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

FILE: B-213960 **DATE:** May 1, 1984

MATTER OF: MEPECC International

DIGEST:

1. GAO will not consider the merits of an allegation that more restrictive specifications are necessary to serve the government's interest. A protester's presumable interest as a beneficiary of more restrictive specifications is not protectable under our bid protest function, which is intended to ensure that the statutory requirements for free and open competition are met.

2. An offeror was not prejudiced by an RFP specification which may have overstated the agency's actual minimum needs where the firm was only able to furnish a system which in fact exceeded the agency's actual needs at a higher price than the successful offeror's.

3. Whether a contractor is performing in accordance with contract terms regarding date of delivery is a matter of contract administration for resolution by the contracting agency, not GAO.

MEPECC International protests the award of a contract to Clifton Precision Instruments & Life Support Division of Litton Systems, Inc. under request for proposals (RFP) No. DADA13-83-R-0009 issued by the Department of the Army for the acquisition of an oxygen generating system for testing in field use exercises. MEPECC complains that the Army awarded the contract to Clifton Precision despite the fact that Clifton Precision's system did not meet the "medical" oxygen requirement set forth in the RFP. In addition, MEPECC alleges that the Army has acted improperly in not terminating Clifton Precision's contract for default where the firm has been unable to meet repeated extensions of the delivery date. We deny the protest in part and dismiss it in part.

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MEPECC and Clifton Precision submitted the only proposals in response to the RFP, offering prices of $99,730 and $95,766, respectively. After amending the RFP to correct certain deficiencies, the Army requested best and final offers; Clifton Precision reduced its price to $85,240, but MEPECC offered no reduction. A technical evaluation was then performed, with Clifton Precision's proposal receiving a slightly higher rating than MEPECC's in terms of technical merit. As a result of this evaluation, and because its offered price was $14,490 lower than MEPECC's, Clifton Precision received the award in accordance with amended paragraph M.1 of the RFP, which provided that award would be made "to the lowest responsive, responsible offeror meeting the specifications outlined in the solicitation."

MEPECC protests that Clifton Precision did not in fact offer an oxygen generating system meeting the requirements set forth in section C.1.4. of the RFP that such systems were to produce "oil-free, dry, sterile, 92% (minimum) pure medical oxygen." MEPECC urges that the term "medical" expressly means that any oxygen generating system offered must be suitable for patient respiration, evidenced by a registration certificate from the Food and Drug Administration (FDA). MEPECC contends that the Army's action in seemingly waiving the "medical" oxygen requirement for Clifton Precision put it at a price disadvantage because MEPECC's system incorporated more costly safety devices and monitoring equipment qualifying it for certification in "medical" applications.

The Army responds that its use of the term "medical" did not mandate that offered systems be suitable for patient treatment, because the procurement purpose was only to obtain an oxygen generating system for testing during field exercises--such testing to encompass logistical considerations, tactical employment, and mobility. The Army states that no oxygen generated by the system during these exercises would actually be used for patient respiration (although we point out that this was not necessarily evident from the solicitation itself). The Army emphasizes that neither section C.1.4. nor any other section of the RFP required that offered oxygen generating systems be certified by the FDA.

In addition, the contracting officer states that "it was evident from the beginning that MEPECC had allegedly developed such a system and was pushing for exclusion of other bidders." The contracting officer advises

that MEPECC requested the Army to make FDA certification and a very early delivery date requirements of the RFP. According to the contracting officer, MEPECC was well aware that it was the only offeror that could meet those requirements. The Army, however, did not accede to MEPECC's request.

Initially, we point out that we will not consider the merits of an allegation that more restrictive specifications than those established in a solicitation are necessary, because a protester's presumable interest as a beneficiary of more restrictive specifications is not protectable under our bid protest function, which is intended to ensure that the statutes and regulations requiring free and open competition in federal procurements are met. King-Fisher Company, B-209097, July 29, 1983, 83-2 CPD 150, affirmed, B-209097.2, September 2, 1983, 83-2 CPD 289.

Also, we cannot conclude that MEPECC, with the burden of proving its case, has offered evidence compelling enough to support its assertion that, by using the term "medical" oxygen in the RFP, the Army was limited to accepting only those systems certified by the FDA for patient therapy. In fact, we have found no definition of the term "medical" oxygen, or any strictures occasioned by its use, in the FDA regulations. Those regulations do define a "portable oxygen generator" as "a device that is intended to release oxygen for respiratory therapy by means of either a chemical reduction or physical means (e.g., a molecular sieve)." 21 C.F.R. § 868.5440 (1983). That definition, however, while it certainly indicates human use, does not speak of any requirement that the system be certified for strictly "medical" applications. And, in that regard, the Army states that in preparing the specifications, it consulted anesthesiologists who advised that a system for field use would not need to meet the stringent standards for oxygen intended for operating room use.

Moreover, notwithstanding the Army's use of the term "medical" in the RFP, we note that MEPECC's submissions to this Office establish that the firm has spent more than 4 years developing its oxygen generating system apparently for "medical" applications only. MEPECC, does not argue that it could have furnished a different, less expensive system that was non-"medical" in nature, nor has it demonstrated that it could have deleted the incorporated safety devices and monitoring equipment from its

system in order to be more price competitive if it had been sure prior to submitting its best and final offer that the required system was not to be used for actual patient treatment. (In this regard, because of the communications MEPECC had with the contracting officer, we are not convinced that MEPECC was unaware of the true purpose of the procurement.) Therefore, we cannot conclude that MEPECC was prejudiced by the use of that term, although it may have overstated the Army's actual minimum needs, because the only system it could furnish in fact exceeded the Army's needs at a higher price than Clifton Precision's.

Further, our analysis of Clifton Precision's proposal reveals that the firm's system, although not originally developed for "medical" applications, but rather adapted from the firm's oxygen generating system used in military aircraft, met the performance characteristics of section C.1.4. Specifically, the firm's proposal at pages 5 and 17, respectively provided that "[the compressor] will be used to generate gaseous oxygen at 92% minimum purity" and "[s]ince compressors being used are of the oil-less type, oil-free oxygen at a minimum purity of 92% is guaranteed." Because the RFP set forth no requirement for FDA certification, and because the use of the term "medical" did not, in our view, compel such certification, we therefore see no impropriety in the Army's determination that Clifton Precision's system conformed to the essential requirements of section C.1.4. in satisfaction of the agency's actual minimum need for a system intended for logistical, tactical and mobility testing purposes.

MEPECC also alleges that it has been prejudiced by the fact that Clifton Precision has not been able to meet repeated extensions of the delivery date, and that the Army has acted improperly in not terminating Clifton Precision's contract for default. We will not consider the matter, however. Whether a contractor is performing in accordance with contract terms and if not, the appropriate action to take, are matters of contract administration for resolution by the contracting agency, not this Office. South Central Corporation, B-211528.2, August 9, 1983, 83-2 CPD 191; Gulf Systems, Inc., B-210080, January 6, 1983, 83-1 CPD 12.

The protest is denied in part and dismissed in part.

Milton J. Socolar

Acting Comptroller General
of the United States