



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Kreonite, Inc.
File: B-222439
Date: July 11, 1986

DIGEST

1. Agency decision to negotiate, requesting competitive proposals in lieu of sealed bids, is justified where the agency foresees a need for discussions and the basis for award reasonably includes technical considerations in addition to price and price-related factors.
2. Protest that solicitation is defective because it does not contain evaluation criteria stating the relative importance of agency's requirements is denied where the solicitation advises offerors of the basis upon which award will be made, states the agency's minimum requirements and the importance of those requirements.
3. Agency's requirement for stainless steel photographic processor tanks does not unduly restrict competition where agency establishes prima facie case that the restriction is legitimately related to its minimum needs and protester, while disagreeing with the agency's technical judgment, fails to clearly show that the agency's determination of its minimum needs has no reasonable basis.

DECISION

Kreonite, Inc. (Kreonite) protests defects in request for proposals (RFP) No. F42600-86-R-71090 issued by the Air Force. The RFP solicited photographic processors and other associated items primarily for use in mobile vans and portable shelters by military intelligence activities. The RFP also solicited a variety of support and technical services for this equipment. Four proposals, including Kreonite's proposal, were received in response to the RFP.^{1/}

^{1/} We note that in October 1985, the Air Force published a notice in the Commerce Business Daily announcing its intent to enter into a sole-source contract for the processors with Hope Industries, Inc. In response to this notice, Kreonite protested the intended sole-source award arguing that Kreonite could provide the solicited processors. As a result, the Air Force issued the present solicitation under competitive procedures.

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Kreonite contends that the Air Force improperly failed to apply sealed bidding procedures to the procurement, which instead requests proposals under negotiated procedures. Kreonite also contends that the solicitation evaluation scheme is defective and that the requirement for stainless steel processor tanks unduly restricts competition.

We deny the protest.

Kreonite contends that since the processors solicited are commercial products available under Federal Supply Schedule (FSS) contracts at listed prices, award should be made on the basis of price under sealed bidding procedures.

The Air Force responds that while the processors are available under FSS contracts from two contractors, the solicitation also requires support and technical services which cannot be procured under FSS contracts. Further, the Air Force explains that technical proposals are required to demonstrate that the numerous technical requirements contained in the solicitation statement of work will be met. The Air Force maintains that the evaluation of technical proposals and discussions will enable it to assure the contractor's full understanding of these requirements and identify and revise any problem areas.

We do not find that the Air Force acted improperly. While the Competition in Contracting Act of 1984 (CICA) eliminates the statutory preference for procurement by formal advertising (now sealed bids), the statute provides specific criteria for determining whether sealed bids or competitive proposals should be requested. See 10 U.S.C.A. § 2304(a)(2)(A) (West Supp. 1986). Specifically, sealed bidding is required if:

"(i) time permits the solicitation, submission, and evaluation of sealed bids;

"(ii) the award will be made on the basis of price and other price-related factors;

"(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

"(iv) there is a reasonable expectation of receiving more than one sealed bid"

We do not agree with the protester that the circumstances here mandate the use of sealed bids. Such use is proper where the award will be made on the basis of price and price-related factors. The basis for award here is not limited to price-related factors; the Air Force also seeks technical proposals demonstrating that the equipment offered will meet

the agency's stated requirements. This was a first time competitive procurement of these items and the solicitation was sent to six processor manufacturers, only two of which held FSS contracts. The Air Force decision was based on the need to assure that all offerors' proposed equipment met the statement of work. Under these circumstances, we will not question the Air Force's judgment that a negotiated procurement with an opportunity for discussions is warranted. See The Saxon Corp., B-221054, Mar. 6, 1986, 86-1 C.P.D. ¶ 225; Essex Electro Engineers, Inc., B-221114, Jan. 27, 1986, 65 Comp. Gen. ___, 86-1 C.P.D. ¶ 92. This was a business judgment by the contracting officer that Kreonite has not shown to be unreasonable.

Next, Kreonite refers to paragraph 1.3 in the solicitation statement of work which reads as follows:

" . . . This equipment will be used in the military intelligence environment and as such will be required to operate under heavy usage with maximum reliability and less than optimum maintenance available at many locations. This equipment will be deployed world wide and will therefore be subject to temperature extremes in shipment and storage. Frequent movement and handling of machines for depot overhaul or redeployment is required and therefore machines and their components must not be sensitive to vibration or impact encountered during such movement. Equipment operated in a military environment must be more durable than equipment operated in a commercial environment. In order to meet these requirements stainless steel construction to include tanks, rackwalls and major structural components shall be utilized to the maximum extent possible in lieu of plastics in these areas to insure extended usage life and serviceability under all conditions."

Kreonite complains that the solicitation fails to instruct offerors how to meet the requirements in this paragraph. For instance, Kreonite states that while, under the terms of this paragraph, the contractor is required "to insure an extended usage life and serviceability under all conditions," the solicitation provides no "standards" as to how to meet this requirement. Kreonite also believes that the solicitation should contain technical evaluation factors to inform offerors of the relative importance of the Air Force's "general statements of requirements" contained in this paragraph.

The Air Force responds that the solicitation advises offerors that award will be made to the responsible offeror whose offer, conforming to the solicitation, will be most advantageous to the government, cost or price

and other factors specified in this solicitation considered. Based on this language, the Air Force intends to make award to the lowest priced offeror meeting the agency's minimum needs contained in the statement of work. In this regard, the Air Force points out that the statement of work contains minimum technical requirements for each processor including minimum requirements for adapters, chemical mixing blend systems, chemical storage, processing times and spare parts kits.

Further, with respect to Kreonite's assertion that the solicitation fails to instruct offerors how to "insure extended equipment usage life," the Air Force points out that paragraph 1.3 clearly advises offerors that processor tanks, rackwalls and major components constructed of stainless steel will meet the agency's requirements.

We find no impropriety with respect to the Air Force's evaluation scheme. When a solicitation specifies that award will be made on the basis of "price and other factors," award must go to the lowest-priced responsible offeror whose proposal is determined technically acceptable. Pikes Peak Water Co., B-211984, Mar. 16, 1984, 84-1 C.P.D. ¶ 315; Los Angeles Community College District, B-207096.2, Aug. 8, 1983, 83-2 C.P.D. ¶ 175. The Air Force proposes to make award on this basis here.

Further, we find that paragraph 1.3 adequately advises offerors of the agency's requirements and their importance. The paragraph clearly states the agency's need for certain stainless steel processor parts and explains the agency's reasons for requiring primarily stainless steel components. For instance, the paragraph states that stainless steel will more readily withstand temperature extremes to which the processors will be exposed and, thus, the use of stainless steel components enhances equipment durability. This paragraph places offerors on notice that processors with certain stainless steel parts are required and we fail to see how specific evaluation criteria would help offers in meeting this requirement. In our view, the solicitation, which informs offerors of the basis upon which proposals will be evaluated, states the agency's minimum technical requirements, and the reasons for those requirements, provides offerors with adequate information to prepare their proposals. See Pikes Peak Water Co., B-211984, supra.

The remaining issue concerning paragraph 1.3 is Kreonite's contention that the requirement for stainless steel processor tanks was "contrived so as to achieve a sole source to Hope Industries, Inc." which manufactures processors with stainless steel tanks. Kreonite, which apparently offers some stainless steel parts, but plastic processor tanks, argues that the Kreonite plastic tanks are equal or superior to the Hope stainless steel tanks. In support of this, Kreonite has submitted technical data from Kreonite engineers which essentially explain the advantages of Kreonite processors over Hope processors. For instance, Kreonite states that "while it is true that the [Hope] stainless steel tanks have a

higher tensile strength [than the Kreonite plastic tanks] . . . the [Kreonite tanks] have greater impact resistance" than stainless steel tanks.

The Air Force responds that in the past plastic processor tanks have been subject to "melt down" as a result of defective temperature control units or have cracked from rough handling during transport, and that it decided it would be more economical to procure steel tanks which would better "withstand the abusive environment experienced by government organizations in the field." Thus, while the Air Force does not dispute that plastic type tanks are in some respects more desirable than steel tanks (for instance, the Air Force states plastic tanks are lighter than steel tanks), the agency maintains that, for its purposes, the steel tanks are better suited.

The determination of the government's minimum needs, the method of accommodating those needs, and the technical judgments upon which those determinations are based are primarily the responsibility of the contracting agency. Herblane Industries, Inc., B-215910, Feb. 8, 1985, 85-1 C.P.D. ¶ 165. The agency is most familiar with the conditions under which the goods have been used in the past and will be used in the future. We therefore will not question an agency's determination of its minimum needs unless there is a clear showing that the determination has no reasonable basis. Eaton Leonard Corp., B-215593, Jan. 17, 1985, 85-1 C.P.D. ¶ 47. However, when a protester challenges a specification as unduly restrictive of competition, it is incumbent upon the agency to establish prima facie support for its contention that the restrictions are reasonably related to its actual needs. When the agency has established this support, the burden is on the protester to show that the requirements complained of are arbitrary or otherwise unreasonable. Allied Materials and Equipment Co., Inc., B-219528, Oct. 24, 1985, 85-2 C.P.D. ¶ 457; Syva Co., B-218359.2, Aug. 22, 1985, 85-2 C.P.D. ¶ 210.

In this regard, specifications based upon a particular product are not improper in and of themselves, and a protest that a specification was "written around" design features of a competitor's product fails to provide a valid basis for protest where the agency establishes that the specification is reasonably related to its minimum needs. Amray, Inc., B-208308, Jan. 17, 1983, 83-1 C.P.D. ¶ 43. A specification is not improper merely because a potential bidder cannot meet its requirements. UNICO, Inc., B-217255, Aug. 7, 1985, 85-2 C.P.D. ¶ 138; Tooling Technology, Inc., B-215079, Aug. 6, 1984, 84-2 C.P.D. ¶ 155.

We find that the Air Force has established a prima facie case for requiring stainless steel processing tanks. The agency has determined that stainless steel tanks provide maximum reliability for the military intelligence users of this equipment. The military intelligence users of this equipment have found that plastic tanks, when subject to temperature

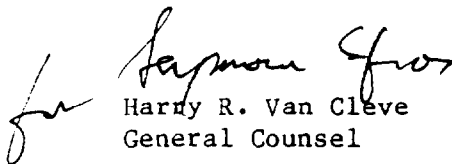
extremes or vibration, melted or cracked, while steel tanks were better able to withstand the adverse conditions to which they had been exposed and were relatively maintenance free.

While the protester disagrees with the Air Force that plastic tanks are less reliable than steel tanks, it does not deny that certain disadvantages to plastic tanks exist, but rather explains that there are limits to these disadvantages. For instance, Kreonite concedes that plastic has lower strength than stainless steel, but indicates that the plastic tanks are able to withstand a 30 foot fall. Further, while the Air Force states plastic tanks may be flammable, Kreonite contends its plastic tanks did not burst into flames when the tanks are subjected to a propane torch.

Even accepting these statements by the protester, they do not show that plastic tanks are as suitable as stainless steel tanks for the Air Force's purposes. In our view, it is reasonable, given the Air Force's need for reliable, durable and relatively maintenance free equipment that the agency procure the strongest, most heat resistant material it can obtain. See Allied Materials and Equipment Co., B-219528, supra. Therefore, we do not find unreasonable the Air Force's decision to restrict the procurement of processor tanks to stainless steel tanks.

Finally, Kreonite complains that while the Air Force indicated on the solicitation cover sheet that this procurement was "restricted," it failed to provide statutory justification by checking the appropriate box on the cover sheet for using other than competitive procurement procedures. Although the record shows that initially the procurement was to be restricted to known sources, in fact, the solicitation was issued to all interested sources (14 solicitation packages were issued) and no source was precluded from submitting an offer. Therefore, we have no basis to conclude that the procurement was "restricted."

The protest is denied.


Harry R. Van Cleve
General Counsel