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Comptroller General
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Decision

Matter of: Premier Engineering & Manufacturing, Inc.

File: B-283028; B-283028.2

Date: September 27, 1999

Eric J. Marcotte, Esq., Robert A. Mangrum, Esq., Carl J. Peckinpugh, Esq., Paul S. Ebert, Esq., Winston & Strawn, for the protester.

Robert K. Huffman, Esq., Ross W. Branstetter, Esq., Lynda Troutman O'Sullivan, Esq., and Jessica S. Abrahams, Esq., Miller & Chevalier, for Global Ground Support, an intervenor.

Sharon A. Jenks, Esq., and Gregory H. Petkoff, Esq., Department of the Air Force, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably determined that awardee's offered product was a commercial item, where the awardee proposed a modified version of its standard commercial product and the modifications were of a type customarily offered in the commercial marketplace and were also minor.

2. In a negotiated procurement in which technical capability was evaluated on a pass/fail basis and the solicitation did not request detailed technical proposals, the agency reasonably determined that the awardee's offered product satisfied the solicitation requirements based upon the awardee's promises of compliance and examination of the awardee's bid sample.

DECISION

Premier Engineering & Manufacturing, Inc. protests the award of a contract to Global Ground Support, under request for proposals (RFP) No. F41608-98-R-20310, issued by the Department of the Air Force for commercial, truck mounted deicers.

We deny the protest.

The RFP, issued under the commercial item acquisition procedures of Federal Acquisition Regulation (FAR) Part 12, provided for the award of a fixed-price, requirements contract for commercial, diesel-powered truck mounted deicers for a 4-year base period with two 3-year option periods. Technical requirements for the deicers were stated in the RFP's commercial item description (CID). Among other things, the deicers were required to be of a two-engine design, a main engine to operate the vehicle and an auxiliary engine to operate the spraying and deicing equipment. CID at 6, 10.

The CID, which stated that it is a "non-developmental specification," also provided that the deicers:

as a minimum, shall be in accordance with the requirements specified herein and shall be the manufacture[r]'s standard commercial product. . . . Standard Commercial Product is a product which has been sold or currently offered for sale on the commercial market through advertisements using manufacturers catalogs or brochures, and represents the latest production model. The [deicer] shall have previously been accepted by demonstrated satisfactory performance in the deicing of commercial and/or [Air Force] aircraft.

CID at 2.

In addition, offerors were informed under that portion of the CID stating performance specifications for the deicer that:

The equipment manufacturer shall be able to demonstrate satisfactory performance of the equipment under all of the above conditions. The manufacturer shall have previously supplied equipment of the same design commercially worldwide, having displayed satisfactory endurance under all climatic conditions.

CID at 6.

In addition, the RFP incorporated by reference the standard "Contract Terms and Conditions--Commercial Items" clause, set forth at FAR § 52.212-4, see RFP at 1, which states, in part, that the contractor shall only tender for acceptance those items that conform to the requirements of the contract. This clause incorporated the standard commercial item definition of FAR § 52.202-1(c), see FAR § 52.212-4(e), which defines a commercial item as any item, other than real property, that is of a type customarily used for nongovernmental purposes and that has been sold, leased, or licensed, or offered for sale, lease, or license, to the general public. Commercial items were also stated to include any item that would otherwise satisfy the above criterion, but for modifications of a type customarily available in the commercial marketplace, or minor modifications of a type not customarily

available in the commercial marketplace made to meet government requirements.

Offerors were informed that proposals would be evaluated with regard to technical capability, past performance, and price. RFP § M-511. Technical capability to meet the RFP requirements was to be evaluated on a pass/fail basis. In this regard, offerors were requested to provide commercial literature to establish technical capability and informed that the agency may also evaluate a bid sample to determine an offeror's technical capability. Past performance was to be adjectivally rated for risk; offerors' risk ratings would then be compared to the evaluated prices and a best value determination made. Past performance was stated to be significantly more important than price.

Prior to the closing date for receipt of proposals, Global asked the Air Force if they would accept a single engine design, if that design would meet the Air Force's performance requirements. Agency Report, Tab J-2, Letter from Global to the Air Force 3 (Oct. 14, 1998). The agency responded to Global that if a commercial unit can satisfy the performance requirements without the use of an auxiliary engine this would be acceptable. Agency Report, Tab J-6, Letter from the Air Force to Global 2 (Oct. 28, 1998).

The Air Force received proposals from five offerors, including Global (which offered its Ultimate Model 2100, which was a single-engine design) and Premier (which offered a dual-engine design), by the November 17, 1998 closing date for receipt of proposals. Four offerors, including Global and Premier, were found to be potentially technically acceptable and were included in the competitive range. Contracting Officer's Statement at 2.

During discussions, the agency identified several deficiencies in Global's proposal, including that firm's proposal of a single-engine design notwithstanding the CID requirement for a dual-engine design. Agency Report, Tab J-10, Discussions Letter from the Air Force to Global 1 (Dec. 30, 1998). Global orally responded that it could satisfy each of the agency's identified deficiencies and would satisfy the RFP requirement for a dual-engine design by incorporating the auxiliary engine design of its smaller Model 700 deicer into its Model 2100. Supplemental Agency Report, Tab C-1, Contracting Officer's Memorandum. Subsequently, Global responded to each of the agency's concerns in its revised proposal. Agency Report, Tab J-15, Global Revised Proposal. With respect to the single-engine design deficiency, Global stated:

In lieu of our original proposed single engine concept, we now propose our auxiliary engine design that is in complete compliance with the CID.

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Please refer to the following schematic that details the hydraulic system of our auxiliary design. Both designs, the single engine we originally proposed and our auxiliary engine design are 90% similar. When we developed our single engine, we [DELETED]. All other systems remained the same. We now propose to revert to our auxiliary engine design depicted below.

Id. at 2.

Global subsequently provided further information, in response to the agency's questions, concerning the dual-engine deicer the firm offered in its revised proposal. Among other things, Global provided a copy of the stability test performed on its offered truck chassis and additional information on the offered auxiliary engine. Agency Report, Tab J-16, Letter from Global to the Air Force (Jan. 26, 1999). Global's revised proposal was determined to pass the technical capability criterion, "conditional on examination/approval of a bid sample." Agency Report, Tab J-17, Memorandum of Program Manager and Program Engineer (Jan. 28, 1999).

On February 25 and 26, the agency's technical evaluators visited Global's offices and examined the firm's bid sample, a Model 2100 with an auxiliary engine.¹ Agency Report, Tab J-19, Trip Report, at 2-3; Supplemental Agency Report, Tab Q, Program Engineer's Statement; Agency's Supplemental Memorandum of Law, attachs. 1 and 2, Evaluator's Statements; Intervenor's Comments, exh. 1, Affidavit of Global's President, at 5. The evaluators also examined a single-engine design Model 2100, from which they concluded that the 90 percent similarity claimed by Global was accurate. Supplemental Agency Report, Tab Q. The evaluators also examined a nearly complete Model 700 with auxiliary engine. Contracting Officer's Statement at 3; Intervenor's Comments, exh. 1, Affidavit of Global's President, at 5. Based on the agency's review, Global's proposed Model 2100 with auxiliary engine was found to be technically compliant.²

The agency also determined that all of the competitive range offerors presented a low past performance risk. Agency Report, Tab K, Performance/Price Tradeoff Analysis, at 1-3. Because the four offerors were all determined to be technically acceptable and to present low past performance risk, price became the determinative factor for award. Global proposed the lowest evaluated price of approximately \$25 million; Premier proposed the second lowest price of

¹The evaluators visited Premier's offices and examined their bid sample on February 23 and 24. Agency Report, Tab J-19, Trip Report, at 1-2.

²Premier's proposed deicer was also found to be technically compliant.

approximately \$[DELETED] million. Id. at 1. Award was made to Global, and this protest followed.

Premier first complains that Global's re-designed Model 2100 with an auxiliary engine does not satisfy the RFP's commercial item requirements. Specifically, Premier argues that the dual-engine design Model 2100 does not satisfy the CID requirements that the offered product be the manufacturer's standard commercial product, which the CID defined to be one that has been sold or is currently offered for sale on the commercial market and which represents the manufacturer's latest production model, and which has previously been accepted by demonstrated satisfactory performance in deicing of commercial or Air Force aircraft.

The Air Force and intervenor respond that Global's Model 2100 deicer has long been offered for sale and sold in the commercial marketplace, and is therefore a commercial item. In fact, [DELETED] purchased a single-engine design Model 2100 in January 1998. Intervenor's Comments, exh. 1, Affidavit of Global's President, at 2. The intervenor also provided documentation showing that prior to the issuance of the RFP here, Global had sold or offered for sale dual-engine design deicers; specifically, Global had offered for sale a dual-engine design Model 2100,³ and has sold two dual-engine design Model 700 deicers, which Global states is only a smaller version of the Model 2100. Id. at 2-3. Since the Air Force's award to Global, the intervenor has actively marketed its Model 2100 as both a single-engine and dual-engine design. See Global's Website, www.global-llc.com/ultimate2100.htm. Finally, the agency and intervenor both note that the addition of an auxiliary engine to the single-engine Model 2100 is both a minor modification—in terms of effort, change in components, and [DELETED]—as well as a modification that is customarily available in the commercial market.

Determining whether a product or service is a commercial item is largely within the discretion of the contracting agency, and such a determination will not be disturbed by our Office unless it is shown to be unreasonable. See Coherent, Inc., B-270998, May 7, 1996, 96-1 CPD ¶ 214 at 3 (protests of whether an awardee's product is a commercial item); see also Trimble Navigation, Ltd., B-271882, B-271882.2, Aug. 26, 1996, 96-2 CPD ¶ 102 at 6 (determination as to whether modifications to a previously developed item are minor are within the agency's technical judgment that will be disturbed only where unreasonable).

Here, we find that the agency reasonably found that Global's dual-engine Model 2100 deicer satisfied the RFP's commerciality requirements. It is undisputed that Global's single-engine Model 2100 satisfied all the commercial item requirements of the solicitation (for example, latest production model and demonstrated satisfactory performance). Premier contends, however, that the consequence of the auxiliary

³Global states that it offered the dual-engine design Model 2100 to [DELETED] in 1997, but that [DELETED] selected the single-engine design.

engine modification to the Model 2100 is that Global's offered dual-engine deicer cannot be considered a commercial item. See, for example, Protester's Comments, at 23-24.

We do not agree. Premier's arguments only reference the CID provisions and ignore FAR § 52.202-1, which as incorporated into the RFP provides that modifications of a type customarily available in the commercial marketplace and minor modifications may be made in an otherwise commercial item. The only reasonable interpretation of the RFP, when read as a whole so as to give effect to all of the provisions, is that offerors were allowed to propose their standard commercial products, as modified in accordance with FAR § 52.202-1. In this regard, the Air Force states that it expected that offerors might have to offer modified versions of their standard commercial items to satisfy the RFP requirements and that this is the reason the agency required a bid sample prior to technical approval. In fact, both Premier and Global proposed modifications to their standard commercial products. Agency Memorandum of Law at 2.

The record shows that the dual-engine design for deicers is a standard commercial design, which is offered by both Premier and Global, as well as other manufacturers. In fact, at the time the RFP was issued, Global offered the Model 700 in both a single-engine and dual-engine configuration in the commercial market.⁴ Also, as noted above, prior to the issuance of the RFP, Global offered to modify its Model 2100 to a dual-engine design to satisfy a commercial customer. In our view, these facts provided the Air Force with a reasonable basis to determine that modifying a single-engine design deicer to provide an auxiliary engine is a modification of a type that is customarily available in the commercial marketplace.

We also find no basis to question the agency's determination that the modification of Global's Model 2100 to offer an auxiliary engine is a minor modification. "Minor' modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process." FAR § 52.202-1(c)(3)(ii). The record shows that the agency examined both a single-engine and dual-engine Model 2100 at the bid sample review and found a 90 percent similarity in the two configurations, which indicates that the essential physical characteristics of Global's Model 2100 had not been significantly altered. Supplemental Agency Report, Tab Q, Program Engineer's Statement. Moreover, the basic function or purpose of the Model 2100--to deice aircraft--is not changed in any way by the use of an auxiliary engine to operate the deicing equipment. Intervenor's Comments, exh. 1, Affidavit of Global's President, at 3. Although Premier disagrees that this modification of Global's single-engine Model 2100 is minor, the intervenor has also provided

⁴Although the parties' disagree as to how similar the Model 700 and Model 2100 are, the record supports the agency's conclusion that the two models are alike in purpose and design.

substantial evidence as to why the modification is minor. We conclude from our review of the parties' competing arguments that Premier has not shown that the agency's determination is unreasonable.

Premier also complains that Global's revised proposal for its dual-engine Model 2100 does not demonstrate compliance with a number of the CID requirements, for example, the requirements regarding electromagnetic interference (EMI) or for a ground control panel.⁵ See Protester's Comments at 42-46. The agency responds that it determined from Global's revised proposal and the bid sample evaluation that Global's dual-engine deicer satisfied all the CID requirements. Supplemental Agency Report, Memorandum of Law, at 2. In this regard, the agency's program engineer describes how he determined that Global's product satisfied each of the CID requirements that Premier asserts that Global's product may not satisfy. Supplemental Agency Report, Program Engineer's Comments. For example, with respect to the requirements regarding EMI, the program engineer stated that Global's Model 2100 had a successful past performance history and that the changes made to the model to provide for an auxiliary engine would have no effect on the product's capability to meet the EMI requirements. In addition, the agency is familiar with the model auxiliary engine proposed by Global and has not noted any EMI problems. Id. at 1. As another example, the program engineer states that he examined the ground control panel offered by Global on its dual-engine Model 2100 and confirmed "the existence and satisfactory performance of this proposed ground control panel." Id. at 2.

Contrary to Premier's arguments, we find that, within the context of this procurement, there was sufficient documentation upon which the agency reasonably determined Global's compliance with the CID requirements. Specifically, the RFP did not provide for detailed technical proposals to demonstrate technical compliance, as Premier's arguments suppose. Rather, the RFP informed offerors that the agency would evaluate an offeror's submitted commercial literature and bid samples to assess the proposal under the technical capability factor (which was to be evaluated on a pass/fail basis). RFP § M-511. Here, the Air Force both accepted Global's promises of compliance and examined Global's bid sample to determine that Global's revised design satisfied the CID requirements. Moreover, the record shows that the agency treated offerors consistently and equally in evaluating

⁵Premier also argues in its comments that Global [DELETED]. Protester's Comments at 45. The RFP, however, did not require such a certification.

proposals under this factor--that is, the Air Force accepted promises of compliance for some CID requirements and reviewed bid samples for compliance with others from each of the offerors, including the protester.⁶

The protest is denied.

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⁶Premier also complains that the Air Force's selection decision is improper, because the agency allegedly waived various CID requirements for all the offerors. However, other than the CID requirements stated above, Premier does not identify any other requirements that the Air Force allegedly waived for Global. Moreover, the record indicates, as argued by the intervenor, see Intervenor's Comments at 45, that the agency waived a CID requirement for Premier. Thus, we fail to see how Premier was prejudiced in any way by the agency's conduct of this procurement.