

DECISION



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

James Connelley
FBI

04739

B-188761
B-188839
FILE: B-188975

DATE: January 12, 1978

MATTER OF: McCotter Motors, Inc.

DIGEST:

1. Basic issue of protests involving parts procurements relates to Defense Logistics Agency's use of contract administration approach which mandates approval of "substituted" parts before delivery. Protests involving contract administration, however, are generally not for resolution under bid protest function. Consequently, GAO cannot take exception to approach.
2. Parts procurements cannot be advertised under present circumstances since, notwithstanding presence of number of possible awardees for parts, specifications, suitable for formal advertising, are lacking; "COPARS" procurement format is inappropriate for parts because list of specific vehicles for parts is unavailable. Moreover, procurements are not sole-source in nature in view of number of competitive offers received.
3. Defense Logistics Agency properly corrected pricing provision problem noted by protester by amendment to solicitation and reopening of negotiations under authority of ASPR § 3-805.4(a) (1976 ed.).
4. It is not possible to require offerors to list major parts and substituted parts offerors would supply under contract since procedure would require evaluation of thousands of substitute items that might never be ordered, thereby creating impossible administrative burden. "Brand Name or Equal" procurement method is also not for use in circumstances.
5. Nothing in Small Business Act makes it mandatory that there be set-aside for small business as to any particular procurement. Consequently, protester's insistence that procurements should be small business set-asides is rejected.

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5. Defense Logistics Agency's lack of knowledge of individual parts' characteristics is not inconsistent with Agency's view that, through appropriate cross-referencing catalogs and other similar data, it can reliably determine acceptability of substituted parts.
6. Protest concerning alleged irregularities in prior years (1974-1976) parts procurements is untimely filed under Bid Protest Procedures.

McCotter Motors, Inc., has protested against the contents of requests for proposals (RFPs)* DSA 700-77-R-7001, -7002, -7004, and -7015 issued by the Defense Construction Supply Center (DCSC), an organizational element of the Defense Logistics Agency (DLA).

The RFP's requested offers for vehicle parts to be obtained under "automated requirements indefinite delivery-type contract[s]," as follows:

- (1) -7001--parts supplied by Ford Motor Company;
- (2) -7002--parts supplied by Chevrolet Motor Division of GMC;
- (3) -7004--parts supplied by Cummins Engine Company, Inc.;
- (4) -7015--parts supplied by Chrysler Corporation.

*The RFP's were negotiated under authority of 10 U.S.C. § 2304 (a)(10) (1970) and Armed Services Procurement Regulation (ASPR) 3-210.2 (XV) (1976 ed.). The cited regulation provides that procurements may be negotiated "when the contemplated procurement is for parts or components being procured as replacement parts in support of equipment specifically designed by the manufacturer, where data available is not adequate to assure that the part or component will perform the same function in the equipment as the part or component it is to replace."

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Notwithstanding the "brand name" parts descriptions, offerors were informed that substitute parts might be furnished in performance of the contract only as approved in advance by DLA under the following clause set forth in all the RFP's:

"Substitute parts WILL NOT be furnished without prior approval of the Contracting Officer.

"If the Contractor intends to supply a SUBSTITUTE ITEM, the Vendor Response Card (DSA Form 1225R) MUST BE returned (DO NOT SHIP) indicating the Manufacturer's Name/Code, Part Number to be furnished, price and delivery. The purchasing office will notify the Contractor, by telephone, upon receipt of the Vendor Response Card indicating the exact time and date of receipt.

"Upon determination of acceptability or non-acceptability of the item(s), the Contracting Officer will notify the Contractor, by telephone, giving all details of action along with any additional information required concerning shipment of the subject item(s).

"The Contractor's required delivery schedule will begin as of the date of notification of acceptability cited in * * * above. The above reviews and the Contractor final notifications will be accomplished within ten (10) calendar days after receipt cited * * * above."

Another clause common to the RFP's stipulated that substitute parts would be charged to the Government at the contract price for the part ordered or at the manufacturer's Distributor/Dealer price of the part (as adjusted by appropriate, Government contractor-offered discount) whichever was lower.

On learning of the issuance of the solicitations in question McCotter Motors filed its protests with our Office. The company's protests, as initially made and as later expanded, are summarized in the following paragraphs:

(1) The parts requirements involved should be obtained under advertised, small business set-aside procedures rather than under unrestricted, negotiated procedures. Moreover, a "COPARS" procurement format should be used. There is sufficient competition to justify formally advertised procurements. Additionally, to the extent DLA is justifying negotiation because data is lacking on the parts, the cited justification supports sole-source negotiation rather than competitive negotiation.

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(2) The "substituted parts" procedures are "conducive to serious contract administration problems" and "set the stage for an abundance of disputes and misunderstandings" especially insofar as substitution will be arranged via oral communications. Because of these problems--and the lack of "federal stock numbers" for most of the ordered parts--there is little real opportunity to substitute equal parts under the solicitations, thereby resulting in "sole-source, restrictive and costly" procurements. Moreover, McCotter Motors is better able to determine acceptability of substituted parts than DLA employees.

(3) Many of the parts to be ordered are available only from the named manufacturer.

(4) It is difficult for a prospective offeror to compute a discount for substitute parts since many non-brand name manufacturers do not have a "dealer net price" from which a discounted price may be computed. This circumstance might encourage the offering of higher-priced brand name parts rather than lower-priced substituted parts.

(5) The Cummins Engine Corporation's "price lists" (to be furnished by the contractor to the Government) which offerors were instructed to use in computing discounted prices are not available to potential offerors or the Government according to the corporation's Florida distributor--thereby possibly reducing competition.

(6) Changed shipping destinations for the parts in question penalize Florida bidders.

(7) Under prior DLA parts contracts (for the years 1974-1976) there were several irregularities in the procurement processes.

(8) An alternative way to procure needed parts here would be a requirement that all bidders list the major parts--and substituted parts--that they intend to supply under the contract.

DLA's replies to McCotter's arguments (keyed to the above-numbered paragraphs) are summarized below.

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(1) It is not possible to set forth specifications for each of the possible parts required since the only information (relating to the performance characteristics of the parts) DLA possesses as to the great majority of the repair parts purchased is a manufacturer's part number; thus the procurements cannot be advertised since specifications for the parts are lacking. The fact that there are a number of concerns willing to compete under negotiated procedures is not inconsistent with the legal position that advertising is not possible in view of the absence of detailed specifications. A "COPARS" format is inappropriate here because the format presumes that a list of specific vehicles may be placed in the bidding documents for bidding purposes unlike the case here where DLA is without knowledge as to the specific vehicles involved in world-wide use. The fact that competitive offers were received on the solicitations in question disputes McCotter's claim that the procurements are, in fact, "sole source" in nature.

(2) There is no reason to believe that Government approval of substituted parts prior to delivery will generate any more chaos (dispute) than under the present system where the Government checks suitability after delivery. Because some substituted parts have been found to be unacceptable under certain contracts DLA has been administratively burdened in replacing unacceptable parts. In any event, DLA's headquarters has requested DCSC to comment on the cost effectiveness of the new substitution procedure for future procurements. Substituted parts will be considered as permitted under applicable contract provisions so long as the substituted parts are the "functional, physical, [and] mechanical" equivalent of the designated parts and are "electrically interchangeable" with the substituted parts. Moreover, the Government must control the substitution process not the contractor.

(3) To the extent the named parts are available only from the listed manufacturer the cited parts are still representative of DLA's reasonable needs.

(4) DLA has corrected the pricing problem McCotter Motors brought to its attention by amending the solicitations to insert a revised pricing provision and allowing all offerors the opportunity to submit new offers based on this pricing approach.

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(5) The Cummins Engine Corporation's price lists are available at DCSC. Moreover, three Cummins' dealers submitted offers under RFP-7004. The only alternative procurement method would have been to negotiate a sole-source contract with Cummins for the parts in question.

(6) The changed shipping destinations represent changes in DLA's reasonable needs and must be directed even though they may put Florida offerors at a disadvantage compared with the earlier shipping destinations. (This position is implicit in the DLA report.)

(7) Although the irregularities raised are not germane to the present protest, DLA headquarters is asking DCSC to review these allegations.

(8) This procedure could require the technical evaluation of thousands of substitute items that might never be ordered. For example, the Chrysler price list covers approximately 186,000 parts. The great majority of these items will never be ordered, however, and DLA cannot predict which items will be ordered. It would also create problems in the evaluation of offers and the pricing of orders. For example, would the disapproval of one substitute part (which may never be ordered) require the rejection of the offer? Again, the time and expense of implementing this proposal would exceed, by far, any possible benefit to the Government.

DECISION

The basic issue of McCotter's protest, as we see it, relates to DLA's new procedure that requires approval of substituted parts before shipment. The rationale for adopting the protested procedure relates to difficulties DLA states it has experienced in contract administration of prior parts contracts and to DLA's belief that the procedure will improve its administration of future parts contracts. Protests involving contract administration, however, are not ordinarily for resolution under our bid protest function. Symbolic Display, Inc., B-182847, May 6, 1975, 75-1 CFD 278. Because of this view, we cannot take exception to DLA's new procedures. Nevertheless, we assume DLA will monitor its experience with the procedure so that action may be taken to change the procedure if further experience and analysis so dictate.

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The rest of McCotter's grounds of protest are, we consider, adequately covered by DLA's above-numbered responses which we view as essentially correct. We offer the following additional observations (keyed to some of the above-numbered paragraphs of McCotter's protest).

(1) Nothing in the Small Business Act or procurement regulations makes it mandatory that there be a set-aside for small business as to any particular procurement. Groton Piping Corporation and Thames Electric Company (joint venture), B-185755, April 12, 1976, 76-1 CPD 247.

(2) As to McCotter's related argument that the procurement would be more appropriately made under "brand name or equal" procedures, it appears that the huge number of possible parts orders makes it administratively infeasible to do so even if DLA were--contrary to its present position--to obtain knowledge of the salient characteristics of each part. Nor do we consider DLA's lack of knowledge of individual parts characteristics to be inconsistent with its view that through appropriate cross-referencing of catalogs and other similar data it can reliably determine the acceptability of substituted parts.

(4) Since DLA recognized deficiencies in its pricing provisions, this permitted it to reopen negotiations and accept revised offers under the general authority of Armed Services Procurement Regulation (ASPR) § 3-805.4(a) (1976 ed.) which provides:

"When, either before or after receipt of proposals, changes occur in the Government's requirements or a decision is made to * * * otherwise modify the * * * statement of requirements, such change or modification shall be made in writing as an amendment to the solicitation."

Since DLA amended the solicitation because of changed pricing requirements, it properly afforded offerors an equitable opportunity to revise their offers based on these changes.

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(7) Since McCotter Motors must be charged with knowledge of the bases of protests related to the procurements for the years 1974-1976 many months (and possibly years) prior to the date McCotter Motors filed its protest with our Office, these grounds of protest are untimely filed with our Office and will not be considered. 4 C.F.R. § 20.2(b)(2) (1977).

Protest denied.


Deputy Comptroller General
of the United States



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

IN REPLY
REFER TO:
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January 12, 1978

The Honorable Lou Frey, Jr.
House of Representatives

Dear Mr. Frey:

We enclose a copy of our decision of today, denying the protests of McCotter Motors, Inc., under three solicitations for vehicle parts issued by the Defense Logistics Agency.

The protest was the subject of your letter of April 28, 1977. The enclosures forwarded with the letter are returned as requested.

Sincerely yours,

Deputy

R. F. K. 1111
Comptroller General
of the United States

Enclosures - 2



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

James Cunningham
PL 1

IN REPLY
REFER TO:
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January 12, 1978

The Honorable Gaylord Nelson
Chairman, Select Committee on Small Business
United States Senate

Dear Mr. Chairman:

We enclose a copy of our decision of today, denying the protest of McCotter Motors, Titusville, Florida, under several solicitations for parts issued by the Defense Logistics Agency.

The protest was the subject of your letter of April 20, 1977.

Sincerely yours,

Deputy

Atkinson
Comptroller General
of the United States

Enclosure