



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Southern Technologies, Inc.
File: B-224328
Date: January 9, 1987

DIGEST

1. Protest that proprietary specification for burners and controls for hot water generators unduly restricts competition is sustained when agency does not justify requirement that contractor obtain equipment to be replaced and installed from one particular manufacturer. Specifications should be stated in a manner that permits consideration of other equipment that is capable of meeting the government's actual needs.
2. When protester successfully challenges an unduly restrictive specification, it is entitled to recover the costs of filing and pursuing the protest.

DECISION

Southern Technologies, Inc., protests the provisions of invitation for bids (IFB) No. N62477-85-B-0245, issued July 23, 1986, by the Naval Facilities Engineering Command, Washington, D.C. The small business set aside covers replacement of burners and controls on three existing high temperature hot water generators at the United States Naval Academy, Annapolis, Maryland.

We sustain the protest.

In pre-bid opening protests to the Navy and our Office, Southern contended that the solicitation unduly restricted competition in specifying that the replacement burners and controls must be manufactured by the Coen Company, Inc., and that no other manufacturer's product will be accepted.

The Navy responds that this project is a retrofit; that the existing generators are LaMont-type, manufactured by International Boiler Works, and that they currently have Coen burners and another manufacturer's controls. The Navy contends that these are incompatible and that it has incurred high maintenance costs and low efficiency, specifically poor turn down and control problems. It therefore has determined

that Coen burners and controls must be provided to ensure proper and reliable functioning of the generators.

Southern, which did not submit a bid by the September 16 amended opening date, contends that specifying a particular manufacturer is unnecessary to satisfy the government's legitimate needs, since other manufacturers can meet the technical and performance requirements of the IFB. Southern questions the agency's statement that its analysis of other installations showed that Coen burners and controls are the only ones that will operate reliably and satisfactorily, as well as the agency's contention that extensive modifications to the generators would be necessary if other manufacturers' products were used. The protester states that it has spoken with the generator manufacturer, who advised that its equipment will work with other manufacturers' burners and controls if correctly specified and installed. Southern has provided our Office with lists of seven military installations that it states are successfully operating using burners and controls of different manufacturers; of seven manufacturers it believes are capable of meeting burner requirements; and of several hundred users of LaMont-type generators, very few of which, it states, use the same manufacturer's burners and controls.

Where, as here, a protester challenges a specification as unduly restrictive of competition, the procuring agency must establish prima facie support for its position that the restriction is reasonably related to its needs. Libby Corp., et al., B-220392 et al., Mar. 7, 1986, 86-1 CPD ¶ 227. This requirement reflects the agency's statutory obligation to create specifications that permit full and open competition consistent with the agency's actual needs. 10 U.S.C. § 2305(a)(1) (Supp. III 1985). In our review of protests concerning specifications, we examine the adequacy of the agency's position not simply with regard to the reasonableness of the rationale asserted, but also the analysis given in support of these reasons, Cleaver Brooks, B-213000, June 29, 1984, 84-2 CPD ¶ 1, to assure that the agency's explanation will withstand logical scrutiny. Fleetwood Electronics, Inc., B-216947.2, June 11, 1985, 85-1 CPD ¶ 664.

The Navy in this instance has restricted the procurement to Coen burners and controls, requiring its small business construction contractor to obtain supplies and personnel to supervise its installation from a single source. This requirement amounts to a sole source and as such is subject to close scrutiny. R. R. Mongeau Engineers, Inc., B-218356, et al. July 8, 1985, 85-2 CPD ¶ 29.

Initially, we point out that the fact that the Navy may have had unsatisfactory experience with generators using Coen burners and another manufacturer's controls is not determinative in applying the legal standards outlined above. The question presented by the protest is whether the Navy has adequately justified its refusal to consider products other than Coen's that may be able to perform equally well. See 10 U.S.C. § 2723(c). This has nothing to do with whether Coen, as the Navy asserts, manufactures the best product.

After examining the record before us, we are of the opinion that the Navy has not justified exclusion of equipment of manufacturers other than Coen. The Navy merely states its position in conclusory form, and has not adequately explained its conclusions. For example, the Navy claims that it requires Coen burners and controls to ensure that they are compatible with existing equipment and are of proven reliability. Southern, however, states that other installations have combined LaMont-type generators with other than Coen burners and controls and that performance is not impaired. Southern also states that the existing generator was not specifically designed to be compatible with Coen burners or the controls that were installed on it. The Navy has not refuted these contentions.

Nor does the record substantiate the Navy's statement that the use of other manufacturers' equipment would involve extensive and expensive modifications to the generators with no assurance that the generators would work satisfactorily. Moreover, Southern, as noted above, states that it spoke with the generator manufacturer, who advised that its heater would work with other manufacturers' burners and controls if correctly specified and installed, and that it should not require modification.

The contracting officer has shown only that Coen burners and controls operate satisfactorily on generators of the same approximate age and type as the Naval Academy's at three other academic institutions. However, he has not shown that other responsible manufacturers could not supply a product that meets the Navy's needs, and that no other products will do, as required by 10 U.S.C. § 2723(c)(1). In the absence of such evidence or other information which would support the Navy's position, we do not believe the Navy has justified its specification for proprietary equipment. At a minimum, it appears that it would be less restrictive to require that the

burners and controls be made by the same manufacturer, rather than two different manufacturers, and that they be compatible with the International Boiler Works generator.

Therefore, by letter of today to the Secretary of the Navy, we are recommending that the requirement be resolicited, using functional, performance, or design specifications in accord with 10 U.S.C. § 2305(a)(1)(C).

In addition, we find Southern entitled to the costs of filing and pursuing the protest. The firm has successfully challenged an unduly restrictive specification, and, as a result of our recommendation, competition for the burners and controls will be enhanced. The rationale for the award of protest costs here is similar to that in cases where a protester successfully challenges an improper sole-source award. In such cases, we consider the incentive of allowing the protester to recover the costs of filing and pursuing the protest to be consistent with the broad purpose of the Competition in Contracting Act of 1984, 10 U.S.C. § 2301 (Supp. III 1985), which is to increase and enhance competition. See AT&T Information Systems, Inc., B-223914, Oct. 23, 1986, 66 Comp. Gen. ___, 86-2 CPD ¶ 447; Washington National Arena Limited Partnership, 65 Comp. Gen. 25 (1985), 85-2 CPD ¶ 435.

The protest is sustained.

for *Harry R. Van Cleave*
Comptroller General
of the United States