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KLEMAN
P.L.I

DECISION



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

FILE: B-189390, B-189937 **DATE:** January 27, 1978

MATTER OF: The Ellis Company

DIGEST:

1. GAO will not question specifications of contracting agency unless protester shows by clear and convincing evidence that specifications would by unduly restricting competition be violation of law. There is no clear showing that 5-year roofing warranty would unduly restrict competition where warranty provision appripes bidders of warranty obligations, bidders can include estimated cost of warranty compliance in bid prices, warranty is used by governmental procuring activities and private corporations and average of about 4.5 bids per solicitation were received in response to number of solicitations containing 5-year warranty requirement.
2. Propriety of reducing 5-year roofing warranty to 1 year simply to moot protest and make prompt award for roofing repairs is questioned. Roofs were in urgent need of repair, contracting officer could have made award during pendency of protest under § 2-407.8(b)(3)(1).
3. Neither law nor regulation requires contracting agency to hold public hearing prior to establishing legitimate needs.

The Ellis Company (Ellis) protests the inclusion of a 5-year roofing warranty in solicitations issued by the Departments of the Air Force, Army, and Navy. The solicitations contained a total small business set-aside. The warranties require, inter alia, that for a period of 5 years after final acceptance of the work, the contractor will make emergency repairs to a roof after being notified by the contracting officer. Pertinent information concerning the solicitations follows:

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<u>Procuring Activity</u>	<u>IFB</u>	<u>Contract Awarded</u>	<u>Bidders</u>
Beale Air Force Base	F04666-77-B-9030	No	3
Beale Air Force Base	F04666-77-B-9024	No	6
Malmstrom Air Force Base	F24604-77-B-0065	Yes	4
Vandenberg Air Force Base	F04684-77-B-0023	No	3
March Air Force Base	F04605-77-B-0051	Yes	7
Fort Ord	DAKF03-77-B-0110	Yes	3
Lemoore Naval Air Station	N62474-77-B-6231	Yes	4

The Department of the Air Force has reported similar information regarding small business solicitations issued by other procuring activities which contained a 5-year warranty.

<u>Procuring Activity</u>	<u>Number of Solicitations</u>	<u>Bidders</u>
Pease Air Force Base	1	3
Griffiss Air Force Base	2	2 & 3, respectively
Dyess Air Force Base	1	5
Grisson Air Force Base	1	5
Rickenbacker Air Force Base	3	5,6, & 7, respectively
Wurtsmith Air Force Base	3	0

Also, we understand that there were three bidders on a recent solicitation by Wurtsmith Air Force Base containing a 5-year warranty provision.

The bid opening dates for the solicitations issued by March Air Force Base, Fort Ord, and the Lemoore Naval Air Station were July 22, September 9 and September 15, respectively.

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Ellis' protest, which essentially challenges the propriety of these solicitations, was filed with our Office on September 19, 1977, or after the bid openings. 4 C.F.R. § 20.2(b)(1), (1977) provides in pertinent part as follows:

"Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals."

Thus, while Ellis' protest is untimely with regard to these solicitations, the same issue exists with respect to the solicitations on which the protests are timely. Therefore, the issue presented by the untimely protests, although not ordinarily for review, is resolved through consideration of the timely protests.

More specifically, Ellis protests in substance as follows.

As a result of Air Force dissatisfaction with roofing guarantees, the Air Force contracted with a consultant firm to develop revised roofing specifications. In preparing the roofing specifications, the consultant firm neither conducted an actuarial study nor did it request comments from various manufacturers of roofing materials. Also, the specifications make no provision for compensating small business roofing contractors, i.e., the Government is demanding that small business roofing contractors provide a free 5-year warranty. If the Air Force requires additional protection, it should be required to properly maintain the roofs and to reimburse the contractor for providing supplies and materials under the warranty. Since the Air Force requires that roofing contractors provide a 5-year warranty, consulting services may be required for the entire warranty period.

Ellis also contends that the Air Force proposes to hold small business contractors responsible not only for the workmanship and the Government's designs, drawings and plans, but also for all the materials which are manufactured by large businesses to meet the Government's requirements and which are installed in accordance with Government specifications under the guidance of Government inspectors. Inasmuch as the roofs are to be installed in accordance with Government specifications, the 5-year warranty affords no additional protection.

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In addition, there is no way to determine the expenses which a small business contractor will incur under the 5-year warranty because there are too many variables. For example, small business contractors will not be reimbursed for the cost of responding to unwarranted requests for repairs. The Air Force has admitted that it has not been able to determine whether roofing failures were caused by defective material and workmanship or defective Government specifications. Manufacturers and contractors are not entirely responsible for roofing failures. However, the 5-year roofing warranty assumes that small business contractors are at fault if roofs prove to be unsuitable and it requires that small business contractors prove otherwise at their own expense. Also, the 5-year warranty reduces the bonding capacity of small business contractors and discriminates against nonlocal businesses because it substantially increases their potential costs.

The 5-year warranty requirement further discriminates against small business contractors since the large businesses which construct the buildings are required to provide only a 1-year warranty. New small business contractors and minority-owned firms are not conversant with the aforementioned risks and liabilities imposed by the 5-year warranty. The 5-year warranty invites the simple expedient of setting up a corporation to perform a few roofing contracts and then dissolving the corporation before the expiration of the warranty period. No public hearing has been held to determine whether the Government has the right to impose such a controversial 5-year warranty on one segment of the construction industry.

After protests had been filed, Air Force bases reduced the 5-year warranty and bonding requirement. The Air Force has made no reference in its report to protests filed by other contractors concerning the inclusion of a 5-year roofing warranty in solicitations issued by Vandenberg Air Force Base and Deale Air Force Base, and an Air Force Base will soon issue a solicitation with a 1-year warranty.

Finally, Ellis argues that the 1-year warranty is the standard in the trade. Only a small fraction of the roofing industry offers a 5-year warranty, and it knows of only one consulting firm that recommends its use.

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According to the Air Force, the Strategic Air Command (SAC) has approximately 70 million square feet of roofing area. SAC has incurred costly repairs resulting from premature roof failures, which indicates that the standard 1-year roofing warranty does not adequately protect the public's investment in real property. Moreover, major national firms, the Public Building Commission of Chicago, the State of New Jersey and the General Services Administration have adopted the 5-year roofing warranty. The Air Force's use of the 5-year warranty is merely conforming to the emerging industry-wide standard. The Air Force is favorably disposed to the use of the 5-year roofing warranty in order to minimize operation and maintenance costs, improve structural integrity of its real property and avoid disruption of operations. The 5-year roofing warranty, which has been in use by private industry for 10 years, has proven to be effective in improving the quality of roofs.

Further, if proper material is used and proper workmanship is performed, no repairs should be required during the warranty period, and all bidders can include in their bid prices the estimated cost of complying with the warranty requirement.

Where roof failures are not attributable to the roofing contractor, Air Force contracting officers have the authority to contract for emergency roof repairs. Also, manufacturers of roofing materials commonly warrant their products, so roofing contractors may be able to obtain redress if roofing materials prove to be defective.

As part of its preaward surveys, the Air Force intends to advise prospective contractors of their warranty obligations and determine if they can meet such requirements. With regard to bid prices, SAC states: "No real cost differential has been noticed when requiring a five-year performance agreement versus the standard construction one-year warranty."

The Air Force further states that a prospective contractor filed a protest with Malmstrom Air Force Base, alleging that the 5-year bonding requirement limited the ability of small business roofing contractors to obtain bonding for other contracts during the 5-year period. Malmstrom Air Force Base

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determined that the 5-year bonding requirement exceeded its legitimate needs and reduced the bonding requirement to 1 year. The solicitations issued by Beale Air Force Base and Vandenberg Air Force Base, which are the subject of Ellis' protest, contain the modified bonding requirement. The Air Force intends to specify only a 1-year bond in all future solicitations for the installation and repair of roofs.

A written protest against the 5-year warranty was filed with March Air Force Base. The Air Force states that although the 5-year warranty was a legitimate need, March Air Force Base amended the solicitation, reducing the 5-year warranty to 1 year, so that the protest would be moot and prompt award could be made to a roofing contractor to accomplish emergency repairs of damaged roofs. Ellis maintains that several oral protests as well as the written protest were filed with March Air Force Base.

The Air Force asserts that it has no record of protests, other than those filed by Ellis, concerning the solicitations issued by Beale Air Force Base and Vandenberg Air Force Base and it knows of no oral protests filed with March Air Force Base or if an Air Force Base plans to issue a solicitation with a 1-year warranty requirement.

Also, the Air Force contends that its roofing consultant studied roofs, roof failures, and roof repairs at 22 Air Force bases. As part of its study, the consultant also contacted 4 roofing contractors, 4 waterproofing contractors, and 17 architectural firms. The consultant is currently preparing Air Force Manual 88-36. The Manual will be completed and the consultant's contract will end in the spring of 1978. Among other things, the Manual will include roofing specifications, a model 5-year roofing warranty, suggested procurement methods and inspection procedures. Since the actuarial study referred to by Ellis is not a commonly used term in the roofing industry, the Air Force is not aware of exactly what such a study would entail.

In conclusion, the Air Force states that SAC is 1 major command out of 11 in the Air Force. SAC has cognizance of 28 out of 130 major Air Force installations in the United States

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and overseas; however, SAC is the leader in developing new and more effective roofing specifications. Ellis, on the other hand, asserts that the roofing specifications used by SAC were developed by private corporations and the U.S. Bureau of Standards.

DECISION

The protest against the March Air Force Base procurement was untimely and in any event was rendered academic by the reduction of the warranty to 1 year. However, we question the propriety of accepting less than what has been determined to be the Government's real needs simply to moot a protest. If the roofs were in urgent need of repair, as contended, the contracting officer could have made an award during the pendency of the protest under section 2-407.8(b)(3)(i) of the Armed Services Procurement Regulation (ASPR) (1976 ed.), which permits an award prior to the resolution of a protest where the contracting officer determines that the items to be procured are urgently required. We will not question such a determination absent a clear showing that it was in error. What-Mac Contractors, Inc.; Chemical Technology, Inc., B-187053(1), November 19, 1976, 76-2 CPD 438. We are by letter of today calling this matter to the attention of the Secretary of the Air Force.

The responsibility for drafting proper specifications is primarily the responsibility of the contracting agency. Jarrell-Ash Division of the Fisher Scientific Company, B-185582, January 12, 1977, 77-1 CPD 19; Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181. It is proper for a contracting agency to establish specifications reflective of its legitimate needs based on its actual experience, engineering analysis, logic or similar rational bases. Bowers Reporting Company, B-187512, August 10, 1976, 76-2 CPD 144. Though specifications should be drawn so as to maximize competition,

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we will not substitute our judgment for that of the contracting agency unless the protester shows by clear and convincing evidence that a contract awarded on the basis of such specifications would by unduly restricting competition be a violation of law. Joe R. Stafford, B-184822, November 18, 1975, 75-2 CPD 324; Globe Air, Inc., B-193396, June 26, 1975, 75-1 CPD 389.

As the Air Force states, bidders can include in their bid prices the estimated cost of complying with the 5-year warranty. Thus, the Government is not demanding that small business roofing contractors offer a free warranty. Moreover, there is no evidence of record that a roofing contractor cannot estimate the cost of warranty compliance when preparing its bid or that the 5-year warranty will result in a substantial increase in bidders' potential costs.

Further, the warranty contains no presumption that the contractor is at fault when a roof proves to be unsuitable. The warranty does not make the contractor an absolute guarantor of the roof against all failures. Under the warranty, the contractor is liable for defective material or workmanship and the result of it.

In addition, we find no indication that a contractor will not be reimbursed for repairing roofing defects not covered by the warranty. The Air Force has indicated that its contracting officers have authority to enter into contracts for roofing repairs where it determines that the contractor is not responsible for the defects. Of course, all contracts for roofing repairs must be made in accordance with applicable provisions of ASPR.

The record also indicates that under certain circumstances manufacturers of roofing materials warrant their products for 5 years or more. While it is suggested that some disreputable bidders may establish corporations to perform a few roofing contracts with the idea of dissolving the corporations before the expiration of the warranty period to reap the immediate benefits of the contract and to deprive the Government of the protection sought, we would expect that the responsibility reviews made before award would ferret out such concerns and that award would not be made to them.

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In Kenneth R. Bland, 54 Comp. Gen. 835 (1975), 75-1 CPD 207, the protester contended that the warranty provision set forth in a solicitation issued by the Federal Power Commission was nonstandard and unreasonable in general business practice. In that case, only 1 of 6 bidders took exception to the warranty provision. Despite the fact that the protester chose not to bid, we were not persuaded, in light of the competition, that the warranty was unreasonable.

The record before us shows that even though no bids were received in response to 3 solicitations issued by Wurtsmith Air Force Base, an average of 4.5 bids per solicitation were received in response to 15 other solicitations shown in the charts on page two, all of which solicitations contained a 5-year roofing warranty requirement, or an average of 4.4 bids if the one solicitation on which Wurtsmith received bids is considered, which strongly suggests that such requirement is not unreasonable. We realize that there is a 1-year roofing warranty in the trade; however, this does not create a conclusive presumption that the 5-year warranty is arbitrary, especially since it has been used by various Government procuring activities and private corporations. Although large businesses may be required to furnish only a 1-year warranty when constructing Government buildings and small business roofing contractors are required to provide a 5-year warranty, we cannot find invidious discrimination against small business concerns, given the apparent need for an extended roofing warranty and no apparent need for an extended warranty on the buildings themselves.

The 5-year warranty is part of a contracting agency's legitimate needs. ASPR § 1-324 (1976 ed.) sets out the various factors which a contracting agency should consider in establishing the nature and extent of a warranty. We know of no law or regulation which requires that a contracting agency hold a public hearing prior to establishing its needs.

Based on the foregoing, it is our opinion that the record does not contain clear and convincing evidence that the 5-year roofing warranty unduly restricts competition. Accordingly, the protest is denied.


Deputy Comptroller General
of the United States