



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Cosmodyne, Inc.

File: B-271838

Date: July 30, 1996

Paul Shnitzer, Esq., Crowell & Moring, and Robert A. Brunette, Esq., for the protester.

Ronald S. Perlman, Esq., and Frederick P. Hink, Esq., Porter, Wright, Morris & Arthur, for Pacific Consolidated Industries, an intervenor.

Commander R.B. McKenna and Timothy Lasko, Esq., Department of the Navy, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that awardee's liquid oxygen/nitrogen generator fails to comply with solicitation requirement for protection against nuclear, biological, and chemical warfare agent contamination because it does not incorporate a High Efficiency Particulate Air (HEPA) filter followed by a bed of activated carbon is denied [deleted].
2. Protest that awardee's liquid oxygen/nitrogen generator will not be able to continue operating after a chemical warfare agent attack as required by the solicitation is dismissed as untimely where argument was not raised in agency-level protest challenging award on other grounds.
3. Protest that awardee's liquid oxygen/nitrogen generator does not meet solicitation requirement that the unit, without the minor modifications necessary to meet the requirements of this solicitation, have been previously deployed is denied where protester fails to demonstrate that modifications to previously deployed unit were other than minor.

4. Protest that awardee's liquid oxygen/nitrogen generator fails to meet solicitation requirements regarding reliability and maintainability is denied where awardee's proposal stated that its previously deployed units had exceeded the requirements.

DECISION

Cosmodyne, Inc. protests the Department of the Navy's selection of Pacific Consolidated Industries (PCI) for award under request for proposals (RFP) No. N68335-95-R-0003, a small business set-aside for liquid oxygen/nitrogen (LOX/LIN) generators. Cosmodyne contends that the PCI unit fails to comply with solicitation requirements regarding protection against nuclear, biological, and chemical (NBC) warfare agent contamination; prior deployment; and reliability.

We deny the protest.

BACKGROUND

The RFP, as amended, sought offers on a base quantity of 6, and an optional quantity of 14, non-developmental, 2-ton capacity LOX/LIN generators, with award to be made to the offeror submitting the lowest-priced, technically acceptable offer. One required technical feature was that the generators be capable of operating in an environment contaminated with biological or chemical warfare agents or radiological fallout. Another requirement was that the generators, without the minor modifications necessary to meet the requirements of this solicitation, have been previously deployed, either commercially or militarily.

The agency received three proposals by the March 6, 1995, closing date, and included two of the three (Cosmodyne's and PCI's) in the competitive range. After conducting discussions with both offerors and receiving best and final offers (BAFO) from both, the agency notified PCI that Cosmodyne was the apparent successful offeror. In response, PCI protested Cosmodyne's small business status to the agency and the technical acceptability of Cosmodyne's proposal to our Office. The Small Business Administration ruled in Cosmodyne's favor with regard to its small business status, but PCI prevailed in its protest to our Office. We sustained PCI's protest on the ground that the record did not support the evaluators' conclusion that Cosmodyne's proposal demonstrated compliance with the solicitation requirement for NBC protection. We recommended that the agency reopen discussions with Cosmodyne and then request an additional round of BAFOs. Pacific Consolidated Indus., B-260650.2, Oct. 25, 1995, 95-2 CPD ¶ 247; aff'd, Cosmodyne, Inc.--Recon., B-260650.3, Mar. 18, 1996, 96-1 CPD ¶ 201.

In response to our decision, the agency reopened discussions with both Cosmodyne and PCI concerning their units' protections against NBC contamination. Upon conclusion of the discussions, both proposals were determined technically acceptable. On January 29, 1996, the agency solicited BAFOs from both offerors

with a closing date of February 1. PCI's total price was lower than Cosmodyne's, and on March 19, the Navy notified Cosmodyne that PCI was the apparent successful offeror.

On March 25, Cosmodyne filed an agency-level protest objecting to the selection of PCI for award on the grounds that PCI's proposal did not meet the solicitation's requirements for protection against NBC warfare agents and that PCI had not previously deployed a 2-ton LOX/LIN plant. On April 3, Cosmodyne filed a supplement to its agency-level protest, arguing that PCI's proposed plant did not meet the reliability and maintainability requirements of the RFP. On April 16, the agency denied all three grounds of Cosmodyne's protest, and on April 22, Cosmodyne protested to our Office.

ANALYSIS

NBC Warfare Protection

Cosmodyne argues first that PCI's proposed plant fails to meet the RFP's NBC warfare protection requirements. These requirements were as follows:

"The generator shall be capable of producing oxygen or nitrogen to the requirements of paragraph 3.3 while operating for one (1) hour after commencement of attack in an environment contaminated with the following NBC agents: C.K., Mustard, Lewisite, GB, GD, and radiological fallout."

"From the time of issuance of an attack, the units should be able to operate for one (1) hour without any contaminants entering the product stream."

Cosmodyne contends that PCI's plant fails to meet these requirements because its NBC filtration system does not incorporate a High Efficiency Particulate Air (HEPA) filter to remove biological warfare agents and radiological fallout, followed by a bed of impregnated activated carbon to remove chemical agent vapors. According to Cosmodyne, such a system is "the only completely safe and approved fielded system for military LOX/LIN plants to date."

Cosmodyne's allegation that PCI's system does not incorporate a HEPA filter/carbon bed combination to protect against NBC contamination [deleted]. As explained in the agency report on the protest, [deleted] Army/Navy approved chemical warfare filter effective against CK, HB, GB, GD, Lewisite, and Mustard, and that it is currently in use aboard Navy aircraft carriers. Thus, the record does not support the protester's initial allegation concerning PCI's proposal.

The protester also argues that PCI's plant will not be able to continue operating after a chemical warfare agent attack, as required by the RFP,¹ [deleted] which serves to remove carbon dioxide, as well as chemical warfare agents from the feed air, could become ineffective at removing the carbon dioxide in the presence of chemical agents, which could allow some carbon dioxide to pass into the cold box portion of the unit, where it would freeze on the heat exchange surfaces, disrupting the production of oxygen and nitrogen.

We dismiss this basis of protest as untimely since it was not raised in Cosmodyne's agency-level protest. Cosmodyne's agency-level protest was premised on the [deleted] assumption that PCI was proposing to furnish one of its GAMMA plants, incorporating an RPSA system. Once Cosmodyne elected to initiate a protest on the basis of this assumption, it was required to raise all related arguments; to hold otherwise would be to invite the submission of piecemeal protests, which our Bid Protest Regulations do not contemplate. Since we will not consider issues that could have been, but were not, raised in a preceding agency-level protest, this basis of protest is dismissed. Research Technology Int'l, B-243844, Aug. 19, 1991, 91-2 CPD ¶ 165; Armstrong Motorcycles Ltd., B-238436; B-238436.2, June 5, 1990, 90-1 CPD ¶ 531.

Prior Deployment/Nondevelopmental Item

Cosmodyne argues that the LOX/LIN plant proposed by PCI does not meet the following solicitation requirement:

"The Unit without the minor modifications necessary to meet the requirements of this solicitation has been deployed, either commercially or militarily."

The protester contends that PCI has not previously deployed a 2 ton per day capacity LOX/LIN plant either commercially or militarily and that it would need to make major modifications to the 1.5 ton units that it has previously deployed in order to meet the solicitation's requirements.

[Deleted] Cosmodyne disputes that determination, arguing that it is apparent from differences between [deleted] and the Navy specifications that a unit meeting the [deleted] specifications would have to be modified substantially to meet the Navy specifications. We disagree. The fact that the two specifications differ in certain regards does not necessarily mean that a particular unit could not meet the requirements of both. For example, the fact that [deleted] specification did not require simultaneous production of oxygen and nitrogen does not mean that the

¹The RFP required that the generator "be capable of continuously producing product to the requirements of paragraph 3.3 for 10 days without stoppages for thawing."

unit offered by PCI was necessarily incapable of simultaneous production. Likewise, the fact that [deleted] specification required only 99.2 percent liquid oxygen purity and only 99.0 percent liquid nitrogen purity does not mean that the plant is incapable of producing liquid oxygen and liquid nitrogen of 99.5 percent purity, as required by the Navy RFP.²

[Deleted] to meet the Navy's requirements here: [deleted] and [deleted]. PCI explains that other changes to its previously deployed unit to increase the unit's production capacity and to increase the level of purity of the oxygen and nitrogen produced were not required since the various components of its previously deployed unit (e.g., the air compressor, the adsorber beds, the heat exchanger, and the separation columns' cross section) were adequately sized to process 2.0 tons per day. PCI maintains that the [deleted] changes that it did make were at most minor [deleted].

The determination as to whether modifications to already developed and deployed equipment are minor is a technical judgment, which we will overturn only if it is shown to be unreasonable. See Eyring Corp., B-245549.7, Mar. 31, 1992, 92-1 CPD ¶ 320. In assessing whether a modification is minor, we will consider both the technical complexity of the change and the degree of risk associated with it. Id. We will also consider the value and size of the modification relative to the value and size of the end product. See Federal Acquisition Regulation § 52.202-1(c)(3).

Here, PCI maintains--and the protester does not dispute--that [deleted] changes were not technically complex, risky ones. [Deleted] The value of the modifications, according to PCI, [deleted]. Given this evidence--which the protester did not seek to rebut--that the changes that PCI proposed were neither technically complex nor risky and that their value relative to the overall value of the end item was extremely small, we think that the agency reasonably concluded that the modifications proposed by PCI to meet the requirements of this RFP were minor.

Reliability/Maintainability

Cosmodyne argues that PCI's unit fails to meet the RFP's requirements regarding reliability and maintainability, which were as follows:

"Reliability. The generator shall have a minimum field mean time between failures (MTBF) of 520 hours."

²Along the same lines, the fact that the maximum allowable dimensions for [deleted] unit were greater than the maximum allowable dimensions for the Navy units does not demonstrate that [deleted] unit, without modification, would exceed the Navy's dimensions.

"Maintainability. The generator shall have a mean time to repair (MTTR) of 2.5 hours or less. The maximum time to repair at the 95th percentile shall be 8 hours. . . ."

According to Cosmodyne, PCI's previously deployed generators have suffered serious operational defects in the field, demonstrating their lack of reliability and maintainability. In support of its allegation, Cosmodyne offered a list of instances in which PCI's units have failed.³

In concluding that PCI's plant satisfied the reliability requirement, the evaluators relied on statements in PCI's proposal as well as their own knowledge of the unit. Specifically, PCI stated in its proposal that [deleted]. In addition to this information, the evaluators relied upon their knowledge of a design change that PCI had made to correct a problem that had resulted in failure of the turboexpanders in a number of the earlier units.⁴ Given this information, we see no basis to challenge the evaluators' determination that PCI demonstrated compliance with the reliability requirement. The evidence proffered by the protester concerning past failures of PCI plants does not alter our conclusion in this regard: at a minimum, without information (which the protester did not furnish) as to how long the generators had been operating prior to their failures, it is impossible to determine that they failed in less than 520 hours.

The protest is denied.

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³The protester has offered no evidence in support of its allegation that PCI's generators do not meet the RFP's maintainability requirement.

⁴The design change in question, as we understand it, was [deleted]. Although the protester contends that there is no evidence in the record that this design change was ever made, we disagree; [deleted]. Also, even if the protester is correct that this change in design was not incorporated into PCI's previously deployed units, that does not show that it has not been incorporated into the design of the plants that PCI is now manufacturing.