

DECISION

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

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Flores
120092

FILE: B-207573, B-207573.2 **DATE:** December 10, 1982

MATTER OF: Solarex Corporation; Solarwest
Electric

DIGEST:

1. RFP which required that solar electric system support an average continuous load of 1,000 watts was essentially a performance requirement. Offerors were expected to utilize their own ingenuity to meet Government's performance requirement. Proposal which would meet the requirement in a manner not foreseen by the protesters was acceptable because it was in accord with the solicitation requirements.
2. Protests against the propriety of the RFP filed after the closing date for receipt of proposals are untimely and will not be considered.

Solarex Corporation (Solarex) and Solarwest Electric (Solarwest) protest an award by the National Park Service, Western Regional Office, Department of the Interior (Interior), to Solenergy Corporation (Solenergy) under request for proposals (RFP) No. 8000-82-02.

The RFP was for a solar electric photovoltaic power system principally consisting of an array of photovoltaic (solar) cells, a battery system to store electrical energy for use when adequate sunlight was unavailable, and backup diesel generators. The protesters contend that Solenergy's proposal did not comply with the RFP specifications. They also contend that the RFP specifications were ambiguous.

The protests are denied in part and dismissed in part.

The RFP required that the system support an average continuous load of 1,000 watts (1 kW). The protesters proposed 7.3- and 7.8-kW photovoltaic arrays capable of supporting the 1-kW requirement with exclusively solar energy (including energy collected by their arrays and stored in the batteries). Solenergy proposed a smaller photovoltaic array having a 5.2-kW rating. Solenergy's proposal noted that the backup generators should be run on a periodic basis in order

to insure that they are running effectively. Solenergy accordingly proposed to support the 1-kW requirement by utilizing electricity generated by the periodic operation of the backup diesel generators to supplement a smaller, less expensive photovoltaic array.

The protesters contend that Solenergy's reliance on energy generated by the backup diesel generators to support the 1-kW requirement was not contemplated by the RFP. They protest that Solenergy's proposal did not comply with the RFP because a 5.2-kW array is too small to support the 1-kW requirement.

Interior responds that the RFP required backup diesel generators. Interior agrees with Solenergy that the diesel generators must be run on a periodic basis. Interior contends that Solenergy's inclusion of diesel generated electricity into its calculations demonstrated a highly responsive attitude toward reducing levels of cost while fulfilling the necessary functional requirement of the photovoltaic system.

In our view, Interior's evaluation of Solenergy's proposal was reasonable and in accord with the RFP criteria.

The 1-kW requirement was essentially a performance-based specification which offerors were to meet by using their own inventiveness and ingenuity in proposing designs and approaches. See Auto-Trol Corporation, B-192025, September 5, 1978, 78-2 CPD 171; International Business Machines Corporation, B-187720, May 19, 1977, 77-1 CPD 349. This was made particularly clear in this case by the fact that the RFP contained "Alternative Proposal" paragraph "L25" which stressed overall performance:

"You may, at your discretion, submit alternative proposals which deviate from the requirements. Such proposals may be considered if overall performance would be improved or not compromised and if they are in the best interests of the Government. Alternative Proposals, or deviations from any requirement of this RFP, shall be clearly identified."

The record demonstrates that Solenergy's proposal would support the 1-kW requirement without relying on the generators any more than necessary to insure their effective operation.

The protesters do not dispute that the generators should be operated periodically. They argue, instead, that Solenergy's reliance on the generators to support the 1-kW requirement was not contemplated by the RFP. This argument assumes that proposals were required to include a photovoltaic array large enough to support the 1-kW requirement. However, the RFP contained no such requirement. It required, instead, that the system support the 1-kW requirement. The diesel generators were a required part of the system. The second paragraph of the specifications stated:

"The scope of this effort covers the requirements for the design, fabrication, assembly and installation of a complete Photovoltaic Power System. The system shall include (but not necessarily be limited to): solar cell modules; power conditioning equipment and battery storage components installed and interconnected into suitable frames; load management switching equipment for back-up diesel generators; interconnecting wire and control systems * * *" (Emphasis added.)

Amendment 2 added the following to the paragraph: "Solar battery charging using the diesel generators shall be included." (Emphasis added.)

The protesters emphasize that the RFP required backup diesel generators. They argue that the generators therefore cannot be utilized to support the 1-kW requirement. We disagree. The diesel generators must be tested periodically. This is not a backup operation but a maintenance operation. There is nothing within the RFP which prohibits offerors from utilizing maintenance test energy to support the 1-kW requirement. The RFP merely required that the system support the 1-kW requirement. It was up to offerors to utilize their own inventiveness and ingenuity in proposing designs and approaches in which this was to be accomplished. When proposals in the best interest of the Government do not violate the terms of the RFP, they are not to be disregarded because they are innovative in ways not foreseen by other offerors and not forbidden by the RFP. Tidewater Management Services, Inc. v. United States, 573 F.2d 65 (Ct. Cl. 1978); Ampex Corporation, B-192498, March 29, 1979, 79-1 CPD 215; Foss Alaska Line, 57 Comp. Gen. 784 (1978), 78-2 CPD 192.

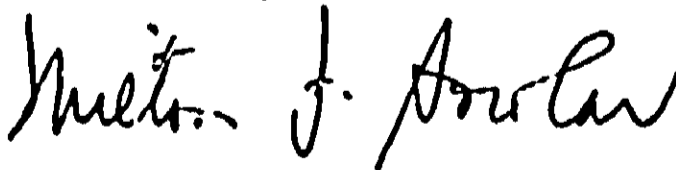
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The protesters contend that the acceptability of Solenergy's proposal implies that a hypothetical proposal which relied almost exclusively on diesel power (for example, a 1-kW array with the balance provided by diesel generators) would be acceptable. As we noted, above, Solenergy's proposal did not rely on the diesel generators any more than was necessary to insure that they were operating effectively. We will not speculate as to the maximum amount of diesel power that would have been acceptable under the RFP. We need not go beyond our determination that Interior's evaluation of Solenergy's proposal was reasonable and in accord with the RFP. This ground of protest is accordingly denied.

Solarex and Solarwest protest that the RFP was ambiguous because it did not give bidders guidance as to how they were to utilize the backup diesel generators in pricing the inverter. Solarex additionally protests that the RFP was defective because the specifications regarding the inverter were mutually exclusive.

These grounds of protest are untimely under section 21.2(b)(1) of our Bid Protest Procedures (4 C.F.R. part 21 (1982)) since they concern alleged solicitation improprieties and, therefore, any protest on these grounds was required to be submitted prior to the closing date for the receipt of initial proposals. Center for Employment Training, B-203555, March 17, 1982, 82-1 CPD 252. With regard to Solarex's contention that it raised questions regarding the ambiguity of the RFP within its proposal, it is well settled that a protest against the RFP that is included within the proposal will not be considered timely. Precision Dynamics Corporation, B-207823, July 9, 1982, 82-2 CPD 35. We therefore will not consider these grounds of protest.

for 
Comptroller General
of the United States