

COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

B-176422

DEC 27 1972

Dear General Robinson:

By letters dated July 31 and August 29, 1972, with enclosures, the Assistant Counsel furnished our Office a report on the protest of Environmental Tectonics Corporation (ETC) against the award of a contract to Met-Pro Water Treatment Corporation under invitation for bids DSA700-72-B-2327, issued by the Defense Construction Supply Center (DCSC), Columbus, Ohio.

The invitation requested bids on an all or none basis for furnishing 45 water purification sets together with 15 data sequences; in addition, an equal quantity was set aside for negotiations with labor surplus area concerns. Of the six firms responding by June 16, 1972, the bid opening date, ETC and Met-Pro submitted the lowest bids. Taking into consideration the bid prices for all contract line items (CLINs), transportation costs and prompt payment discounts, the contracting officer reports evaluated prices of \$901,964.88 for ETC and \$908,747.42 for Met-Pro.

Attached to Met-Pro's bid was a cover letter dated June 14, 1972, stating that it had previously supplied identical items under prior contracts and requesting waiver of first article testing, the requirement for a maintenance capability model, and various data CLINs. The contracting officer referred the request to the United States Army Mobility Equipment Command, the requisitioning activity, for evaluation. The Command concluded that in the event of an award to Met-Pro, the requirement for a maintenance capability model could be waived. Deletion of this CLIN resulted in a \$3,238.50 reduction in Met-Pro's bid price. It was also determined that various data CLINs could be waived. Of the data requirements waived, we are concerned primarily with CLINs 0014 through 0017 since they were the only data items for which Met-Pro charged a price. The deletion of these data CLINs resulted in a further reduction of \$18,252 in Met-Pro's bid price. The Command declined to waive first article testing and initial production testing for Met-Pro and also advised that waivers could not be granted for other bidders because they had not previously produced the items for the Army.

As a result of the waivers, the contracting officer advises that Met-Pro's total evaluated bid price was reduced to \$887,310.65, a

B-176422

reduction of \$21,436.77. As evaluated, Met-Pro's bid was \$14,654.23 lower than ETC's bid. Award of a contract for the non-set-aside and set-aside portions was made to Met-Pro on June 30, 1972. ETC's protest followed.

As stated in its letter of August 11, 1972, ETC's basic contention is that Met-Pro was determined to be the low bidder by virtue of DCSC's use of an improper and unfair evaluation factor. With respect to the purchase or nonpurchase of the data CLINA, ETC contends that all bids should have been evaluated on the same basis. Contending that the end item is to be made in accordance with detailed Government specifications and manufacturing drawings, ETC argues that the existing data package (previously furnished by Met-Pro) should, with perhaps minor modification, be sufficient for use with end items produced by any contractor. On the other hand and pointing to the fact that the instant invitation cites versions of data specifications which were not in effect at the time Met-Pro's prior contracts were awarded, ETC suggests that the existing data package might be insufficient. In this connection, ETC also alleges that there have been numerous changes to the end item specifications since Met-Pro's prior production which could also render the existing data package inadequate. ETC contends that the validity of this allegation is borne out by DCSC's refusal to waive first article approval and initial production testing for Met-Pro notwithstanding its status as a prior producer. Alternatively, ETC urges that if all bidders were not evaluated equally with respect to the purchase of data CLINA, the invitation was defective because it failed to advise bidders that data CLINA could be waived for previous suppliers of the equipment.

With respect to the decision not to waive first article and initial production testing for Met-Pro, the contracting officer's supplemental report advises that:

"First article testing and initial production testing, as far as the United States Mobility Equipment Command is concerned, are waived only when the equipment has been recently tested and found to conform to specification requirements. Due to the lapse of time since the testing under Contract No. DSA 700-67-C-7670, USAMECOM did not waive these requirements for Met-Pro. \* \* \*"

The lapse of time since previous testing is a proper basis for determining that waiver is inappropriate. See paragraph 1-1902(a)(1)(B) of the Armed Services Procurement Regulation; B-169779/August 6, 1970. We see no real

B-176422

inconsistency in the refusal to waive testing and the determination that the items previously furnished were identical in all material respects to the items covered by this procurement so that the existing data would be adequate.

With respect to the impact of changes in the data and end item specifications by letter dated November 3, 1972, the United States Army Mobility Equipment Command expressly confirmed what was implicit in the decision to waive the data CLINs for Met-Pro. The letter stated in pertinent part as follows:

"2. Numerous changes were made in specifications for the sets during the performance of prior contracts by Met Pro, namely DSA700-67-C-P070, 68-C-9773, and 70-C-8795, however, the Contractor was required and did update the data during the performance of each contract. Upon completion of DSA700-70-C-8795, the data package was updated to reflect all changes to that point.

"3. Since the completion of Contract DSA700-70-C-8795, the Government has made some changes and the data package was updated by the Government prior to the initiation of the current procurement."

In response to ETC's contention that the specifications are so detailed that no contractor conforming to those specifications could produce an item as to which existing data could be utilized, the contracting officer's supplemental report contains the following pertinent reply:

"\* \* \* ETC's allegations in this regard are not correct. Drawing List 13208E 4556, which forms a part of the specification, includes Specification Control Drawings. These drawings depict an existing commercial item or vendor developed item advertised or catalogued as available on an unrestricted basis on order as an off the shelf item or an item, which while not commercially available is procurable on order from a specialized segment of an industry. These drawings, under the heading 'Suggested Source of Supply' list the name, address, code identification and item identification of one or more known sources. The suggested sources are for reference only and do not represent the only sources for the items. The drawings would allow considerable variance in the manufacture

B-176422

of water purification sets. Another area of possible variation is with respect to lubrication fittings and oil filling and draining requirements (see Paragraphs 3.7.2 - 3.7.4 of the specification). These authorized variations would invalidate the use of the data supplied by a manufacturer for a set manufactured by another.

"The data supplied by Met-Pro under its prior contract, notwithstanding the variations permitted under the specifications, can be utilized under the current contract because Met-Pro is obligated to furnish water purification sets identical to those previously furnished (see Met-Pro's letter of 14 June 1972 which is part of Contract DSA 700-72-C-9230."

On the basis of the record before us and in light of the foregoing explanation, there is no basis for our Office to adopt ETC's view of the latitude afforded by the specifications. Indeed, it is evident that the only reason the data CLINs were waived for Met-Pro was because its cover letter was viewed, as part of the Met-Pro contract, as precluding the firm, in the event of a waiver, from manufacturing the items in a way which would render existing data inadequate. We note that ETC has not questioned the correctness of the contracting officer's determination in this regard and we cannot say that his judgment was unwarranted. ETC's bid, on the other hand, offered no assurance that a particular make or buy decision by it might not render existing data inadequate. Consequently, we are unable to disagree with the contracting officer's decision to waive the data CLINs for Met-Pro and not to waive them for ETC.

With respect to the basis for award and evaluation of data CLINs, the invitation incorporated by reference DCSC Contract Provision DO5, entitled "DATA PRICING, AND AWARD OF DATA (1972 MAR)." Paragraph "b" of clause DO5 provides in pertinent part that: "Separate awards will not be made for data CLINs, however, the right is reserved to make an award for the end item CLINs without awarding the data CLINs." It is the contracting officer's position that the foregoing provides, by implication, that bids for which any data element may not be required will be evaluated without considering the cost of data CLINs not to be awarded. ETC's position in response is that this inference cannot be drawn from the language used.

Admittedly, DO5 does not expressly cover the situation involved here but, in our view, this is not decisive. It is axiomatic that the

evaluation of bid prices must be based on the prices of the items that will be the subject of the award. Therefore, the right reserved by D05 not to award the data CLINs necessarily implies that the bid prices of any data CLINs deleted will not be considered in the evaluation of bids. The right to delete all of the data CLINs from evaluation and award permits the deletion of one or more data CLINs. See 52 Comp. Gen. (B-176415, October 11, 1972). It is also obvious that a change in the data requirements or a determination that the need for the advertised data requirements no longer exists would lead to a decision not to award the data CLINs reflecting the revised or eliminated requirement. Moreover, given a competitive environment, it is not unreasonable, in our view, to recognize that the need for the requirement may depend upon who will be the successful contractor. As a matter of policy this possibility should be recognized in the invitation for bids and we understand that DBA is in the process of revising D05 to accomplish this end. Nevertheless, we cannot find that the lack of specificity in D05 is a sound basis for questioning the legal sufficiency of the award.

Accordingly, the protest is denied.

R.F.KELLER

Lieutenant General Wallace H. Robinson, Jr.  
Director, Defense Supply Agency

Acceptable level of clarity  
Advisory  
Specificity  
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Walter Davis  
First Grade  
Tests  
Classification  
CONTRACTS