The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: T-L-C Systems

File: B-225496

Date: March 27, 1987

DIGEST

1. Protest that solicitation should be set aside for small business is denied where the record does not show that contracting officer abused his discretion in determining that there was no reasonable expectation of receiving proposals from at least two responsible small business concerns.

2. Sealed bid procedures are not appropriate where, based on a previous attempt to procure equipment, the contracting agency believes discussions are required.

3. Protest that solicitation requirement that fire alarm equipment be certified by nationally recognized testing laboratory as meeting National Fire Protection Association standards is unduly restrictive is denied where the requirement was included because of safety concerns and the protester offers no reason, other than its contention that competition is restricted, why the standards or certification should not be used.

DECISION

T-L-C Systems protests the provisions of request for proposals (RFP) No. DAAA03-86-R-0059, issued by the Army for a computer based radio signaling fire alarm system for the Pine Bluff Arsenal. T-L-C contends that the requirement should be set aside for small business and that the agency should have solicited sealed bids instead of competitive proposals. The protester also argues that a solicitation requirement that equipment be certified by a nationally recognized testing laboratory as meeting two specified National Fire Protection Association standards (NFPA) is unduly restrictive. We deny the protest.

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A number of proposals were submitted in response to the RFP. Award has been withheld pending our decision.

T-L-C argues that the requirement should be set aside for small business since on numerous occasions the government previously acquired similar fire alarm equipment from such firms. In this regard, the protester notes that there are at least four small business firms that can supply equipment that will meet the agency's needs. The protester contends that, of the seven firms listed on the agency's offeror's list, four are actually small businesses. Thus, according to the protester, there is sufficient small business competition to justify a set-aside.

As a general rule, the decision whether to set aside a particular procurement is within the discretion of the contracting officer. International Technology Corp., B-222792, June 11, 1986, 86-1 CPD ¶ 544. There are two situations, however, in which an agency is required to set aside a specific procurement for small business. One is where a contract has an anticipated value of $10,000 or less and is subject to small purchase procedures. Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.501(f) (1986). The other situation is where the item has been previously acquired successfully by the contracting office on the basis of a small business set-aside. FAR, 48 C.F.R. § 19.501(g).

Neither applies here. First, the procurement is valued at more than $10,000. Second, FAR, 48 C.F.R. § 19.501(g) requires that the same item must have been acquired successfully through a small business set-aside by the same "contracting office." Although T-L-C says that numerous other military facilities have procured the equipment on a set-aside basis, the protester does not allege that the contracting office at Pine Bluff Arsenal has ever purchased the equipment on a small business set-aside. Thus, the requirement for a repetitive set-aside does not apply. See Swan Industries, B-217199; et al., Mar. 25, 1985, 85-1 CPD ¶ 346. In all other cases, the decision to set aside a procurement is based on whether there is a reasonable expectation of receiving proposals from at least two responsible small business concerns and that award can be made at a reasonable price. FAR, 48 C.F.R. § 19.502-2. That determination basically involves a business decision within the broad discretion of contracting officials, and our review generally is limited to ascertaining whether those officials have abused that discretion. J.M. Cashman, Inc., B-220560, Nov. 13, 1985, 85-2 CPD ¶ 554.

T-L-C maintains that the Army has failed to identify or has misidentified several small business firms that might have been interested in submitting offers on a set-aside. The Army based its decision in large part on a prior procurement for identical equipment.1/ According to the agency, it received only one acceptable offer from a small business. We believe such prior related procurement history is an appropriate consideration on which to make the judgment whether a set-aside is warranted. J.M. Cashman, Inc., B-220560, supra. Further, the small business utilization representative concurred in the contracting officer's decision to not set aside the requirement. Although T-L-C maintains that in fact several small businesses would participate, including one which the agency considers to be large, without any evidence of successful participation of more than one small business in the prior procurement, we have no basis on which to question the Army's judgment.

T-L-C also argues that the agency should have solicited sealed bids instead of competitive proposals. According to the protester, other agencies have used sealed bidding to procure the same equipment. T-L-C says that competitive proposals should not be solicited where, as here, the government has clear, concise specifications.

The Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a) (Supp. III 1985), eliminates the previous statutory preference for formally advertised procurements (now "sealed bids"), and allows agencies to use the competitive procedure or combination of procedures that is best suited for the circumstances of the procurement. CICA further provides that sealed bids are appropriate only if the award will be based solely on price or price related factors and it will not be necessary to conduct discussions with offerors. Id. Thus, contrary to T-L-C's contention, the use of sealed bids is not limited to circumstances where clear and concise specifications cannot be written. Moreover, based on the problems it had in getting an acceptable proposal under the previous solicitation, the agency envisions the need to discuss proposals with the offerors. The protester has made no showing at all that the agency's judgment in this regard

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1/ The contract awarded pursuant to the prior solicitation was terminated because the agency concluded the awarded had not met the solicitation requirements. This protest concerns a resolicitation of the requirement.

is unreasonable, and we, therefore, will not question the use of negotiated procedures as authorized by CICA. T-L-C Systems, B-223136, Sept. 15, 1986, 86-2 CPD ¶ 298.

T-L-C maintains that only one manufacturer of fire alarm equipment is, as required by the solicitation, listed by Underwriters Laboratories, Inc. (UL) or Factory Mutual (FM) as conforming to NFPA standards 72D and 1221.2/ Thus, the protester concludes this requirement is unduly restrictive of competition.

In preparing a solicitation for supplies or services, a contracting agency must specify its needs and solicit offers in a manner designed to achieve full and open competition, so that all responsible sources are permitted to compete. 10 U.S.C. § 2305(a)(1)(A)(i) (Supp. III 1985). Consequently, when a solicitation provision is challenged as exceeding the agency's actual needs, the initial burden is on the procuring agency to establish support for its contention that the provision is justified. Daniel H. Wagner, Associates, Inc., 65 Comp. Gen. 305 (1986), 86-1 CPD ¶ 166. Once the agency establishes support for the challenged specifications, the burden shifts to the protester to show that the specifications in dispute are unreasonable. Information Ventures, Inc., B-221287, Mar. 10, 1986, 86-1 CPD ¶ 234.

We do not find that the protester has shown that the requirement that the equipment have UL or FM approval as meeting the two NFPA standards is unreasonable. In this regard, the Army argues that because of safety concerns UL or FM approval under both NFPA standards was included by the direction of the Army Materiel Command, Installations and Services Activity, in accordance with Army Regulation 420-90 relating to fire protection. The Army concedes that no manufacturer of the required equipment is currently listed by UL or FM as complying with both NFPA standards, although the Army maintains there is no technical reason why a system could not comply with both standards. While the protester

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2/ This position appears to be inconsistent with the protester's earlier contention that several small businesses could compete. We assume that the prior argument was based on the protester's assumption that the specification requirements it objects to here would be removed from the solicitation.

disagrees with the agency's conclusion, other than its contention that competition is restricted, it has not offered any reason why the standards or the certification should not be used. Nor does the protester contend that it could compete if the restrictions were removed. In view of the impact of this alarm equipment on the safety of personnel, and considering the fact that several offers have been received, we do not think that the protester has shown that the agency acted unreasonably in requiring its fire alarm equipment to be certified as meeting the two NFPA standards.

The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel