administration of the T-AGOS 19 contract; from this McDermott infers that the Navy will administer the contemplated T-AGOS 23 contract in a similar fashion. This entire protest basis is thus premised on the argument that the solicitation essentially requires vessel construction consistent with commercial standards while the Navy, in practice, imposes "onerous and unpredictable" requirements as evidenced by the Navy's administration of the protester's T-AGOS 19 contract. There is no suggestion that these RFP provisions are ambiguous or defective in themselves; rather, the protester argues that the Navy will continue imposing excessive requirements that cannot be reasonably anticipated by other potential offerors. The protester therefore essentially asks our Office to determine that the Navy's practices in the past were in fact unreasonable and excessive and were beyond the level that could be anticipated by responsible offerors. The protester also asks us to essentially find that the Navy will continue its alleged errors in the future. We decline to do so. In particular, we point out that McDermott can file claims regarding the administration of the T-AGOS 19 contract under the Contract Disputes Act, 41 U.S.C. § 601 et seq. (1982), matters which are not subject to our bid protest

jurisdiction. 4 C.F.R. § 21.3(m)(1) (1989). Similarly, McDermott's allegations regarding how the Navy may choose to administer the T-AGOS 23 contract (allegations which amount to mere speculation based upon the Navy's actions under the predecessor contract) are matters also beyond the scope of our jurisdiction. Id. We therefore dismiss McDermott's allegations concerning the procedural requirements of the specifications.

#### SUBSTANTIVE SPECIFICATION DEFECTS

McDermott next argues that various portions of the RFP's substantive specifications are defective because they provide insufficient information to enable other offerors to intelligently prepare proposals. Specifically, McDermott principally argues that the Navy's contract design, including the specifications, contract drawings, and contract guidance drawings, is so deficient in critical areas (lacking design information in such areas as piping, electrical and heating, ventilation and air conditioning) that the actual scope of work can only be determined after award by the successful contractor and after the contractor is "locked into" a fixed-price contract. According to McDermott, other offerors have no basis for knowing whether their cost proposals are realistic in view of the undefined scope of work.

We first note that the protester itself does not claim to be in any way misled by the specifications and drawings. Rather, it argues that the RFP does not contain sufficient design detail to enable other shipyards to realistically propose prices because they, lacking McDermott's expertise and experience, are not adequately apprised of the risks and burdens involved in the major design effort required of the successful contractor. Ordinarily, we entertain bid protests concerning defective specifications where the protester itself is directly prejudiced by a defect in the solicitation's technical specifications. Here, the protester is fully aware of the requirements, understands them, and can submit an appropriate price. The protester complains, however, that other shipyards with less experience and expertise will "underbid" McDermott with unrealistic prices without being aware of the major design risks and burdens involved in the project. Thus, the protest essentially requires us to speculate as to the degree of expertise and experience of offerors not before us.<sup>4/</sup> Nevertheless, we think that McDermott has not shown

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<sup>4/</sup> No other offeror has filed a protest concerning the allegedly restrictive specifications.

that an experienced shipyard, familiar with military shipbuilding projects, will be misled concerning the amount of design effort involved with the RFP.

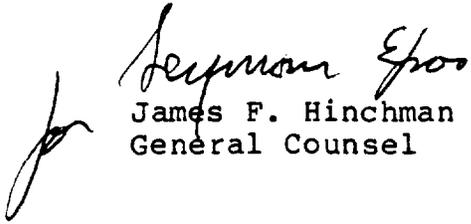
For example, McDermott complains that the contract guidance plans for numerous piping systems consist of one-line system drawings which are devoid of any detail as to pipe size, quantity or routing. According to the protester, the piping systems must be "designed essentially from scratch" by each bidder which cannot estimate the scope and true cost of the work.

First, we fail to see how an experienced shipyard, when presented with one-line piping drawings for a complex vessel, will assume anything other than that substantial design work will have to be completed after award. While other offerors may not have the expertise and experience of McDermott to precisely estimate the costs involved, the solicitation design risks, in our view, are apparent and obvious. Second, we are not persuaded that other experienced shipyards cannot reasonably estimate the project costs involved given these obvious design risks. Specifically, we agree with the Navy that a shipbuilder should be able to estimate the costs based on information furnished in the RFP, including the size of the ship, operational environment of the ship, ship manning level, amount of steel, tonnage, ship dimensions, type of propulsion system, and type and number of auxiliary systems. We are of the same view, for example, with respect to the proposed ship's electrical and HVAC systems. In short, risks are inherent in procurements, and offerors are expected to use their professional expertise and business judgment in taking these risks into account in computing their offers. General Electric Canada, Inc., B-230584, June 1, 1988, 88-1 CPD ¶ 512.

In light of the foregoing, we conclude that McDermott has failed to carry its burden of proof with respect to its allegations concerning the T-AGOS 23 specifications. In this regard, we note that the primary focus of McDermott's allegations is that the complained-of specifications are stated in performance terms which cannot be complied with absent further information. In the final analysis, we view the Navy's actions in promulgating the specifications for this RFP in largely performance terms as consistent with the mandate of the Competition in Contracting Act, 10 U.S.C. § 2305(a)(1)(A)(iii) (Supp. IV 1986) to develop specifications which allow for the broadest basis of

competition with due regard to the agency's needs. See generally Pitney Bowes, 68 Comp. Gen. 249 (1989), 89-1 CPD ¶ 157.

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

  
James F. Hinchman  
General Counsel