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DECISION

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

FILE: B-198679.2 DATE: October 7, 1981

MATTER OF: Dynalectron Corporation--Reconsideration

DIGEST:

GAO affirms prior decision denying protest that the use of peak workload data in specifications and the failure to include nonpeak workload data and projections, purportedly available from prior contracts, rendered specifications unduly restrictive of competition, unfairly advantageous to the incumbent contractor, and inappropriate for the award of a fixed-price incentive contract. The protester has presented no new factual grounds showing that the specifications were unreasonable, that the agency could reasonably provide more precise information, or that the agency's decision to award a fixed-price incentive contract lacked a reasonable basis.

Dynalectron Corporation requests reconsideration of our decision in Dynalectron Corporation, B-198679, August 11, 1981, 81-2 CPD 115, denying the firm's protest against the allegedly inadequate, restrictive specifications used by the Department of the Air Force in request for proposals (RFP) No. F08606-80-R-0004 for photographic/optical support services at the Eastern Space and Missile Center and the Kennedy Space Center. Specifically, Dynalectron asserted that the use of peak workload data in the RFP statement of work (SOW) and the omission of nonpeak workload data and projections of nonpeak requirements for the contract option periods, purportedly available from prior contracts, made the RFP specifications unduly restrictive of competition and unfairly advantageous to the incumbent contractor. The protester further claimed that the allegedly inadequate specifications and fluctuating workloads anticipated under the contract rendered inappropriate the fixed-price incentive contract which the Air Force proposed to award.

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We noted that the RFP directed offerors to base proposals on the peakload estimates included in the SOW. These estimates, in our view, appeared reasonably related to the work required under the contract; moreover, we concluded that the protester had failed to show that the Air Force could reasonably provide more precise information. We also concluded that any uncertainty regarding the performance requirements was not sufficient to render the specifications inadequate--especially since Dynalectron had not submitted any evidence to contradict the incumbent contractor's assertion that it had prepared its proposal on a peak workload basis. Thus, we found no basis in the record upon which to question the Air Force's SOW; moreover, given this conclusion and since we could not question the rationale of the Air Force's finding in support of the chosen contract type, we were not in a position to challenge the selection of a fixed-price incentive contract for these services.

Dynalectron contends that we improperly placed the burden of proof on the protester to establish the allegedly restrictive nature of the solicitation which resulted from the contracting agency's asserted failure to provide the best available information. The protester also cites Gibson & Cushman Dredging Corporation, B-194902, February 12, 1980, 80-1 CPD 122, for the proposition that the SOW's lack of data for nonpeak workloads here improperly required offers based on the most costly performance requirements and unduly restricted competition; moreover, Dynalectron again generally asserts that this nonpeak data is reasonably available in a form for inclusion in the SOW. Finally, Dynalectron argues that the alleged failure to provide the best available information in the SOW places an additional burden on offerors competing for a fixed-price incentive contract; offerors other than the incumbent are forced to propose the "worst case" target cost, while the incumbent contractor can propose a lower target cost on the basis of prior experience. In summary, Dynalectron concludes that the terms of the RFP fail to encourage maximum practical competition, as required by applicable procurement statutes and regulations.

While Dynalectron obviously disagrees with our conclusions, the protester has not presented any new factual grounds demonstrating that our earlier decision was in error and has essentially reiterated its original position in requesting reconsideration of the case.

Contrary to Dynalectron's assertions, the burden of proof is properly placed on the protester in protests against a contracting agency's specifications. The agency is primarily responsible for determining its actual minimum needs, deciding the best method for accommodating those needs and drafting specifications which reflect those needs. In order for the protester to prevail, the agency's judgment in these matters must be shown to be without a reasonable basis. Harris Data Communications, Inc., B-192384, January 8, 1979, 79-1 CPD 7. Similarly, when a protester challenges specifications as unduly restrictive of competition, the burden of proof does not change--it is merely deferred. Although in these cases the contracting agency must initially establish prima facie support that the restrictions imposed on competition are reasonably related to the agency's actual needs, the burden of proof remains on the protester to show that the requirements complained of are clearly unreasonable. Amdahl Corporation, B-198911.2, March 27, 1981, 81-1 CPD 231; Oshkosh Truck Corporation, B-198521, July 24, 1980, 80-2 CPD 161. We are of the opinion that the real complaint here concerning the restrictive nature of the specifications is that the incumbent contractor enjoys an unfair competitive advantage in this procurement. See Amdahl Corporation, supra, involving an identical conclusion made in response to a similar protest.

The Air Force insists that the specifications do reflect the agency's minimum needs for these services--peak workload requirements can be satisfied only by offers based on peak workload data. The Air Force considers the detailed SOW, information provided in connection with an onsite visit and further data available to offerors in the agency's "reference library" sufficient information from which to prepare a competitive proposal. Dynalectron simply has not shown that the agency's determination of its needs and the specifications based on that

determination are unreasonable or that nonpeak data is reasonably available in a form for inclusion in the SOW.

Dynalectron's reliance on our decision in Gibson & Cushman Dredging Corporation, supra, is misplaced. Unlike the Air Force, the contracting agency in the Gibson case knew at the time the specifications were drafted that the "worst case," most costly performance method upon which the specifications were based would not be used in performing the contract. We held that the agency's specifications were defective because they intentionally overstated the agency's minimum needs. Here, however, the Air Force states that the SOW based on peak workload data does reflect the agency's minimum needs. Based on the present record, we are not in a position to question the Air Force's statement. Consequently, our decision in Gibson is inapplicable to the facts of this procurement.

Because we cannot question the Air Force's view that the RFP specifications constitute an adequate basis for competition and the agency has made the requisite determination and findings for the type of contract it proposes to use, we still have no basis for challenging the Air Force's decision to award a fixed-price incentive contract for these services.

Therefore, we find no evidence that the incumbent contractor enjoys an unfair competitive advantage for this procurement.

Our decision of August 11, 1981, is affirmed.

Milton J. Socolar

Acting Comptroller General
of the United States