

McArthur
14380-4



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Liebert Corporation

File: B-232234.5

Date: April 29, 1991

R. Timothy Hanlon, Esq., Alex D. Tomaszczuk, Esq., and John E. Jensen, Esq., Shaw, Pittman, Potts & Trowbridge, for the protester.

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DIGEST

1. Where protester knew basis of protest, but protester reasonably understood from competition advocate that agency would not act contrary to the protester's interests while the competition advocate investigated the matter, protester reasonably delayed filing protest until it received notice to the contrary.
2. Under the Economy Act, 31 U.S.C. § 1535 (1988), where the ordering agency reasonably determines that amounts are available, that the receiving activity is able to provide or get by contract the ordered goods or services, that ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise, and that placement of the order is in the best interest of the government, an agency may purchase its requirements under another agency's contract.
3. Where contract provided for purchase of nonredundant uninterruptible power systems and for expansion of those systems to redundant configuration, agency's purchase of redundant systems made from nonredundant systems and ancillary items available under the contract is within scope of contract.

4. Proposed issuance of delivery orders for quantity of uninterruptible power systems in excess of stated maximum quantity under the contract would be outside the scope of that contract, would result in a contract materially different from that for which the competition was held, and absent a valid sole-source determination, would be subject to Competition in Contracting Act requirements for competition.

DECISION

Liebert Corporation protests the actions of the Air Force and the Federal Aviation Administration (FAA) in attempting to procure uninterruptible power systems (UPS) for the FAA through the issuance of delivery orders under the Air Force's requirements contract (No. F04606-88-D-0067) with Exide Electronics Corporation. The protester contends that the FAA is improperly procuring its requirements under an interagency agreement with the Air Force under the Economy Act, 31 U.S.C. § 1535 (1988). The protester also argues that the Air Force will violate the Competition in Contracting Act (CICA) of 1984, 10 U.S.C. § 2301 et seq. (1988), by issuing orders beyond the scope of the Exide contract.

We sustain the protest because implementation of the interagency agreement will result in issuance of delivery orders for quantities far in excess of the maximum quantities specified in Exide's contract, in contravention of the competition requirements of CICA, 10 U.S.C. § 2304(a)(1) and 41 U.S.C. § 253(a)(1) (1988).

I. BACKGROUND

A. Contract Award

On May 5, 1987, the Air Force issued request for proposals (RFP) No. F04606-87-R-0313 for a firm, fixed-price requirements contract for supply of UPS, including certain reimbursable services and materials, used to protect electronic equipment from power anomalies both by controlling the flow of current from commercial utilities and by providing power in the event that service is interrupted. The RFP, as amended, provided for award of a multiyear requirements contract to the low, technically acceptable offeror for 74 different contract line item numbers (CLINs) covering UPS of various configurations and ranging from 1 kilovolt-ampere (KVA) through 750 KVA, as well as an additional 17 CLINs of optional equipment, services, spares, and data associated with installation and maintenance of the UPS.

Each of the 74 UPS CLINs contained 6 sub-CLINs, one for each of 5 program year quantities and one for the total multiyear ("All Program Years") quantity. Each sub-CLIN contained a

best estimated quantity (BEQ) for evaluation purposes and a maximum quantity; for example, CLIN 0046, for 750 KVA UPS, contained 5 sub-CLINs (CLINs 0046AA-0046AE), with a BEQ of 0, 0, 0, 1 and 0 and with maximum quantities ("MAX;") of 1, 1, 2, 4 and 8, for a 5-year BEQ of one UPS and a total "multiyear contract maximum quantity" of 16 (CLIN 0046AF). The five individual sub-CLINs for each program year also specifically contained a "quantity variation [of] 0 % OVER [and] 0 % UNDER." In addition to the total maximum quantities for each CLIN, the solicitation also contained the clause at Federal Acquisition Regulation (FAR) § 52.216-19, Delivery-Order Limitations, specifying the maximum and minimum quantities for each individual delivery order under the contract, stating as follows:

"(b) Maximum order. The Contractor is not obligated to honor--

- (1) Any order for a single item in excess of 415;
- (2) Any order for a combination of items in excess of 500; or
- (3) A series of orders from the same ordering office within 30 days that together call for quantities exceeding the limitation in subparagraph (1) or (2) above.

"(d) Notwithstanding [paragraph] (b) . . . the Contractor shall honor any order exceeding the maximum order limitations in paragraph (b), unless that order (or orders) is returned to the ordering office within 30 days after issuance, with written notice stating the Contractor's intent not to ship the item (or items) called for and the reasons. . . ."

The agency found that Exide's best and final offer for a 5-year contract at an evaluated price of \$26,734,671, including data and reimbursables, as well as certain optional hardware contained in CLIN 0075, was substantially below the evaluated price of \$65,161,404 submitted by Emerson Electric Company, Liebert's parent corporation. Accordingly, the agency awarded a contract to Exide on May 6, 1988, at a value of \$621,831,472 (since reduced to \$610,567,865), based on the maximum quantity for the 74 UPS CLINs: \$448,244,172 in hardware (CLINs 0001-0075); \$173,231,700 for reimbursable material, labor and travel (CLINs 0076-0087 and 0091-0092); and \$355,600 in data (CLINs 0088-0090).

B. Interagency Agreement

Subsequently, the FAA received a handbook from Exide, which described the contractor's requirements contract and provided guidance to agencies interested in using the Air Force contract to satisfy their own requirements. The FAA at that time had developed a critical need for electrical power equipment for Air Route Traffic Control Centers (ARTCCs); its examination of the Air Force contract, in consultation with that agency's program office, satisfied the FAA that equipment available under the Air Force contract with Exide would meet the FAA's needs.

On November 29, 1989, the FAA entered into a reimbursable interagency agreement pursuant to the Economy Act, by which the Air Force would supply the equipment. Under the terms of the agreement, the Air Force essentially was to provide contract management services to the FAA and use its existing requirements contract with Exide to acquire the equipment, with the FAA providing funds in an estimated amount of \$82 million for the period from December 1989 through fiscal year 1993.

The agreement stated that the agencies would order a site survey to develop generic drawings and specifications and to determine the precise configuration needed to meet the FAA's needs. The contractor was then to prepare a test system, which would also serve as the final system for delivery, with the Air Force providing supply support as needed to the FAA and with equipment deliveries starting in approximately April 1991.

In July 1990, the agencies modified the interagency agreement to assign the Air Force responsibility to modify existing ARTCC equipment to assure compatibility with the new equipment being furnished. In September, the agencies again modified the agreement, to assign the Air Force the responsibility for modifying 86 existing Cooper Industries 550 kw engine generators to make them compatible with the new systems. The two modifications increased the estimated amount of the interagency agreement to \$95 million.

On January 26, 1990, in furtherance of the interagency agreement, the Air Force issued delivery order No. 135 under CLIN 0076 of the Exide contract, in the amount of \$75,000 for a site installation survey. On April 25, the agency modified this delivery order to increase its value to \$750,000 and to include material and travel and the following work to be performed under the site survey:

"Engineering support in defining interface for the [FAA] Boston site UPS, switching, load-banks, and back-up power. . . . This effort will result in definition of a 'generic' site/SUPS interface for all 23 sites. The government recognizes some site-specific adjustments will be required . . . however, this effort is intended to cover all engineering necessary to establish a standardized site layout. . . . This contract does not authorize procurement of any equipment. The equipment must be ordered on a site-by-site basis."1/

By letter of April 24, 1990, having learned that the FAA and the Air Force had entered into an interagency agreement, the protester requested a copy of that agreement and other information under the Freedom of Information Act (FOIA). On April 30, after meeting with the contracting officer, the protester submitted a written request for an explanation of how the Air Force planned to use the Exide contract to meet the FAA's requirements, expressing the protester's belief that the specific system configuration required by the FAA (3000 KVA parallel redundant system) was not available under that contract. The Air Force responded by letter of May 29, declining to provide any information, but stating that "all applicable procurement laws and regulations have been followed."

On June 18, 1990, the protester received a copy of the interagency agreement pursuant to FOIA; the agency advised the protester that it would be providing additional information. On July 18, the protester learned from the contracting officer that Liebert would not in fact be receiving any additional information. The protester subsequently met with the Air Force Competition Advocate, and on August 8 the Competition Advocate directed Headquarters, Air Force Logistics Command, to investigate the propriety of using the Exide contract to meet the FAA's requirements. During this time, the protester continued its efforts to obtain additional information.

On October 4, pursuant to another FOIA request, the agency supplied the protester with a complete copy of delivery order No. 135, as modified, which the protester recognized to be in implementation of the interagency agreement. On October 19, as Liebert states it was about to file a protest with our Office, the Competition Advocate notified the protester that

1/ This delivery order, as modified, indicated for the first time that the site survey was being ordered to meet FAA requirements. The original delivery order was for a site survey without reference to FAA or any particular site.

based on information from Liebert, the agency had changed its plans and would not in fact purchase any of the FAA's requirements under the Exide contract.^{2/} After further discussing the matter with the ordering activity, however, the Competition Advocate notified Liebert on November 21 that the agency had changed its plans again and would in fact order the FAA's requirements from Exide. Liebert filed this protest on December 6. At a bid protest conference held on January 29 in connection with its initial protest, Liebert learned that the FAA intended to meet its requirements by ordering 750 KVA UPS under CLIN 0046 of Exide's contract. Liebert filed a supplemental protest 2 days later.

II. TIMELINESS

The agencies and the awardee argue that the protest is untimely because the protester waited more than 10 days after learning its basis of protest, which in their view was, at the latest, ascertainable from a copy of the interagency agreement that the protester received in June or from the additional information received in October, 2 months before Liebert filed its protest in December. We disagree.

From the time in April when the protester first learned of the agency's plans to order FAA requirements under the Exide contract, the protester made a good faith effort to secure additional information about the interagency agreement and its implementation, two issues that we find to be interrelated. While the protester knew its basis of protest on October 4, upon its receipt of delivery order No. 135, we do not find it unreasonable for Liebert not to have filed a protest within 10 days of that date in view of the Competition Advocate's assurances on October 19 (the 10th working day after October 4) that the agency would not order the FAA items under the Exide contract. It is clear that as late as November 21 the protester reasonably believed that the Air Force was addressing Liebert's concerns. Liebert had no reason to file a protest until the agency announced its intention to order its needs under Exide's contract, notwithstanding Liebert's

^{2/} The record shows that Headquarters, Air Force Logistics Command, on behalf of the Competition Advocate, directed the purchasing office to discontinue the placement of orders for FAA requirements under the Exide contract.

objections. Liebert did so within 10 days of receiving this notice.^{3/}

III. FAA'S USE OF THE ECONOMY ACT

The Economy Act provides as follows:

"The head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another agency for goods or services if--

- (1) amounts are available;
- (2) the head of the ordering agency or unit decides the order is in the best interest of the United States Government;
- (3) the agency or unit to fill the order is able to provide or get by contract the ordered goods or services; and
- (4) the head of the agency decides ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise." 31 U.S.C. § 1535(a).

CICA generally requires that in conducting a procurement for property or services, the head of an agency obtain full and open competition through the use of competitive procedures, but exempts procurement procedures otherwise expressly authorized by statute. 41 U.S.C. § 253(a). The Economy Act provides for such a procedure. National Gateway Telecom, Inc. v. Aldridge, 701 F. Supp 1104, 1113 (D.N.J. 1988) (interpreting the identical provision in 10 U.S.C. § 2304(a)(1)).^{4/}

The protester argues that under the Economy Act, the FAA could not reasonably determine that its requirements could not "be provided by contract as conveniently or cheaply by a commercial enterprise." In support of this contention, the protester has submitted copies of recent Federal Supply Schedule contracts to demonstrate that prices for UPS are far

^{3/} The use of the Economy Act in relation to the requirements of CICA is an issue of first impression for our Office. Accordingly, we would consider that issue, regardless of its timeliness, under the significant issue exception to our timeliness rules at 4 C.F.R. § 21.2(b) (1991).

^{4/} CICA, 41 U.S.C. § 253(f)(5)(B), precludes an agency from procuring property or services from another agency under the Economy Act, however, unless that agency complies fully with CICA in its procurement of such property or services.

more competitive than at the time of the original Air Force competition,^{5/} At the time of the original competition, 18 months prior to the execution of the interagency agreement, Exide's prices were less than half of the prices submitted by its competitors, including Liebert's parent corporation, Emerson Electric Company. In making its determination, the FAA considered the results of this competition and relied upon engineering estimates provided by its technical personnel. While prices may now be more competitive, nothing in this record establishes that the agency was unreasonable in concluding that the Exide contract was likely to be cheaper and more convenient than a separate agreement.

The protester also contends that the FAA cannot properly have its needs satisfied under the Exide contract because that contract may only be used for Air Force requirements. We disagree. The FAA and the Air Force are both agencies of the United States government, and the Congress has provided for agencies to support each other when appropriate under the Economy Act, 31 U.S.C. § 1535(a)(3), which specifically allows the agency that fills another agency's order to "get by contract the ordered goods or services." The Economy Act therefore allows an agency to use its own contracts to satisfy another agency's needs. Competitors for a requirements contract, such as the one here, are on constructive notice of the Economy Act and its implementing regulations, FAR Subpart 17.5, since these regulations are published in the Federal Register and the Code of Federal Regulations. See East Dayton Meat & Sausage Co.--Recon., B-240949.2, Dec. 4, 1990, 90-2 CPD ¶ 457. Competitors therefore knew or should have known of the possibility that the Air Force might serve as an agent for some other agency in issuing delivery orders under the contract. The protester's argument would undermine this provision of the Economy Act by precluding an agency from ordering under any other agency's requirements contract--we find no merit to the protester's position.

IV. THE EXIDE CONTRACT AND FAA REQUIREMENTS

A. Differences Between Contract CLINs and FAA's Requirements

^{5/} The protester also argues that the FAA expressed a concern with avoiding "the risks associated with a separate procurement," which the protester considers to be an improper basis for entering into an interagency agreement. So long as the agency makes the appropriate determination supported by reasonable findings of fact, there is nothing wrong with the agency's consideration of administrative convenience or procurement risks. See generally National Gateway Telecom, Inc. v. Aldridge, 701 F. Supp. at 1111.

The protester argues that the Air Force cannot properly accomplish the tasks assigned to it under the interagency agreement by issuing orders against the Exide contract because those tasks exceed the scope of the Exide contract.^{6/} The protester asserts that the FAA's requirement for redundant UPS differs significantly from the nonredundant UPS under contract, not only in the bypass mechanism but also in the logic boards, front display panels and circuit breaker configuration. In addition, having reviewed drawings of the FAA's projected UPS system, the protester contends that much of the necessary ancillary equipment--a battery monitor, diesel control switchgear, UPS input switchgear, UPS output switchgear, noncritical switchgear, switchgear and UPS monitoring and display and power/control filters--are nowhere among the items available under the Exide contract, although they represent a substantial portion of the \$155 million project cost, of which the UPS and the equipment modifications represent a smaller portion. The protester also argues that the portion of delivery order No. 135 ordering a "generic site survey," including the services of a customer support engineer, is beyond the scope of the contract, specifically CLIN 0076 for site installation support.

In determining whether a modification is beyond the scope of the contract, we look to whether the contract as modified is materially different from the contract for which the competition was held. Clean Giant, Inc., B-229885, Mar. 17, 1988, 88-1 CPD ¶ 281. We also consider whether the solicitation for the original contract adequately advised offerors of the potential for the type of changes during the course of the contract that in fact occurred. CAD Language Sys., Inc., B-233709, Apr. 3, 1989, 89-1 CPD ¶ 342.

While the precise requirements of the FAA were not known at the time of award, the contract provided for a variety of configurations on the understanding that the individual delivery orders would spell out the precise configuration and assemblage of equipment needed for each order. For the reasons stated below, we do not find that plans to assemble redundant systems from nonredundant ones are beyond the scope of the Exide contract.

^{6/} The protester objected to agency plans to modify ARTCC equipment and Cooper Industries generators through the Exide contract. The FAA now advises our Office that it will withdraw these items from the interagency agreement and procure them separately. Under such circumstances, the issue of whether the Exide contract could have been modified to accomplish such work is academic.

Regarding the use of nonredundant modules to create a parallel redundant UPS, Attachment 10 to the contract lists four different configurations for UPS, two nonredundant configurations (single- and three-phase nonredundant, CLINs 0002-0046), a cold standby redundant configuration (CLINs 0047-0058) and a parallel redundant configuration (CLINs 0059-0074). In the UPS, current passes through a battery, which serves to remove the chance of spikes and surges and insures uninterrupted power in the event of utility failure. In nonredundant systems, a single module provides power, with a bypass switch to transfer the load back to the local utility source in the event of failure of the UPS. In cold, stand-by redundant systems, one module provides power with a second module installed to pick up the load if the first fails. In parallel redundant systems, such as the FAA requires, four 750-KVA modules are combined into a 3,000 KVA system, with a fifth module installed to pick up the load if one of the other four fails or requires service; the individual modules contain no bypass switch but depend upon a stand-alone bypass control cabinet to insure against UPS failure.

We find nothing in the contract to preclude the agency from purchasing nonredundant 750 KVA systems under CLIN 0046 as modules for combination with other ancillary equipment under contract to satisfy the FAA's requirement for 3,000 KVA parallel redundant systems. The contract specifically provides for delivery of single module, nonredundant systems with "all the provisions for interface connections to accessory items to insure easy and economical expansion . . . to a fully redundant UPS," as well as for expansion of the UPS. The Air Force maintains that the contract was designed to allow flexibility in the configurations and designs to be procured, and we agree that inasmuch as the agency may buy a nonredundant module and later add modules to convert that system into a redundant one, it is reasonable to interpret the contract to allow the agency to assemble from the start a redundant system of nonredundant components available under the contract. The chief difference identified by the protester between redundant and nonredundant configurations is in the bypass mechanism and the need for a bypass control cabinet with the latter. In this respect, the record shows that when constructing redundant configurations in the past, the Air Force has not purchased bypass control cabinets under the Exide contract but has purchased the cabinets under separate contract, and we have no basis for assuming that it will take a different approach in the instant case.

With regard to the ancillary equipment--battery monitor, diesel control switchgear, UPS input switchgear, UPS output switchgear, noncritical switchgear, switchgear and UPS monitoring and display and power/control filters--the agencies point out that CLIN 0077 provides for "reimbursable contractor

furnished material that may be required in the contractor's performance of each task (under CLIN 0076) in direct support of Item 0001-0074." The agencies argue that CLIN 0077 was designed to insure that the delivered systems would meet the requirements of individual orders, at a minimum of administrative inconvenience but with maximum flexibility in creating configurations responsive to user needs.

In our view, CLIN 0077 clearly permits the furnishing of incidental material to support UPS being provided under the specific CLINS. The record shows that the ancillary equipment being ordered is necessary for the functioning of the systems being delivered and we have no basis to object to the agencies' plans to buy needed ancillary items to incorporate into each system. With regard to the generic site survey, the record shows that the agency modified the contract in May 1989 to add the services of senior customer support engineers to conduct surveys under CLIN 0076. We see nothing improper, in view of the FAA's requirements, in tasking Exide to run one generic site survey for 23 sites in lieu of 23 separate surveys.

B. Maximum Quantities

The protester argues that FAA's requirements cannot be satisfied under the Exide contract because of the maximum quantity provisions in the contract. The protester points out that the FAA's requirements for 92-115 750-KVA UPS (four to five nonredundant modules at each of 23 sites) far exceeds the maximum quantity of 16 allowed.

The FAA argues that "[t]here is no limit to the quantity the government may order [for] any single CLIN," provided the orders are timely placed and the aggregate dollar value does not exceed \$621 million. The FAA contends that FAR § 52.216-19, Delivery-Order Limitations, allows the agency to order quantities in excess of the maximum order limitations, specifically making the contractor responsible for meeting such orders unless he takes positive action to reject the order within a certain number of days (30 under the Exide contract). The FAA argues that the Exide contract is structured to allow ordering "a nearly infinite range of UPS equipment types and configurations" and that the additional value of UPS ordered under CLIN 0046, roughly \$12 million, is de minimis in relation to the total contract value.

The FAA's argument overlooks the fact that this contract contains two different kinds of maximum quantity provisions. The Delivery-Order Limitations clause allows the government to place and the contractor to decline delivery orders exceeding the specified maximums and permits the government to explore the possibilities of securing lower prices for larger

quantities exceeding the limitations. 49 Comp. Gen. 437 (1970). It imposed maximum order limitations per delivery order of 415 for a single item and 500 for a combination of items issued within 30 days. Wholly separate from this provision are individual maximum quantities set forth for each CLIN. These maximums clearly pertain to each line item over the life of the contract, and have nothing to do with what may be ordered under an individual delivery order. We note that the Air Force requirements were initially competed on the basis of stated maximum quantities for each CLIN, and the award price reflects these maximums. We therefore view the FAA's assertion that it can order an almost infinite quantity of any one line item so long as the total maximum dollar value of the contract is not exceeded as patently unreasonable.

An order in excess of the maximum quantity stated in the contract would be outside the scope of the contract. Such an order would result in a contract materially different from that for which the original competition was held and, absent a valid sole-source determination, would be subject to CICA requirements for competition. See Neal R. Gross & Co., Inc., 69 Comp. Gen. 292 (1990), 90-1 CPD ¶ 212; Clean Giant, Inc., B-229885, *supra*. We therefore sustain the protest to the extent that the quantities to be ordered are in excess of the stated maximum quantities in the Exide contract.

V. REMEDY

The FAA states that it is now 16 months into its interagency agreement with the Air Force, and that UPS systems are urgently needed for expanded Air Route Traffic Control Centers and for Terminal Radar Approach Control facilities. The FAA also states that restarting any acquisition at this late date would cause enormous schedule and cost impacts throughout the National Airspace System modernization program for various reasons, including an estimated 3 years to complete drafting an RFP for UPS systems, proposal evaluation, and source selection. The record supports the agency's position that the requirements are urgent and critical for the agency and for the public safety. The record shows, however, that the specifications for a UPS are complete and available and that the items are essentially off-the-shelf equipment. We therefore think that procuring the items competitively should not require an extensive period of time.

We therefore recommend that FAA comply with CICA requirements for full and open competition in obtaining the UPS by issuing a competitive RFP for equipment beyond the scope of Exide's contract. From our review of the record, it appears that the Air Force has already obtained 12 of the 16 750-KVA UPS available under the contract. One site is currently under preparation, but construction on the next site will not begin

until the fall. While the balance of the requirements are being competitively procured, the FAA has an immediate requirement for five UPS at the site currently under construction, one more than the Exide contract makes available. Because of the criticality of the FAA's requirements, we see no objection to the use of Exide's contract to obtain this additional quantity necessary to avoid serious disruption to the National Airspace System, provided that the agency appropriately justifies such action. We also find the protester to be entitled to its cost of pursuing this protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d).

The protest is sustained.

for Milton J. Jester
Comptroller General
of the United States