DECISION

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

FILE: B-217053; B-218535 DATE: July 24, 1985

MATTER OF: Terex Corporation; Caterpillar Tractor Company

DIGEST:

1. Protests that Army should amend solicitation to restrict eligibility for award to offerors which have marketed product commercially in significant numbers for at least 1 year are denied. While Competition in Contracting Act of 1984 and relevant Army regulation state that it is the government's policy to promote the use of commercial products whenever practicable, nothing in the act or regulation requires that any particular procurement be restricted to offers of commercial products.

2. Protest that RFP product testing requirements are inadequate is denied. Responsibility for establishment of tests necessary to determine product acceptability is within ambit of cognizant technical activity, and protester's disagreement with agency's engineers over adequacy of tests is not sufficient to carry protester's heavy burden of proof.

Terex Corporation (Terex) and Caterpillar Tractor Company (Caterpillar) protest under request for proposals (RFP) No. DAAE07-83-R-H291 issued by the United States Army Tank-Automotive Command (Army). The RFP solicits offers for a 5-year contract to supply 1,068 full tracked, low speed diesel engine driven, medium drawbar pull tractors (hereinafter referred to as T-9 tractors). The protesters contend that this procurement represents an improper departure from the Army's usual policy of including a "standard commercial product" clause in all solicitations for construction equipment which is nondevelopmental in nature. The standard commercial product clause basically requires that offers be based upon providing off-the-shelf commercial construction equipment which has been used by civilian industry in significant numbers for at least 1 year. Caterpillar also

contends that the Army has included inadequate product testing requirements in the RFP as a substitute for requiring offers to be based upon commercially proven products only. The protesters therefore request that our Office direct the Army to amend the RFP to include the standard commercial product clause and to eliminate the allegedly inadequate product testing provisions.

We deny the protests.

The basic facts and background relevant to this procurement are not in dispute. The concept of purchasing commercial construction equipment for use by the Army was formulated in the late 1960's. Among other things, the commercial construction equipment program was designed to take advantage of the commercial construction equipment industry's research and development efforts so that the government could obtain the most recent technology; to obtain maximum reliability, availability, and maintainability of commercial equipment and necessary spare parts; and to eliminate the necessity for, the expense of, and the delays related to product testing and evaluation by the military. The Army, apparently satisfied with its policy of procuring commercial construction equipment, had procured various items of construction equipment under the auspices of this policy under four different procurements as recently as 1982.

The Army readily admits that it fully intended to buy the T-9 tractors here on the basis of commercial acceptability supported by substantial sales and use in the marketplace. In fact, as Caterpillar points out, the Army's Belvoir Research and Development Center, in an October 1983 report, specifically identified the T-9 tractors as a commercial construction equipment item to be purchased under the program. The Army conducted a presolicitation field survey of the known manufacturers of T-9 tractors to collect data upon which it could draft the specifications and subsequently issued a presolicitation performance specification for the T-9 tractor. This performance specification, MIL-T-52270C, dated March 15, 1983, specifically described the T-9 tractor as a standard commercial vehicle which, in order to be eligible for contract award, had to have been marketed and used in the commercial market for at least 1 year. However, prior to issuing the present RFP, the Army revised specification No. MIL-T-52270C and issued specification No. MIL-T-52270D, March 7, 1984, which deleted the requirement that the product offered must have been commercially marketed for at least 1 year. Thus, the RFP as issued on

April 6, 1984, incorporated revised specification MIL-T-52270D and no longer required that offers be based upon commercially proven tractors in order to be eligible for contract award.

Both protesters argue that it was improper for the Army to delete the requirement for an off-the-shelf commercially proven vehicle in view of the Army's longstanding policy of acquiring and using commercial products when feasible. The protesters cite several Department of the Army circulars and documents, prior Army procurements, and the Army's presolicitation actions in the present case, to show that the Army favored the use of commercial construction equipment. In particular, Caterpillar cites Army Regulation 70-1, paragraph 6-3 (February 1, 1984, effective March 15, 1984) which states, "Acquisition of commercial products to satisfy Army requirements is authorized and encouraged." Terex also invokes as support section 2301(b)(6) of title 10, United States Code, as amended by the Competition in Contracting Act of 1984, Pub. L. 98-369, § 2721, 98 Stat. 1185, 1186, which states that it is the policy of Congress that agencies in the Department of Defense "promote the use of commercial products whenever practicable."

The Army reports that, although it originally planned to procure these T-9 tractors under the auspices of the commercial construction equipment program, it changed its plans and deleted the standard commercial product eligibility requirement from the RFP because of certain language contained in the appropriation acts governing the funds to be used for the contract. Section 779 of the Department of Defense Appropriation Act, 1984, Pub. L. 98-212 (Dec. 8, 1983), 97 Stat. 1421, 1452, provides in pertinent part:

> "None of the funds appropriated by this Act may be obligated or expended to formulate or to carry out any requirement that, in order to be eligible to submit a bid or an offer on a Department of Defense contract to be let for the supply of commercial or commercial-type products, a small business concern (as defined pursuant to section 3 of the Small Business Act) must (1) demonstrate that its product is accepted in the commercial market or (2) satisfy any other prequalification to submitting a bid or an offer for the supply of any such product."

Similarily, section 8071 of Pub. L. 98-473 (Oct. 12, 1984), 98 Stat. 1837, 1938, an act providing continuing appropriations for fiscal year 1985, provides in pertinent part:

> "None of the funds appropriated by this Act may be obligated or expended on a Department of Defense contract for commercial or commercial-type products if the solicitation excludes any small business concern . . . that cannot demonstrate that its product is accepted in the commercial market . . . ."

Accordingly, the Army determined that, since both 1984 and 1985 funds would be used for this multiyear contract, it had to change the specifications to permit offers from small businesses regardless of whether such small businesses had previously produced a T-9 tractor which had been commercially marketed for at least 1 year.

The Army also reports that, even though its presolicitation market survey showed that only large businesses manufactured the T-9 tractor, it had no basis to conclude that an offer would not be received from a small business in response to the present RFP. Additionally, the Army states that it considered issuing a solicitation which would require large businesses to offer only commercially proven T-9 tractors but which would exempt small businesses from that eligibility requirement. However, small business offerors whose products did not meet or exceed the commercially proven standard would be required to have their products tested extensively by the Army. The Army rejected this dual standard approach because the Army did not believe the two eligibility criteria--commercially marketed and product testing--could measure fairly and equally the performance of the T-9 tractors offered. Accordingly, the Army decided to require all offerors, both large and small businesses, to have their products undergo extensive testing and added a series of product tests to the specification by amendment No. 5 issued October 23, 1984.

The protesters' argument that it has been the Army's policy to purchase commercially proven construction equipment and their reliance upon prior procurement actions and the Army's circulars provides no basis for objection to the Army's decision to use less restrictive specifications in the present procurement. The Army directives do not have the force and effect of law and do not provide a basis for determining the legality of a proposed award. See Timeplex, Inc., B-197346, et al., Apr. 13, 1981, 81-1 C.P.D. ¶ 280 at 12, wherein our Office specifically stated that a Department of Defense directive which encouraged the use of off-the-shelf products did not provide an adequate basis to sustain a protest. In any event, we regard the Army's

commercial construction equipment program to be a matter of executive branch policy which is ordinarily not for review under our bid protest function. See General DataComm Industries, Inc., B-182556, Apr. 9, 1975, 75-1 C.P.D. ¶ 218.

With regard to the protester's invocation of the Competition in Contracting Act of 1984 and Army Regulation 70-1, we note that, while these authorities state the government's policy of "promot[ing] the use of commercial products" and "authoriz[ing] and encourag[ing]" acquisition of commercial products, there is nothing in either the Competition in Contracting Act of 1984 or Army Regulation 70-1 which mandates acquisition of commercial products in any specific procurement. See, for example, Interior Steel Equipment Co., B-212253, Nov. 14, 1983, 83-2 C.P.D. ¶ 556, for the analogous government policy favoring use of a small business set-asides in a fair proportion of purchases; we pointed out in Interior Steel Equipment Co. that there is nothing in the Small Business Act or procurement regulations which mandates a small business set-aside on any particular procurement. Moreover, we note that the Competition in Contracting Act of 1984 is applicable only to solicitations issued after March 31, 1985, and therefore was not in effect at the time the present RFP was issued (April 6, 1984).

Accordingly, we deny both protests that the Army must require commercially proven vehicles in this procurement.

Caterpillar also contends that the Army's product testing requirements, which were incorporated into the RFP by amendment No. 5, are inadequate as a replacement for the commercially proven product standard which the Army had originally intended to use in this procurement. Basically, Caterpillar argues:

> "As explained at length in our protest, a test program lasting 4 to 5 years would be necessary to insure the Army's receipt of reliable and durable machines. Obviously, a test program of that duration is not feasible due to the excessive cost and delay involved. This is the very reason for the Army's strong preference for commercial construction machinery. Thus, the only viable method to assure the procurement of a proven, reliable, durable, and supportable T-9 tractor is to amend the solicitation to reinstate the commerciality requirement for large businesses."

Regarding the propriety of the product testing requirements, our Office has consistently taken the position

that procurement agencies have the primary responsibility for drafting specifications which reflect their actual needs. See D. Moody & Co.; Astronautics Corp. of America, 55 Comp. Gen. 1, 17 (1975), 75-2 C.P.D. ¶ 1 at 23. In this regard, we have consistently held that the responsibility for the establishment of tests and procedures necessary to determine product acceptability is within the ambit of the expertise of the cognizant technical activity. Id.; see also Aeronautical Instrument and Radio Co., B-190920, Oct. 13, 1978, 78-2 C.P.D. ¶ 276 at 4. Here, Caterpillar is essentially arguing that the test specifications should be made more stringent. To the extent that Caterpillar's allegation of inadequate test requirements can be construed as an argument that the testing specification should be made more restrictive, we will not consider the issue because, we do not review protests which contend that more restrictive specifications should be incorporated into a solicitation. S.A.F.E. Export Corp., B-212489, Feb. 6, 1984, 84-1 C.P.D. ¶ 146. To the extent that Caterpillar alleges that the test procedures are deficient, we are not convinced by Caterpillar's arguments.

The Army reports that its engineers at the Belvoir Research and Development Center developed the RFP's test procedures as a substitute for the commercial acceptability standard. The Army engineers designed a series of tests which require a total of approximately 3200 hours of testing. The specifications call for extensive testing to be performed on two preproduction vehicles. A second round of tests will be performed on two production vehicles. Additionally, the contracting officer points out that the specification calls for post-test disassembly and examination of the test tractor in order to allow discovery of "impending failures and points of excessive wear which can be used to uncover design deficiencies and project potential future failures." The Army admits that the RFP prescribed tests do not match the tests which Caterpillar reports that it performs on newly introduced commercial tractors, but the Army considers its testing requirements to be adequate for the government's needs. Furthermore, the Army reports that its engineers designed the test series based upon a proven specification (MIL-T-52270B) which had been used successfully for several procurements, including three separate T-9 tractor procurements, between 1963 and 1971. In these circumstances, we cannot find unreasonable the Army's reliance on the test requirements successfully used before implementation of the commercial construction equipment program. See Bell Helicopter Textron, 59 Comp. Gen. 158, 171 (1979), 79-2 C.P.D. ¶ 431 at 19. In any event, this protest issue essentially presents a disagreement between

Caterpillar and the Army's engineers over whether the required testing will be adequate to fulfill the government's needs for a quality product. Since it is the protester which must bear the heavy burden of showing that the contracting agency's technical opinion was unreasonable, we defer to the Army's engineers on this technical matter and conclude that Caterpillar has not carried its burden of proof. See DANTEC Electronics, Inc., B-213247, Aug. 27, 1984, 84-2 C.P.D. ¶ 224 at 6; London Fog Co., B-205610, May 4, 1982, 82-1 C.P.D. ¶ 418 at 3.

Accordingly, we deny Caterpillar's protest that the RFP's testing procedures were inadequate.

The protests are denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel