**Comptroller General**
**of the United States**

**Washington, D.C. 20548**

# Decision

**Matter of:** Strategic Resource Solutions Corporation

**File:** B-278732

**Date:** March 9, 1998

James C. Dever, III, Esq., Maupin Taylor & Ellis, P.A., for the protester.
John E. Lariccia, Esq., and Capt. Christopher J. Aluotto, Department of the Air Force, for the agency.
Jennifer Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

1. Where, pursuant to 10 U.S.C. § 2865 (authorizing simplified method of awarding energy savings performance contracts (ESPC), including use of a list of prequalified firms), agency initiated process of selecting firms for award of ESPCs in 1997, agency reasonably limited consideration of firms to those on the 1997 prequalified list, the only list available at the time. Even though the actual selection will not be made until 1998, agency is not required to consider firms which subsequently were included on the 1998 list; the resulting delay and cost would be inconsistent with the simplified and cost-conscious selection process authorized by the statute and the statutory goal of accelerating the use of ESPCs.

2. Agency did not violate 10 U.S.C. § 2319 (regarding imposition of qualification requirements) by refusing to allow protester, which was able to demonstrate its qualifications prior to the date of award, to submit an offer for an energy savings performance contract, since statute governing award of such contracts by the Department of Defense, 10 U.S.C. § 2865, does not require that all qualified firms be permitted to submit offers.

## DECISION

Strategic Resource Solutions Corporation (SRS) protests the restriction of competition for four Energy Savings Performance Contracts to be awarded by the Department of the Air Force to companies on the 1997 List of Prequalified Energy Savings Performance Contractors for the Department of Defense. The solicitations at issue are request for proposals (RFP) Nos. F0426-98-R-0101; F44650-98-R-0002; F08637-97-R-6009; and F41689-97-R-0030. SRS, which was not on the 1997 prequalified list (having not been incorporated in time to apply for it), but which is

on the 1998 prequalified list, argues that firms on the 1998 list should also be eligible for consideration.

We deny the protest.

BACKGROUND

To help reduce their consumption of energy, federal agencies are authorized to award energy savings performance contracts (ESPC) for periods of up to 25 years. 42 U.S.C. § 8287(a)(1) (1994). Under an ESPC, a private contractor evaluates, designs, finances, installs, and maintains energy saving equipment at a government installation. The contractor receives compensation for its efforts only if and when energy cost savings are realized by the government; if the government realizes no savings, the contractor receives no compensation.

To accelerate the use of these contracts on military installations and to reduce the administrative effort and cost on the part of the Department of Defense (DOD) and the private sector, Congress authorized the Secretary of Defense to develop a simplified method of awarding ESPCs. 10 U.S.C. § 2865(c)(1) (1994). To this end, the Secretary was authorized to request statements of qualifications, including financial and performance information, from firms engaged in providing shared energy savings contracting; to designate from the statements received, with an update at least annually, those firms that are presumptively qualified to provide shared energy savings services; to select at least three firms from the qualifying list with which to conduct discussions concerning a particular project; to request technical and price proposals from each of the firms selected; and to select from among these firms, the one most qualified for award. 10 U.S.C. § 2865(c)(2)(A).

The Air Force decided that, rather than having each Air Force installation in the country award its own ESPC, it would divide the nation into six regions and award one 25-year ESPC for each region. The awardee for each region would then evaluate, design, finance, install, and maintain energy savings equipment at every Air Force installation located within its region. For each region, one contracting activity was designated as the lead installation for soliciting and evaluating offerors' qualifications to perform the solicitation's requirements and the offerors' proposals. For region I, Tyndall Air Force Base (AFB) was designated as the lead installation; for region II, Wright-Patterson AFB, Ohio was designated; for region III, AFSPC/CONF in Colorado Springs was designated; for region IV, Langley AFB was designated; for region V, Travis AFB was designated; and for region VI, Randolph AFB was designated.[1]

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[1]This protest concerns only regions I, IV, V, and VI. The protester never complained about region III, and it withdrew its complaint regarding region II after Wright-

(continued...)

The Air Force desired to solicit proposals from the prequalified firms best qualified to meet its needs, but determined that it would need to obtain further information to make such a selection. In this regard, the DOD prequalified list identifies the firms that have been determined qualified, but provides no detail concerning their particular qualifications. The Air Force thus decided to issue a request for qualifications to interested firms on the 1997 prequalified list to obtain more detailed information regarding their financial strength, technical capability, and ability to perform its specific effort.

Each of the lead activities posted a notice on the CBD on-line announcing its intention to award a 25-year ESPC with an estimated value of $200-$250 million. The notices instructed prequalified firms interested in competing to notify the bases of their interest so that a request for qualifications could be issued to them, with the best qualified firms then to be invited to respond to a competitive RFP. Each of the CBD notices stated that only firms on the 1997 prequalified list would be eligible to compete.

A representative of SRS telephoned the contracting office at Tyndall AFB on or about June 30, 1997, to express interest in competing for the ESPC and to request a copy of the request for qualifications, but was informed that only those firms on the DOD prequalified list could obtain a copy. Tyndall issued its request for qualifications on October 14, 1997, with responses due by November 25.

Similarly, SRS responded to the Langley AFB CBD notice by e-mail dated October 8 and by telephone call of November 10, during which its representative was informed that SRS could not submit a qualifications package because it was not on the 1997 prequalified list. Langley issued its request for qualifications on October 17, with responses due by November 19.

SRS also contacted Travis AFB on October 8 and asked for a copy of the request for qualifications. By letter dated October 22, the contracting officer informed SRS that the proposed acquisition was restricted to firms on the 1997 prequalified list. On November 14, Travis AFB issued its request for qualifications, with responses due by December 23.

The fourth lead activity at issue here, Randolph AFB, issued its request for qualifications on October 29, with responses due by December 23.

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[1](...continued)
Patterson amended its Commerce Business Daily notice inviting expressions of interest from prequalified firms to state that the DOD prequalified lists for both 1997 and 1998 would be used instead of only the 1997 list.

On November 25, DOD released the 1998 prequalified list, which was to go into effect on January 1, 1998. SRS was included on the list. On November 28, SRS protested to our Office.

TIMELINESS

As a preliminary matter, the Air Force argues that SRS' protests of the Langley and Tyndall AFB procurements should be dismissed as untimely because SRS did not raise its objection to them until after the closing date for receipt of responses to the requests for qualifications. The agency contends that where a competitive field is to be narrowed on the basis of offerors' qualifications prior to issuance of an RFP, firms objecting to terms of the request for qualifications must do so prior to the date set for receipt of the qualification statements. See Nomura Enter., Inc., 69 Comp. Gen. 69, 72 (1989), 89-2 CPD ¶ 437 at 4-5.

We think that it would be unreasonable to apply the above rule in this case since there is no evidence in the record establishing that SRS knew (or reasonably should have known) of the closing dates for receipt of the qualifications packages. The closing dates were not set forth in the CBD notices announcing the procurements, and both contracting activities refused to furnish the protester with copies of their requests for qualifications. We therefore decline to dismiss SRS' protests of the Tyndall and Langley AFB procurements.

DISCUSSION

The protester argues that firms whose names appear on the 1998, even if not on the 1997, prequalified list should have been permitted to respond to the request for qualifications because the Air Force did not anticipate selecting--and, in fact, will not select--the firms with which to conduct discussions until 1998. SRS contends that 10 U.S.C. § 2865(c)(2)(A)(iii), which permits the Secretary of Defense to select at least three firms with which to negotiate from the qualifying list, contemplates use of the qualifying list for the year in which the selection is made and the RFP is issued. In the alternative, the protester argues that pursuant to 10 U.S.C. § 2319 (1994), which governs the use of qualification requirements, a potential offeror cannot be denied the opportunity to submit an offer if it can demonstrate that it meets the standards for qualification prior to the date of award.

Under 10 U.S.C. § 2865, the agency has broad discretion in selecting the firms with which to negotiate; there is no requirement that competitive procedures be used or even that maximum practicable competition be sought. Rather, in the interest of promoting the use of ESPCs with minimum administrative effort and cost, the statute authorizes the agency to "select at least three firms from the qualifying list," and make award to the most qualified firm among them. 10 U.S.C. § 2865(c)(2)(A). The statute does not specify how the agency is to go about choosing the firms for negotiation; the only relevant restriction is that, once the agency decides with whom

to negotiate, the firms must be on the list in effect at the time of that decision. Thus, with respect to its selection of firms from that list, the agency's discretion is broad and subject only to a test of reasonableness.

Given the statutory scheme, if the selection of firms with which to negotiate had been made in 1997, the Air Force could have selected any three firms for negotiations as long as the firms appeared on the 1997 list. Similarly, since the selection decision will not be made until 1998, the Air Force can select any three firms for negotiations as long as those firms are on the 1998 list; however, in light of the agency's broad statutory authority to select firms from the list on any reasonable basis, the fact that the protester appears on the 1998 list does not entitle the protester, or any other firm on the list, to be selected for negotiations.

The Air Force's approach here was to solicit (and evaluate) substantial additional financial and technical information from firms on the 1997 list (the 1997 list being the only one available at the time the agency initiated the selection process) to determine which, among them, were best qualified to meet its needs. As noted above, the DOD prequalified list identifies the firms that have been found qualified, but provides no detail concerning their particular qualifications. Accordingly, we see nothing unreasonable in the agency's decision to solicit additional information in order to determine which firms would best meet its needs. Further, while the process was initiated at the end of 1997 and it thus was evident that the actual selection might not occur until 1998, we think that it was reasonable for the Air Force to limit its review at that point to firms on the 1997 list--the only list available at the time--particularly given the likelihood that firms on the 1997 list would also be on the 1998 list, and the impossibility of predicting whether firms not on the 1997 list would be on the 1998 list.

Finally, we have no objection to the agency's declining to consider a firm that was added to the list in 1998. A contrary conclusion would require the agency to expend substantial time and effort considering the new firms' qualifications at the point in time when the agency is ready to make its selection of firms with which to negotiate. The resulting delay and cost--in the interest of considering the qualifications of firms which, under the statute, the agency is under no obligation to select for negotiations--would be inconsistent with the simplified and cost-conscious selection process authorized by the statute and would not foster the statutory goal of accelerating the use of ESPCs.

Turning to the protester's second argument, we do not think that the Air Force violated 10 U.S.C. § 2319(c)(3) by denying SRS the opportunity to submit an offer. Section 2319(c)(3) provides as follows:

> A potential offeror may not be denied the opportunity to submit and have considered an offer for a contract solely because the potential offeror (A) is not on a qualified bidders list, qualified manufacturers

> list, or qualified products list, or (B) has not been identified as meeting a qualification requirement established after October 19, 1984, if the potential offeror can demonstrate to the satisfaction of the contracting officer that the potential offeror or its product meets the standards established for qualification or can meet such standards before the date specified for award of the contract.

Even assuming that the prequalified list is subject to the requirements of 10 U.S.C. § 2319,[2] we cannot conclude that the Air Force's failure to permit SRS to submit an offer for the ESPCs violated that statute. By its terms, 10 U.S.C. § 2865 authorizes selection of only three firms with which to hold discussions leading to the award of a contract; thus, as stated above, even if SRS had been on the 1997 list which the agency used to make its selection here, there was no requirement for the Air Force to select SRS as one of the firms with which to negotiate. As a result, we cannot say that SRS was denied the opportunity to submit an offer solely because it was not on the qualified list, as stated in 10 U.S.C. § 2319(c)(3).

The protest is denied.

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[2]It is not clear that the prequalified list is the type of qualification requirement contemplated by 10 U.S.C. § 2319, which focuses on approval of products. See 10 U.S.C. § 2319(a); Federal Acquisition Regulation § 9.201; Stevens Technical Servs., Inc., 72 Comp. Gen. 183, 190 (1993), 93-1 CPD ¶ 385 at 9. Similarly, the statute makes clear that the purpose behind the contracting scheme authorized by 10 U.S.C. § 2865 is to accelerate the use of ESPCs and reduce the administrative effort involved by DOD as well as the private sector; that purpose could be thwarted if the contracting procedures were subject to the limitations of 10 U.S.C. § 2319.