

DECISION



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

FILE: B-204136

DATE: July 20, 1982

MATTER OF: Southwest Marine, Inc.

DIGEST:

1. Protest based on contention that procurement for overhaul of two ships of the same class should have been formally advertised rather than negotiated is denied where protester has not shown that specifications, while voluminous, were complete and specific enough for formal advertising and agency has shown lack of success in past advertised procurements for similar services.
2. Where conclusions in a GAO audit report concern whether the agency is carrying out its functions in the most efficient manner, the conclusions are not determinative as to the legal sufficiency of the agency's decision to negotiate a particular contract.
3. Protest based on contention that solicitation should have provided for fixed-price rather than cost-plus-award-fee contract is denied where agency has shown that scope of ships' overhaul could not be known and defined until ships were torn down and inspected, thus making it impossible to draft definite performance specifications until after contract award.
4. Protest that combining overhauls for two ships into one procurement unduly restricted competition is denied since determination of minimum needs and method of accommodating them is responsibility of agency and protester had not shown that agency's rationale for combining the projects to be unreasonable.

5. Allegation that solicitation for overhaul of ships is defective since it lacks adequate evaluation criteria and does not provide for award to be made primarily on the basis of cost is without merit where solicitation lists rationally based evaluation factors in descending order of importance and agency has reasonably established its need for technical proposals to determine which offeror provides best assurance that its performance will be successful.

Southwest Marine, Inc. protests any contract award under request for proposals (RFP) No. N00024-81-R-8505 issued by the Naval Sea Systems Command for the overhaul of two destroyers. Southwest contends that since detailed specifications for such work exist, procurement by negotiation cannot be justified and that even if negotiation could be justified, the use of a cost-reimbursement contract rather than a fixed-priced contract is not warranted. Southwest further argues that the combination of the work on two destroyers into one procurement unduly restricts competition. Finally, it contends that because the RFP lacks proper evaluation criteria, it is impossible to determine how a proposal should be structured to meet the Government's needs. For the reasons discussed below, we deny this protest.

BACKGROUND

The RFP solicited proposals for the overhaul of two destroyers, the USS DAVID R. RAY and the USS O'BRIEN, on a cost-plus-award-fee basis. The overhaul was scheduled to begin on the USS RAY first with work commencing on the USS O'BRIEN four months later. The RFP required the contractor to do some advance planning, design work, and specification preparation for the USS O'BRIEN. Then, the baseline specification for the USS RAY, supplementary specifications and drawings developed by the Navy and the specifications and drawings developed by the contractor would serve as a basis for negotiating the work package and the cost and schedule estimates for the USS O'BRIEN, which would be incorporated into the contract by modification.

In Section M, the RFP stated the Navy's aim was to select the offeror whose proposal and capabilities offered "optimum satisfaction of program requirements" and that award would be made to the responsive and responsible offeror whose proposal was considered to be in the best interest of the Government, price and other factors considered. As a basis for the proposal evaluation, the RFP listed the five categories set out below in descending order of importance (the last three were to be considered of equal importance).

- A - Technical Approach
- B - Resource Availability
- C - Management Capability/Approach
- D - Experience
- C - Cost

Section L of the RFP contained an attachment which informed offerors of the items which should be addressed under each of these categories. For example, under Resource Availability were included such subheadings as: facilities, manpower requirements, manpower recruiting, manpower utilization, testing/test support, quality assurance, engineering, and multi-ship considerations. Each of the main evaluation factors contained 3 to 12 subheadings indicating specific information required.

PROCUREMENT METHOD

The authority cited by the Navy for negotiating this procurement is 10 U.S.C. § 2304(a)(10) (1976), which provides an exception to the statutory preference for the use of advertising where it is determined that it is "impracticable to obtain competition." The determination and findings (D&F) underlying the decision to negotiate justified the use of negotiation on the basis that it was impossible for the agency to draft adequate specifications for the solicitation of bids.

Southwest argues that the "normal" way to contract for ship overhauls is by formal advertising and notes that the specifications for the USS RAY were in such detail that the specification package filled 13 shipping boxes while the RFP's index to the specifications occupied 13 pages. The protester concludes that the drafting of the specifications for the USS RAY was an accomplished fact and that formal advertising was possible, practicable and required.

Southwest further states that as the contractor would be required to draft specifications for the USS O'BRIEN within 60 days after award of the contract it was clearly possible for the Navy to do so and to procure at least that vessel's overhaul through formal advertising. Southwest contends difficulty or administrative inconvenience does not mean that it is impossible to draft adequate specifications and argues that the fact the Navy wished to conduct discussions and anticipated difficulties with its specifications because of emergent work does not authorize negotiation.

Although it had voluminous specifications for the USS RAY, the Navy states they were incomplete because it could not define much of the work until the existing facilities and equipment had been torn down and inspected to determine their internal condition and the actual repairs required. A ship's internal condition, the Navy states, may vary significantly on the basis of length of service between maintenance, care exercised by the ship's crew, mission requirements and the ability of the ship's crew to identify and report work requirements prior to contract award. In the past, these uncertainties have led to numerous change orders and equitable adjustments increasing the fixed-priced contracts awarded pursuant to formal advertising as much as 50 percent as well as increasing the Navy's administrative costs. Moreover, the Navy asserts its proposed approach implements our Office's recommendation in the report, Contracting for Navy Ship Repairs and Overhaul--Need for Change, December 10, 1976, PSAD-77-47. This report recommended that because of the unique problems of the Navy's past experience with formally advertised procurements for this work, it should experiment with competitively negotiated procurements.

The Navy further maintains that contrary to the protester's position, the combination of the baseline specifications, which are the same for both ships, and the supplementary specifications, to be prepared by the contractor for the USS O'BRIEN will not constitute a sufficiently precise work package to permit advertising the overhaul work on the USS O'BRIEN. The Navy explains that the supplementary specification procedure is a method of implementing "relatively minor modifications to a baseline specification" during the early stages of contract performance without issuing formal change orders. While this

process should transform the contractor's experience gained during work on the USS RAY into a more detailed and accurate work package for the USS O'BRIEN, it will not, according to the Navy, be adequate for advertising because the uncertainties in the basic specification caused by differing internal conditions of each ship will still exist.

Our review of an agency's determination to negotiate under 10 U.S.C. § 2304(a)(10) due to the impracticability of securing competition is limited to ascertaining whether there is a reasonable basis for the determination. Self-Powered Lighting, Ltd., 59 Comp. Gen. 298 (1980), 80-1 CPD 195; Department of Commerce, International Computaprint Corporation, 57 Comp. Gen. 615 (1978), 78-2 CPD 84.

The D&F here was based on the agency's assessment that in this particular instance, the overhaul work to be performed on the two ships was simply too indefinite to permit the Navy to draft adequate specifications. The protester disagrees with the Navy's judgment, basing its position primarily on the fact that the specifications which have been drafted for this procurement are voluminous and on the premise that the Navy's position is grounded on its doubts whether the specifications are adequate, rather than on a determination that the drafting of adequate specifications is impossible. Also, a significant part of Southwest's position consists of its argument that the Navy has misconstrued the meaning of our 1976 report.

We have no basis upon which to object to the Navy's determination to negotiate. The Navy states that there has been no completed overhaul of any ship of the same class as the USS RAY and USS O'BRIEN although two contracts for two ships of the same class recently have been awarded. Therefore, it asserts that even the baseline specifications for the overhaul are untested as to accuracy and estimated costs. Contrary to the protester's position, the Navy's D&F supporting its decision to negotiate did in fact include a finding that it was impossible for the Navy to draft specifications adequate to support an advertised procurement. Further, although Southwest is indeed correct in its assertion that the basic specifications for the work are voluminous and that supplementary specifications are being prepared by the contractor for the USS O'BRIEN, we do not

believe that volume alone necessarily has any bearing on whether those specifications describe such a major undertaking as the overhaul of these two ships in sufficient detail for the procurement to be advertised. In light of the Navy's report, we cannot conclude that the voluminous specifications here were adequate to support formal advertising.

Finally, although we agree with the Navy that the major point of our report concerning the agency's contracting procedures for ship overhaul work was that in many instances this type of work is not susceptible to procurement by formal advertising, we think the legal sufficiency of a particular determination to use competitive negotiations depends solely on the facts and circumstances surrounding that procurement. Consequently, the resolution of the disagreements between the protester and the Navy as to the precise meaning of portions of our audit report, which concerns whether the agency is carrying out its overhaul function in an efficient manner is not necessary as it is not determinative of the legal sufficiency of the Navy's actions here for its position.

FIXED-PRICE v. COST REIMBURSEMENT TYPE CONTRACT

Southwest argues that even if formal advertising may be impracticable, the award of a fixed-price contract is not, and it again cites our 1976 report as support for its position.

While we recognize that generally fixed-price contracts are more advantageous to the Government than cost-reimbursement type contracts, Marine Management Systems, Inc., B-185860, September 14, 1976, 76-2 CPD 241, such contracts are only suitable when "reasonably definite design or performance specifications are available." Defense Acquisition Regulation (DAR) § 3-404.2. We will not disturb an agency's determination of the procurement method to be used unless it is clearly shown to be unreasonable. Cornell University, B-196915, January 15, 1981, 81-1 CPD 46. Here, the agency maintains that the same uncertainties as to the extent and scope of the work required as cited in its negotiation justification plus its unfavorable prior experiences with fixed-price contracts for similar overhaul work in the past justified using a cost-type contract for this procurement. The protester has not shown the agency's determination to be unreasonable. Further, although, as indicated before, the findings in our 1976 audit report are not determinative as to the legality of the agency's actions, we stated in the report that the Navy should tailor the contract type to the

particular situation and did not suggest that only fixed-price type contract were appropriate for ship overhaul work.

COMBINATION OF TWO OVERHAULS

Southwest contends the combination of two large and separable overhauls into one huge effort serves no useful purpose and unduly restricts competition by greatly increasing the resources necessary for performance. It argues that the combination more than doubles the effort required for a single vessel since the two overhauls overlap.

The Navy concedes the four-month performance overlap in the overhauls of the two ships will require greater manning during such period, but it states ample manpower is available and it does not anticipate that the two ships will have to be concurrently drydocked. The Navy contends the combination of the overhauls for the USS RAY and the USS O'BRIEN into one procurement will reduce costs because of economies in material acquisition, improved learning curves, and reduced administrative costs to the Navy, and will also provide the contractor with a more stable work projection. The agency expects the contractor's performance on the USS O'BRIEN will benefit from the experience it gains on the USS RAY and points out that standardization with respect to the two ships of the same class is also a legitimate concern.

The determination of an agency's minimum needs and the methods of accommodating those needs is primarily the responsibility of that agency. This is because the agency officials who are familiar with the conditions under which supplies or services have been used in the past, and how they are to be used in the future, are generally in the best position to know those actual needs and, therefore, are best able to define them. Keystone Diesel Engine Company, Inc., B-187338, February 23, 1977, 77-1 CPD 128. Moreover, though the specifications in a solicitation must be drawn to maximize competition, the fact that one or more potential offerors may be precluded from competing does not render the specifications unduly restrictive if they reflect the legitimate needs of the agency. Bowne Time Sharing Inc., B-190038, May 9, 1978, 78-1 CPD 347. Consequently, we will not question an agency's determination of its minimum needs unless there is a clear showing that the determination is unreasonable. Keystone Diesel Engine Company, supra. More specifically, we have held that it is for the agency to determine whether to procure by means of a total package approach rather than by separate procurements for divisible portions of a total requirement and that those determinations will also not be

disturbed unless shown to be unreasonable. See Joseph Albanese & Associates, B-193677, March 6, 1979, 79-1 CPD 152.

We conclude that the Navy's determination to combine the overhauls for two ships into one procurement has not been shown to be unreasonable or to unduly restrict competition. In this regard, we note that the Navy advises us that four proposals were received in response to the solicitation. Although Southwest strongly disagrees with the reasons underlying the Navy's determination, it has not, in our opinion, demonstrated that the anticipated economies and benefits resulting from the combination are not obtainable.

LACK OF ADEQUATE EVALUATION FACTORS

Although Southwest contends the RFP provides no meaningful notification of the evaluation factors or any of the Navy's objectives beyond completion of the work on time, it concedes the RFP gives ample instructions for the content of the technical proposals and that the Navy's needs appear to be "quite clearly specified." It argues that most of the required work is routine ship repair, modification, and overhaul work with technical requirements which are absolutes and not variable and that the end product will be the same no matter who gets the contract or how it is planned and performed. Southwest insists cost is the only variable factor and the only one which will differentiate among the offerors, but complains that cost is of negligible importance among the evaluation factors. Because the RFP does not state award will go to the offeror who proposes to do the work in the most cost-effective way, Southwest contends it would be a waste of time to prepare a proposal tailored to that objective. Therefore, Southwest concludes the Navy's statement that award will go to the offeror proposing "optimum satisfaction of program requirement" is a needless redundancy or a statement of intent to acquire more than the Navy's stated minimum needs, regardless of cost. Southwest sees the root of the problem as the Navy's attempt to procure a standard service "in the guise of a technical competition."

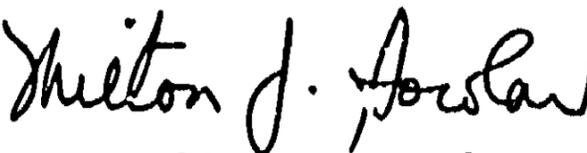
The Navy contends the RFP is designed to obtain the most technically acceptable proposal meeting its requirements at the most reasonable cost and insists the RFP clearly specifies what it is looking for in the proposals and how they will be evaluated. It states the RFP contemplates a cost-reimbursement contract with cost reasonableness to be evaluated in relation to the technical proposal.

It denies cost will be of negligible importance but it concedes it will not necessarily be the controlling factor.

The selection of evaluation factors and the relative weight assigned to them are primarily for consideration by the contracting agency, and our Office will not substitute its judgment for that of the agency unless a protester can clearly show that the agency's actions in establishing such factors and weights are arbitrary or not reasonably supported by the facts, National Veterans Law Center, B-198738, February 2, 1981, 81-1 CPD 58.

We see nothing improper in the RFP as issued. We disagree with Southwest's contention that the stated evaluation criteria are insufficient to inform offerors what criteria are of prime importance. The RFP clearly lists the evaluation criteria in descending order of importance. Moreover, cost will not be the only variable factor; under the evaluation criteria, the agency should be able to measure the various degrees of each offeror's capability, resources and pertinent experience. The Navy is seeking on-time performance in compliance with the specifications, and in this connection the Navy simply is requiring offerors to demonstrate their competence, resources and experience with respect to those matters the agency has determined are essential to successful performance. The alternative suggested by Southwest would require the Navy to rely upon the assumption that the lowest cost offer would result in its needs being efficiently met. There is nothing improper or illegal in an agency awarding a contract to other than the low cost offeror when technical considerations are important to the agency's needs. Columbia Research Corporation, B-202762, January 5, 1982, 82-1 CPD 8. In view of the Navy's experience with similar overhaul programs, we see no reason to object to the agency's evaluation approach here.

The protest is denied.

for 
Comptroller General
of the United States