



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

Decision

Matter of: Pacific Utility Equipment Company
File: B-259942
Date: May 16, 1995

Douglas J. Behr, Esq., and Arthur S. Garrett, Esq., Keller and Heckman, for the protester.
Alden Abbott, Esq., Jerry A. Walz, Esq., and Niel B. Moeller, Esq., Department of Commerce, for the agency.
Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Under step one of a two-step formal advertising procedure for all-terrain tracked vehicles, the agency improperly rated the awardee's proposal as technically acceptable, where that firm's proposal contained no evidence that it satisfied the solicitation requirement that a minimum of four units of the model bid have been sold during the last 24 months.

DECISION

Pacific Utility Equipment Company protests the award of a contract to RV Specialties, Inc. under invitation for bids (IFB) No. 51ABNW400108 by the U.S. Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), for four all-terrain tracked vehicles. Pacific Utility contends, among other things, that RV Specialties had not sold four vehicles of the same model offered during the previous 24 months, as was required by the solicitation.

We sustain the protest.

The IFB was for four all-terrain tracked vehicles (snowcats) with related equipment and trailers to be delivered to National Weather Service facilities in the Northwestern United States. The agency will use the vehicles to tend remote weather stations located in mountainous terrain.

This procurement was conducted under two-step formal advertising procedures. Two-step formal advertising is a hybrid method of procurement that combines the benefits of sealed bids with the flexibility of negotiations. Step one is similar to a negotiated procurement in that the agency requests technical proposals, without prices, and may

conduct discussions. Step two consists of a price competition conducted in accordance with sealed bid procedures, except that the competition is limited to those firms that submitted acceptable proposals under step one. Federal Acquisition Regulation § 14.501; Helmets Ltd., 71 Comp. Gen. 281 (1992), 92-1 CPD ¶ 241.

Step one was implemented here by the issuance of a Request for Technical Proposals (RFTP), which included detailed specifications for the vehicles and requested offerors to submit technical information that, among other things, demonstrated compliance with the government's requirements as set forth in the specifications. The specifications required that the offered vehicle "be a proven design of current model year" and that "a minimum of [four] units of the Model bid must have been approved¹ during the last [24] months to ensure parts availability."

The agency received five technical proposals, including those of RV Specialties and Pacific Utility, by the closing date for the RFTP. RV Specialties offered its Lite-Foot II model and included a letter of recommendation from its most recent customer, the Salt Lake City Mosquito Abatement District, which stated that it had purchased a Lite-Foot II vehicle from RV Specialties in May 1994. RV Specialties's proposal also listed four other owners for its Lite-Foot vehicles. RV Specialties did not, however, provide any information showing that the Lite-Foot model was the same as its offered Lite-Foot II model, or when these other Lite-Foot vehicles were sold to the listed customers. Pacific Utility offered the LMC BEARTRAC 1500 vehicle from Logan Manufacturing Company, Inc. Pacific Utility stated in its technical proposal that "[s]ixty new units [of the vehicle] have been purchased in the past 24 months."

After completing its initial evaluation, the agency's source evaluation board (SEB) rated four of the five proposals, including the proposals of RV Specialties and Pacific Utility, as capable of being made acceptable, and requested additional information and clarifications from each of those four offerors. The agency apparently did not request additional information from RV Specialties at that time regarding its compliance with the requirement that it have sold four units of the model bid within the last 24 months. Upon receipt of the additional requested information, the SEB completed its final evaluation and rated three of the firms' proposals, including those of RV Specialties and

¹The agency interprets the term "approved" as equivalent to "sold to" or "accepted by" a purchaser for value. This seems reasonable considering the context.

Pacific Utility, as acceptable, and invited these offerors to submit bids under step two of the procurement.

RV Specialties was the low bidder on step two at \$255,927, followed by Pacific Utility at \$272,886. Before award was made, RV Specialties completed a "Past Performance Questionnaire," listing four "manufactured track vehicle" contracts that it had been awarded.² After checking these references, the agency determined that RV Specialties was responsible and made award to that firm.

Pacific Utility first protested to the agency, which denied its protest. This protest followed. Pacific Utility basically protests that RV Specialties's proposal should not have been determined to be technically acceptable under step one because, among other things, it did not show that it had sold four units of the model bid during the last 24 months. Contract performance continues because Pacific Utility did not protest to our Office within 10 days of award. See 31 U.S.C. § 3553(d)(1)(1988).

Our review of an agency's technical evaluation under the first step of a two-step sealed bid procurement is limited to ascertaining whether the evaluation is reasonable. Shughart & Assoc., Inc., B-226970, July 17, 1987, 87-2 CPD ¶ 56. Generally, initial technical proposals submitted in the first step of a two-step acquisition need comply only with the basic or essential requirements, and not all the details of the specifications, since step one contemplates the qualification of as many technical proposals as possible through negotiation. Id. Where a technical proposal reflects a basic or essential change to the specification requirements, it may not be determined acceptable. See Baird Corp., B-193261, June 19, 1979, 79-1 CPD ¶ 435.

In our view, because the RFTP's requirement that a minimum of four units of the vehicle model bid have been sold during the last 24 months may significantly limit the eligible competitors, it is a basic or essential requirement with which offerors must comply to qualify for step two. Id.; 53 Comp. Gen. 47 (1973). As explained by the chairman of

²The dollar value of these contracts for "manufactured track vehicles" ranged widely from \$18,000 to \$74,000. One of the contracts was awarded in early 1992, one in early 1993, and the other two in 1994. In comparison to the prices for its previously sold vehicles, RV Specialties's bid for the vehicles it is offering here is approximately \$60,000 per vehicle.

the SEB in responding to this protest, the requirement was included in the RFTP because:

"approximately eight or nine years ago NOAA purchased a snowcat from a vendor in Denver and that vehicle turned out to be a lemon. That vendor subsequently filed for bankruptcy after making only a few units in less than two years. We did not want another experience like that one. We wanted to receive reliable units and ensure availability or replacement parts. That is why we called for the successful vendor to have manufactured several snowcats during the past two years. We felt that any vendor who has been making snowcats at least two years and is still in business would be reputable and would stand behind his product."

In short, this restriction was to ensure the reliability of the vehicle and the availability of parts.

Although the SEB chairman's statement gives the reason for the requirement, it does not accurately reflect the plain language of the requirement that "a minimum of [four] units of the model bid must have been [sold] during the last [24] months to ensure parts availability." [Emphasis supplied.] Notwithstanding the SEB chairman's statement, the language of the requirement cannot reasonably be construed as allowing it to be satisfied by selling four all-terrain vehicles of any model type within the last 24 months. If the agency had merely intended that the offeror have produced four vehicles of any model type within the last 24 months, the RFTP should have so specified. Thus, in order for RV Specialties's proposal to be reasonably found to have satisfied this requirement, it had to show that RV Specialties sold at least four Lite-Foot II vehicles, the model offered here, within the designated 24-month period.

As stated above, the customer list provided by RV Specialties in its technical proposal shows that four Lite-Foot model vehicles had been sold in addition to the Lite-Foot II sold to the Salt Lake City Mosquito Abatement District, but does not indicate when the vehicles were sold or delivered, or whether any of the vehicles was a Lite-Foot II, the model offered here. This was insufficient to show compliance with the specification requirements for several reasons.

First, the record shows that the Lite-Foot and the Lite-Foot II are different models. RV Specialties's technical proposal indicates that the Lite-Foot II is a "new machine" that is "smaller and lighter," presumably as compared to its

previously produced Lite-Foot machine. The protester asserts that the Lite-Foot is so substantially different from the Lite-Foot II that it can only reasonably be considered to be a different model. According to the protester, a Lite-Foot model vehicle it inspected belonging to one of RV Specialties's listed customers has "five (5) axles, all terrain dropcenter tracks, a 300 cu. inch 6-cylinder Ford gas engine, a fiberglass cab, and electric over hydraulic sticks." In contrast, the Lite-Foot II model has "four (4) axles, 'J' style snow-track cleats, a 4-cylinder gas engine, steel cab and manual sticks." The agency does not dispute the protester's description of the differences between the Lite-Foot and the Lite-Foot II. While we recognize that RV Specialties states that it customizes each vehicle and that many equipment options are available for this type of vehicle, we agree with the protester that the differences between the Lite-Foot model and Lite-Foot II model are so fundamental that they could not reasonably be considered the same model for purposes of meeting the requirement in question here. Indeed, RV Specialties uses different nomenclatures to designate its vehicles.

Second, other than the vehicle sold to the Salt Lake City Mosquito Control Abatement District, RV Specialties's proposal does not show that any of its listed vehicles were sold or delivered during the 24-month period required by the solicitation--no dates of sale or delivery are mentioned in the proposal, and this matter was not clarified during discussions.³ Thus, RV Specialties's proposal does not evidence compliance with the requirement that it have sold four of the models offered within the previous 24 months.

³However, RV Specialties's technical proposal does not list a fifth axle as an option nor does it list an optional engine for the Lite-Foot II.

⁴Moreover, even the Lite-Foot II vehicle sold to the Salt Lake City Mosquito Abatement District is apparently not used as a "snowcat" and is substantially different from the Lite-Foot II vehicle being offered here by RV Specialties. Photographs of the Salt Lake City Mosquito Abatement District's vehicle provided by the protester show that the vehicle does not even have a cab, which is an essential feature of the vehicle solicited here.

⁵Construed most favorably to RV Specialties, the 24-month time frame encompasses the period prior to the date the RFTP was issued.

In response to this protest, the agency asserts that other evidence it considered during its evaluation indicated that RV Specialties was acceptable. For example, the chairman of the SEB states that in the course of reviewing and evaluating the step-one technical proposals, "the SEB reviewed the acceptability of previously delivered snowcats manufactured by RV Specialties" by contacting two former customers who expressed "satisfaction" with the performance of their vehicles. This reported inquiry is unsupported by any documentation in the record and is, in any case, insufficient to find that RV Specialties had sold four units of the model bid within the last 24 months. We note in this regard that one of the customers referred to by the SEB chairman was the Salt Lake City Mosquito Abatement District for which the agency already had the information contained in RV Specialties's proposal regarding the model bought by that customer and the date of its purchase; the other was a customer that had bought its snowcat prior to the specified 24-month period.

The agency also alludes to the reference checks the agency made in determining RV Specialties's responsibility after step-two bids were received. The record shows that the contract specialist did contact the customers listed on RV Specialties's past performance questionnaire, which included the two customers listed in RV Specialties's technical proposal and mentioned in the SEB chairman's statement, but there is no suggestion that she ascertained the model purchased by these references.

In sum, there is no evidence that RV Specialties satisfied the requirement that it have sold four of the models offered within the previous 24 months, and thus it should not have been determined acceptable under step one or permitted to bid on step two.

⁶This latter customer was contacted before the RFTP was issued by an agency official inquiring about the snowcat which that customer uses at a telecommunications site near one of the agency's weather stations, and as a result, RV Specialties was added to the bidders list. However, according to RV Specialties's past performance questionnaire, evaluated after step-two bids were submitted, that customer had purchased its vehicle on January 30, 1992, outside the RFTP's 24-month time frame.

⁷The handwritten notes taken by the contract specialist of her telephone calls to the customers listed on RV Specialties's past performance questionnaire only show that she asked about customer satisfaction with delivery and/or performance of the vehicle, and not about the model of the vehicle purchased.

The agency has advised our Office that two of the vehicles have been delivered and that delivery of a third is "imminent." We recommend that the agency terminate the remainder of its contract with RV Specialties, if feasible, and award a contract for the final vehicle to Pacific Utility, if that bidder is otherwise responsible. 4 C.F.R. § 21.6(a) (1995). We find that Pacific Utility is entitled to recover its proposal and bid preparation costs as well as the costs incurred in filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.6(d). Pacific Utility should submit its certified claim directly to the agency within 60 working days of receipt of the decision. 4 C.F.R. § 21.6(f).

The protest is sustained.

\s\ James F. Hinchman
for Comptroller General
of the United States