



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

Decision

Matter of: Argus Research Corporation--Protest and
Request for Declaration of Entitlement to
Costs

File: B-249055; B-249055.2

Date: October 20, 1992

Donald M. Walls for the protester.
William A. Wotherspoon, Esq., for Paramax, an interested party.
Michael J. Glennon, Esq., Department of Navy, for the agency.
David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Limitation of competition for preliminary designs for submersible vessel to offerors capable of completing the final design and constructing the prototype in the next phase of the procurement is legally unobjectionable where agency reasonably concluded limitation will assure that designs are consistent with construction contractors' capabilities, thereby avoiding unnecessary delays and duplication of costs, and will reduce lost time associated with a construction contractor familiarizing itself with another firm's design.
2. Allegation that after award agency may impose upon contractors the agency's own in-house design, which allegedly is inconsistent with solicitation performance specifications, agency's actual minimum needs, and statutory and regulatory preference for the use of nondevelopmental items and technology, concerns contract administration, a matter not for consideration by the General Accounting Office.
3. Protester is not entitled to reimbursement of the costs of filing and pursuing its protest where agency corrective action--withdrawal of offer to enter into a cooperative research and development agreement--was implemented 10 working days after the protest was filed.

DECISION

Argus Research Corporation protests the terms of request for proposals No. N00024-92-R-6109, issued by the Department of the Navy for preliminary designs for the Advanced SEAL Delivery System (ASDS). Argus contends that one of the contemplated contracts should have been set aside for small business concerns and that the solicitation otherwise unduly restricts competition. Argus also asks that we declare it entitled to reimbursement of its protest costs in connection with a protest ground in response to which the agency allegedly took corrective action.

We deny the protest and the request.

The solicitation requests proposals for one or more contracts to develop a preliminary design for ASDS, a "dry" submersible vehicle to be used to covertly transport Navy special forces personnel (SEALs) into high-threat environments.¹ The solicitation statement of work (SOW) requires the preliminary designs to meet "the functional, performance, Integrated Logistics Support . . . certification, design, test and production requirements" derived from an attached, classified ASDS "Top Level Requirements" statement and from "best commercial practices."

The solicitation does not require offerors to include any preliminary design work in their proposals. The solicitation does generally require that proposals demonstrate the offeror's capability to perform the ASDS preliminary design effort, and specifically requests a description of: (1) security clearance levels for proposed facilities and personnel; (2) corporate experience; (3) the offeror's "preliminary design technical approach," that is, its "work plan for accomplishing the SOW tasks; a description of the proposed preliminary design project organization . . .; time-phased assignment periods of engineering, management and support personnel; and a subcontractor management plan (if applicable)"; (4) proposed key personnel; (5) the offeror's company and major subcontractors, including an outline of the management organization and infrastructure; and (6) facilities. Likewise, the solicitation provides for proposals to be evaluated on the basis of technical/management and price factors, with technical/management significantly more important than price. The technical/management factors

¹Navy SEALs are currently transported in "wet" submersibles, that is, mini-sub flooded inside in which the SEALs breathe using scuba equipment.

include corporate experience, preliminary design technical approach, personnel, corporate description and management, and facilities. In addition, the solicitation provides that because only contractors who are selected to provide preliminary designs are eligible to compete for a contemplated subsequent contract for a detailed design/manufacturing development phase and construction of an ASDS prototype, preliminary design offerors must "have the capability to design and construct the ASDS either through their own capability or through subcontracting arrangements." Accordingly, the solicitation generally requires that proposals also describe the offeror's capability to construct an ASDS prototype.

Argus objects to the solicitation provision limiting the competition for the preliminary design contracts to firms that have or can acquire the capability to develop the detailed design and construct the ASDS prototype in the next phase of the acquisition. According to Argus, the current combined approach restricts competition; decoupling the preliminary design effort from the subsequent phase would increase competition and afford the agency the benefit of input from an independent design agent during construction. Argus also argues that the Navy should have set aside one of the contemplated preliminary design contracts for competition by small business concerns. Argus questions whether the Navy conducted a proper marketing study before determining not to set aside one of the contemplated contracts for small business competition; according to the protester, there are "a number of small businesses who could actually assemble teams to accomplish the ASDS preliminary design."

Under the Competition in Contracting Act of 1984 (CICA), an agency is required to specify its needs and select its procurement approach in a manner designed to promote full and open competition. 10 U.S.C. § 2305a(1)(A)(i) (1988); LaQue Center for Corrosion Technology, Inc., B-245296, Dec. 23, 1991, 91-2 CPD ¶ 577. A contracting agency should include restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs. 10 U.S.C. § 2305(a)(1)(B)(ii). Where a protester alleges that a requirement is unduly restrictive, we review the record to determine whether the requirement has been justified as necessary to satisfy the agency's minimum needs. RMS Indus., B-247233; B-247234, May 1, 1992, 92-1 CPD ¶ 412. We find no basis to question the Navy's approach here.

As acknowledged by Argus, the Navy's effort to obtain a dry submersible (which offers superior SEAL protection and operating characteristics relative to the current wet submersibles) has been delayed for many years. According to the Navy, requiring the preliminary design offerors to have

or be able to obtain the ability to complete the detailed design and construct the ASDS prototype will serve a dual purpose: (1) assure that the designs reflect an awareness of the construction contractor's capabilities, thereby avoiding unnecessary delays and duplication of costs, and (2) reduce the lost time associated with a construction contractor familiarizing itself with another firm's design. In addition, the Navy notes that the solicitation permitted offerors to enter into teaming arrangements; the agency therefore determined that, notwithstanding the requirement for the capability to design and construct the ASDS prototype, there would be adequate opportunity for firms without both capabilities to compete.

Argus does not dispute the Navy's explanation that requiring preliminary design offerors to possess or be able to acquire the capability to complete the final design and construct the ASDS prototype will reduce delays and avoid unnecessary costs. Rather, it argues that the independence of the preliminary design contractor would afford the agency certain other advantages during the construction phase. It is not the responsibility of our Office, however, to weigh the advantages and disadvantages of the agency's chosen approach; our concern is solely to assure that any restrictions on competition reasonably are necessary to meet the agency's minimum needs. Id. In this regard, we have previously recognized that avoiding significant, unnecessary delays, see The Great Lakes Towing Co., B-235023, June 16, 1989, 89-1 CPD ¶ 570, or the unnecessary duplication of costs, see The Caption Center, B-220659, Feb. 19, 1986, 86-1 CPD ¶ 174, may justify restrictions on competition. In particular, we have specifically held that an agency procurement of the design and installation of a signage system as a total package, rather than on the basis of separate awards for each phase, was reasonable where the agency reasonably concluded that a total package approach would minimize or avoid unsatisfactory results, unnecessary delays and disruption to the facility. Express Signs Int'l, B-227144, Sept. 14, 1987, 87-2 CPD ¶ 243. Since it is undisputed that the Navy's approach will reduce unnecessary delays and costs, and in view of the agency's determination that adequate competition exists, we find that the agency reasonably limited the preliminary design competition to offerors able to design and construct the ASDS prototype.

Likewise, we find no basis to question the Navy's determination not to set aside one of the preliminary design contracts for small business competition. Pursuant to the Small Business Act, 15 U.S.C. § 631 et seq. (1988), Federal Acquisition Regulation (FAR) Part 19 instructs contracting agencies to set aside certain acquisitions for exclusive

small business competition. FAR § 19.502-2 sets out what is referred to as the "rule of two";

"The entire amount of an individual acquisition or class of acquisitions . . . shall be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that (1) offers will be obtained from at least two responsible small business concerns . . .; and (2) awards will be made at fair market prices."

The determination["] whether to set a procurement aside is a matter within the agency's discretion which we will not disturb absent a showing that it was unreasonable. Dakota Sys., Inc., B-246697, Mar. 27, 1992, 92-1 CPD ¶ 312.

It is Argus' position that a proper marketing survey would have shown that a number of small businesses could assemble teams to accomplish the ASDS preliminary design. Whether or not this is the case, however, as discussed above, the Navy reasonably decided to limit the competition for the preliminary design contracts to firms that could also complete the detailed design and construct the ASDS prototype. Although the agency initially included several small businesses on a bidder's list based upon their responses to a 1989 synopsis for a "concept design," nothing in the record establishes that the Navy lacked a reasonable basis when it determined that there was no reasonable expectation that offers would be obtained from at least two responsible small business concerns also capable of both completing the detailed design and constructing the ASDS prototype. Indeed, the results obtained here confirm the Navy's expectation; while a number of offers were received, none was submitted by a small business concern. We thus find no basis for questioning the Navy's decision not to set aside a contract for small business concerns.

Argus maintains that the Navy has developed and intends to impose upon the successful offerors an in-house design which, according to Argus, fails to satisfy the requirements set forth in the Top Level Requirements statement or the agency's actual needs and is inconsistent with congressional and statutory preferences for the use of nondevelopment items and technology. In addition, Argus states that it has been advised that the in-house design has been furnished to "favored prospective contractors"; according to Argus, this improperly will confer an unfair competitive advantage upon such firms by enabling them to include in their proposed team firms with the facilities and experience necessary to construct the specific hull type upon which the in-house design is based.

The record contains no evidence that an in-house ASDS design has been furnished to selected offerors. While the Navy reports that it developed a "notional design" for the purpose of verifying that a vehicle could be designed that would satisfy its operational requirements, the agency categorically denies making this design available to any contractor or anyone outside the government. Argus has refused to name the source of the information on which its allegation regarding the in-house design is based, and in the face of the agency's denials changed its argument to one that the presence of contractor support personnel at Navy offices rendered disclosure "inevitable." In other words, it now is evident that this allegation was based on Argus' speculation. Such speculation is insufficient to establish that any disclosure has been made or that the agency has otherwise acted in bad faith or improperly in this regard. See Oktel, B-244956; B-244956.2, Dec. 4, 1991, 91-2 CPD ¶ 512.

The Navy also denies that it intends to impose the in-house design upon the successful offerors, explaining that the in-house design "presents only one concept" that will satisfy its performance requirements, and that "how each offeror meets their requirements in the course of performing the contract is left to the discretion of each offeror." Likewise, the solicitation states that there are a number of designs which can satisfy the agency's performance requirements. In any case, Argus' claim in this regard concerns a matter of contract administration, which is not for consideration by our Office. See Fritz Cos., Inc., B-246736 et al., May 13, 1992, 92-1 CPD ¶ 443.

On August 13, 1992, Argus protested to our Office an August 5 offer by the Mare Island Naval Shipyard to enter into a cooperative research and development agreement with one of the ASDS offerors for the purpose of preparing the ASDS preliminary design. Argus argued that this offer violated various statutes, regulations, executive orders and agency directives. On August 27, 10 working days after Argus raised this argument, Mare Island withdrew its offer. Argus requests that we declare it entitled to reimbursement of the costs of filing and pursuing this protest ground.

Under our Bid Protest Regulations, 4 C.F.R. § 21.6(e) (1992), we may declare a protester entitled to the costs of filing and pursuing its protest, including reasonable attorneys' fees, where the agency takes corrective action in response to its protest. We will find such an entitlement only where, based on the circumstances of the case, we find that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Building Servs. Unlimited--Request for Declaration of Entitlement to Costs, B-244135.2, Oct. 7, 1991, 91-2 CPD ¶ 312.

Even if withdrawal of the Mare Island offer here constituted corrective action in the face of a clearly meritorious protest, it is clear that this action was taken promptly-- only 10 working days after the protest was filed. Under these circumstances, Argus is not entitled to recover its protest costs. See Tuscon Mobilphone, Inc.--Request for Declaration of Entitlement to Costs, B-248155.2, July 22, 1992, 92-2 CPD ¶ 43; Dynair Elecs., Inc.--Request for Declaration of Entitlement to Costs, B-244290.2, Sept. 18, 1991, 91-2 CPD ¶ 260 (cancellation of RFP 4 weeks after filing of protest was prompt corrective action).

The protest and the request are denied.


for James F. Hinchman
General Counsel