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PK-7

DECISION



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

FILE: B-192453

DATE: June 18, 1980

MATTER OF: Pentech Division, Houdaille
Industries, Inc.

DL604826

DIGEST:

1. Complaint concerning whether equipment is equivalent to brand name system specified in grant procurement will be examined by GAO to determine whether exclusion of equipment is unreasonable or made in bad faith.
2. Rejection of complainant's untried system because only proven system was desired is not unreasonable.

Pentech Division, Houdaille Industries, Inc. (Pentech) complains that Onondaga County, New York (Onondaga) acted improperly in selecting its competitor's pure oxygen-based activated sludge treatment system over its own less expensive system for the construction of an advanced wastewater treatment facility. The project is 75 percent funded by construction grants awarded by the U.S. Environmental Protection Agency (EPA), Region II, under title II of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 833, 33 U.S.C. §§ 1281, et seq. (1976), as amended by the Clean Water Act of 1977, Pub. L. No. 95-217. Only Pentech and Union Carbide submitted bids. Onondaga rejected Pentech's \$2,378.432 bid as nonresponsive and awarded Union Carbide a contract for \$2,777,917. As explained below, Pentech's complaint is denied.

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Generally, sludge treatment systems of the type of concern here use oxygen to promote micro-organism growth, turning soluble material (substrate) to insoluble material (biomass). Because the residual water (effluent) left after the biomass is removed is permitted to reenter the water source, the quality of the effluent and thus,

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the entire system, depends upon the effectiveness of the treatment process design. Conventionally, this kind of system exposes wastewater to atmospheric air using large aeration basins and requires that water be detained in the basins for six to eight hours to achieve an acceptable effluent purity level. The effectiveness of any oxygen-based activated sludge treatment system, however, depends upon: (1) the purity of the oxygen injected into the substrate and (2) the efficiency of the system used to inject it.

By injecting pure oxygen directly into the substrate, Union Carbide Corporation has been able to reduce the detention time required to as little as two hours. The Union Carbide process is patented and evidently is available from only two sources. Union Carbide markets it and a similar process is marketed by Air Products and Chemicals, Inc. (Air Products), as Union Carbide's licensee. Both of these processes are the only brand names listed in the solicitation and differ significantly only in the means used to generate oxygen on-site. Air Products, which withdrew from the competition before bidding, generates liquid oxygen by using a cryogenic plant to condense oxygen from atmospheric air. Union Carbide produces oxygen by removing nitrogen from the air with a pressure swing adsorption plant.

Pentech, on the other hand, has developed a system which it says meets Union Carbide's performance standards by injecting atmospheric air into the substrate by using a significantly improved jet gas-liquid injection system. The Pentech system requires no more space or facilities than Union Carbide's but does not require constructing and operating a pure oxygen generation facility. Pentech claims its process is safer and more reliable than the Union Carbide process because pressurized treatment tanks are not necessary, minimizing the risk that explosive gas mixtures will be generated and that the system will have to be shut down. Pentech, however, represents at

best an innovative but unproven advance in the conventional oxygen-based sludge treatment process. No operational pilot-scale installation exists.

Essentially, Pentech presents three complaints. Viewing its system as capable of meeting Onondaga's requirements, Pentech asserts that Onondaga's refusal to consider its system placed an undue restriction on competition. Noting that the only difference between the Union Carbide and Air Products systems is found in the manner through which pure oxygen is produced on-site, Pentech also contends that Onondaga's use of a two brand name specification was inappropriate. Pentech believes the specification assured Union Carbide's selection virtually as a sole-source because, according to Pentech, Onondaga knew or should have known that the specifications as written would discourage Air Products' participation and because Onondaga in fact knew before bid opening that Air Products would not participate. Pentech further believes its bid was functionally responsive to Onondaga's solicitation, and should not have been rejected, because it offered a "pure oxygen system" which would meet all material performance requirements.

Pentech's first protest to Onondaga was rejected. Pentech then appealed Onondaga's rejection of its protest under EPA's protest procedures in 40 C.F.R. § 35.939(e). The EPA Regional Administrator concluded that Pentech's protest was without merit, citing 40 C.F.R. §§ 35.939(j)(1)(5), and further, that Onondaga's proposed award to Union Carbide was reasonably supported.

It appears that neither EPA nor Onondaga considered Pentech's protest as raising a legitimate procurement question. As EPA concedes, the Regional Administrator's decision turns on the application of 40 C.F.R. § 35.939(j), which defines the limits of EPA's consideration of any protest. Subparagraph 1 of that section excludes from consideration issues not arising under the procurement provisions contained in "this subchapter," ostensibly subpart E of chapter 1, 40 C.F.R. Subparagraph

5 further excludes issues involving "basic project design determinations." Pentech's protest was construed as relating principally to whether Onondaga should have considered Pentech's innovative technology to assure a cost effective selection of alternative approaches (policies implemented by 40 C.F.R. § 35.908, and by Appendix A to section 35). The Regional Administrator concluded that Pentech's protest did not relate to procurement issues. Instead, he concluded, Pentech's "arguments are too late and [presented] in the wrong forum." Neither Onondaga nor the EPA apparently has analyzed whether Pentech's system is functionally equivalent to the brand names.

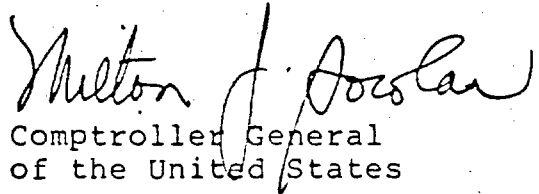
In its report to this Office EPA contends that the basic design or project choices, in effect, excluded Pentech and that this determination is valid. However, as indicated EPA dismissed the protest filed with it on procedural or policy related grounds (40 C.F.R. § 35.939 (i)(1) and (j)(5) (1979)). EPA also believes that this Office is not an appropriate forum to consider issues involving basic project design determinations.

We have consistently recognized in the course of our review of direct Federal procurements that agencies have great discretion in determining their needs and how to satisfy them. We also recognize, as argued by EPA, that Federal grantees and not EPA are charged with the responsibility of determining how to satisfy their requirements, and it is not our function to interfere with this process. Nevertheless, we believe a limited review is merited when an interested contractor complains of exclusionary specifications by Federal grantees because EPA's regulations (40 C.F.R. § 35.936-3) implementing § 204(a)(6) of the Federal Water Pollution Control Act Amendments of 1972 (33 U.S.C. § 1284(a)(6)) encourage open competition. See also OMB Circular A-102, Attachment O. We believe such a party should be heard to object to an exclusion it considers arbitrary or made in bad faith. To this extent, therefore, we reject EPA's request that we dismiss the complaint without giving any consideration to the substantive arguments raised by Pentech.

As to the restrictiveness of the specification, EPA points out that the Pentech system has not been used in any installation. Because pilot-scale installations were not in operation, the technical data submitted to the grantee was largely theoretical. Pentech's system, therefore, incorporates essentially untried design and process differences from past practice. Under these circumstances, we believe the use of the exclusionary (two brand name or equal) specification and the finding that the Pentech system was not equal to the specified systems was not unreasonable or the result of bad faith, and that Pentech was not prejudiced in any event by EPA's refusal to consider its complaint.

In the circumstances, we do not find it necessary to resolve the other issues Pentech raises.

The complaint is denied.



Acting Comptroller General
of the United States