

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

FILE: B-221114 **DATE:** January 27, 1986
MATTER OF: Essex Electro Engineers, Inc.

DIGEST:

Agency decision to use negotiation procedures in lieu of sealed bidding procedures is justified where the basis for award reasonably includes technical considerations in addition to price-related factors.

Essex Electro Engineers, Inc., protests the terms of solicitation No. DAAK70-85-R-0344, a small business set-aside, issued by the Army Belvoir Research and Development Center, Fort Belvoir, Virginia, for generator sets and associated items. Essex principally contends that the Army improperly failed to apply sealed bidding procedures to the procurement, which instead requests proposals under negotiated procedures. Essex also contests the propriety of the solicitation's evaluation and award selection criteria and alleges that the solicitation's quality assurance provisions lack adequate specificity to permit full and open competition.

We deny the protest.

The solicitation requested technical proposals and prices for 24 electric generator sets. These generator sets are transportable and are driven by a gas turbine engine; they require supporting equipment, various systems, and other devices for proper operation. The solicitation states that award will be made on the basis of the overall lowest price among those proposals found technically acceptable as to stated technical criteria. Further, the solicitation expressly provides that evaluation will involve "the contractor's capability to interpret, perform, and satisfactorily complete the engineering, manufacturing, quality assurance and management requirements of the proposed contract." In this connection, the solicitation

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lists the following major evaluation criteria: 1) Technical Approach; 2) Scientific and Technical Personnel; 3) Manufacturing; 4) Organization and Management; and 5) Quality Assurance.

Essex essentially argues that under the Competition in Contracting Act of 1984 (CICA), 10 U.S.C.A. § 2304 (West Supp. 1985), and under the implementing regulations, sealed bidding is still the "preferred" and "first in order" method of procurement. Essex cites Federal Acquisition Regulation (FAR), § 6.401 (Federal Acquisition Circular (FAC) 84-5, Dec. 20, 1984, effective for solicitations issued after Mar. 31, 1985), which provides:

"(a) Sealed bids . . . Contracting officers shall solicit sealed bids if--

- (1) Time permits the solicitation, submission, and evaluation of sealed bids;
- (2) The award will be made on the basis of price and other price-related factors;
- (3) It is not necessary to conduct discussions with the responding offerors about their bids; and
- (4) There is a reasonable expectation of receiving more than one sealed bid." (Emphasis supplied.)

Essex maintains that this regulation applies here. Specifically, Essex contends that the Army has complete and detailed specifications; that its requirements are not unique or complex; and that similar procurements have in the past been the subject of sealed bidding procedures. According to Essex, the Army's sole justification for using negotiation procedures is its unfounded belief that there is a "possibility" that discussions "may be necessary" during the course of this procurement.

In response, the Army states that this solicitation, for the first time, allows offerors to propose either of two alternate engines, manufactured by "Allison" or "Teledyne," and that offerors are required to provide extensive integrated logistics support (ILS) data concerning the chosen engine. Further, government drawings are not available for the Teledyne engine so that offerors in the procurement must supply these drawings and data. Because this procurement is set aside for small business, the Army states that the contracting officer followed the recommendation of his technical personnel to negotiate the

procurement so that discussions, if necessary, concerning the scope, nature and extent of the ILS requirements could be undertaken with small business firms.

We do not think that the Army acted improperly. While CICA eliminates the statutory preference for formally advertised procurements ("sealed bids"), the provisions of the FAR, quoted above, do provide specific criteria for determining whether a procurement should be conducted by the use of sealed bids or competitive proposals. See United Food Services, Inc., B-217211, Sept. 24, 1985, 85-2 CPD ¶ 326. However, we do not agree that the circumstances here mandate the use of sealed bids. The use of sealed bids is restricted to circumstances where the award will be made on the basis of price and other price-related factors. FAR, § 6.401. Clearly, the basis for award here is not restricted to price-related factors alone. The Army, in addition to requesting prices, also seeks technical proposals containing specific technical data. In this regard, the protester argues that the data the Army seeks for evaluation purposes is not so complex that it cannot be obtained during a preaward survey as part of a responsibility determination under sealed bidding procedures.

We disagree. First, the general rule is that the determination of the government's minimum needs and the best method of accommodating those needs is primarily the responsibility of the contracting agencies. This rule recognizes that, since government procurement officials are the ones most familiar with the conditions under which supplies, equipment, or services have been used in the past and how they are to be used in the future, they are generally in the best position to know the government's actual needs. See Frequency Electronics, Inc., B-204483, Apr. 5, 1982, 82-1 CPD ¶ 303. As to the decision to negotiate the procurement, we will not question the judgment of the agency which determined that the technical data regarding the new engine is sufficiently important to warrant discussions and a negotiated procurement unless the determination is shown to be unreasonable. Such a determination essentially involves the exercise of a business judgment by the contracting officer which, on this record, has not been shown to be unreasonable.

Second, we reject the protester's argument concerning the use of a preaward survey as a substitute for negotiations, since a preaward survey conducted after or aside from the actual competition would not accomplish the Army's purpose. A preaward survey, as part of the agency's investigation of an offeror's responsibility, focuses on the

firm's ability to perform as required and involves matters like financial resources, experience, facilities and performance record, but does not include negotiation of the terms of the contract to be executed. In contrast, the focus of the negotiation process is to develop, through discussions if necessary, the contractual terms themselves, such as a promised method of production, and, thereby, to define and frame the terms of a firm's offer. See Saxon Corp., B-216148, Jan. 23, 1985, 85-1 CPD ¶ 87. Thus, elimination by an agency of a small business proposal, during the evaluation process, even for traditional responsibility matters such as "understanding" of the scope of work, does not generally have to be referred to the Small Business Administration as a nonresponsibility determination. See Tri-States Services Company, B-218733.2, Aug. 20, 1985, 85-2 CPD ¶ 196. Accordingly, this basis for protest is denied.

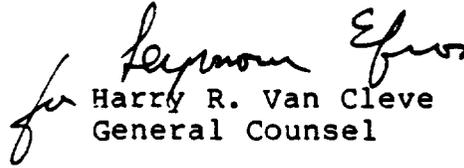
Two minor issues remain.

The protester alleges that the solicitation's evaluation criteria are not appropriate for a sealed bid procurement and that, in any event, the relative importance of the evaluation factors is not stated with sufficient specificity. We have already found that the procurement was properly negotiated so that the present solicitation's evaluation scheme is not intended to be appropriate for sealed bid procurements. Moreover, as stated previously, the solicitation simply and clearly provides that award will be made on the basis of overall lowest price among those proposals found technically acceptable as to stated technical criteria. In short, we have reviewed this evaluation scheme and find the solicitation criteria for evaluation and award to be simple, straightforward and complete. Accordingly, this basis for protest is also denied.

Finally, the protester argues that the solicitation is indefinite in that it provides that the awardee must comply with a "Quality Program Requirement" (MIL-Q-9858A) that is "in effect on the contract date." The protester states that it is patently unfair to require firms to submit offers without a full knowledge of the particular specification revision that is applicable. In this respect, we note that the FAR specifically provides for incorporation in a solicitation of specifications "in effect on the contract date." See FAR, 48 C.F.R. § 52.246-11 (1984). In fact, however, the solicitation incorporates a baseline quality contract requirement, that is, MIL-Q-9858A, dated Dec. 16, 1963, as amended Mar. 8, 1985. It is this

revision that an offeror must propose and the quality contract program under it must be in place by the time of award. There is no evidence in the record that a new revision is anticipated, and we have been informally advised that, in fact, no revisions are in process.

The protest is denied.

for
Harry R. Van Cleve
General Counsel