



The Comptroller General
of the United States

Washington, D.C. 20548

Hunter - PL

Decision

Matter of: ANGUS Chemical Company
File: B-227033, B-227034
Date: August 4, 1987

DIGEST

1. A contracting agency is not required as a matter of law to spend funds provided in a lump-sum appropriation act in a certain manner when the appropriations act itself does not so require, notwithstanding language cited by the protester in a congressional committee report about how Congress desired the funds to be spent.
2. Protest alleging that the agency failed to conduct meaningful price discussions is dismissed as untimely when raised more than 10 working days after the protester knew the basis for protest.

DECISION

ANGUS Chemical Company protests the decision of the Department of the Army to cancel request for proposals (RFP) No. DAAA21-86-R-0333 and instead award contracts for its requirements to two other companies under RFP DAAA21-86-R-0227. Both solicitations called for the award of fixed-price contracts to fabricate explosive agent subsystems for the Tactical Explosive System (TEXS). The TEXS consists of pipe to be buried in roadways throughout the Federal Republic of Germany, into which, in the event of an attack, the explosive agent can be pumped and detonated to create anti-tank ditches. RFP 0333 was for an explosive subsystem using nitromethane, and RFP 0227 was for a subsystem using blasting agent. The Army canceled RFP 0333 because it decided the nitromethane-based subsystem was too expensive.

ANGUS contends that the Army's cancellation of RFP 0333 violates a congressional requirement in appropriating TEXS funds that nitromethane-based explosive subsystems be tested for effectiveness alongside blasting agent subsystems and that the explosive agent chosen for the TEXS be compatible with the agent chosen by the Federal Republic of Germany for its counterpart to the TEXS. ANGUS further contends that the cost comparison upon which the cancellation was based was inaccurate, and that the Army failed to conduct

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meaningful discussions about ANGUS' initially proposed prices, which ANGUS alleges could have resulted in substantial price reductions in its best and final offer.

We deny the protest in part and we dismiss it in part.

BACKGROUND

RFP's 0333 and 0227 were issued simultaneously, calling for a two-phase procurement. Phase I was to consist of a 1-year period to develop the explosive subsystems. Phase II was to be for the actual production of the subsystems over a period of 5 years through the exercise of 1-year options. Each solicitation provided that award would be made to the technically acceptable proposal with the lowest total price. The solicitations also provided that the government reserved the right to make multiple awards, although the production options under Phase II would be exercised with only one contractor.

The Army received three proposals in response to RFP 0227 and one, from ANGUS, in response to RFP 0333. All the proposals were evaluated and found to be technically acceptable. ANGUS' proposal was determined to be too expensive and, therefore, RFP 0333 was canceled since the only acceptable proposal received was at an unreasonable price. Contracts were awarded under RFP 0227 to the two lowest priced offerors.

CONGRESSIONAL APPROPRIATION REQUIREMENTS

ANGUS contends that the Army, in canceling RFP 0333, has violated an explicit agreement with Congress that there would be side-by-side testing of blasting agent and nitromethane during the development phase of the explosive subsystems for the TEXS. ANGUS further contends that the cancellation of the RFP means the Army also will be violating an agreement with Congress that the degree of compatibility of each of the subsystems with the explosive subsystems chosen by Germany for its counterpart to the TEXS would be a factor in evaluating which type would be chosen for Phase II production. In this regard, ANGUS alleges that while no formal announcement has been made, German officials strongly have indicated to the Army that they prefer nitromethane over blasting agent. ANGUS cites several passages from recent reports from the House Committee on Appropriations to support its position as to Congress' intent and expectation.

The cited reports indeed indicate that the committees, in reporting on the funding for the projects in the Department of Defense Appropriation Act, 1986, Pub. L. No. 99-190,

99 Stat. 1185 (1985), expected that both nitromethane-based and blasting agent subsystems would be tested, and that the systems selected should be compatible with Germany's. Nevertheless, while views expressed in a statute's legislative history may be relevant in interpreting that statute, those views are not a substitute for the statute itself. AAA Engineering and Drafting, Inc. et al., B-225605, May 7, 1987, 87-1 C.P.D. ¶ 488. As we stated in our decision in LTV Aerospace Corp., 55 Comp. Gen. 307, 325 (1975), 75-2 C.P.D. ¶ 203:

" . . . as a general proposition, there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that history for the purpose of writing into the law that which is not there."

The fact is that the 1986 appropriation act contains no language specifying either side-by-side testing of blasting agent and nitromethane or compatibility with Germany's version of the TEXS. When Congress appropriates lump-sum amounts without statutorily restricting what can be done with those funds, the legal effect simply is that Congress does not intend to impose legally binding restrictions. See Newport News Shipbuilding and Dry Dock Co., 55 Comp. Gen. 812 (1976), 76-1 C.P.D. ¶ 136. Furthermore, while an agency may want to keep faith with Congress regarding how Congress wishes funds to be spent, it is the reality of the annual appropriations process, as well as nonstatutory arrangements, that provide the safeguard against abuse; as a strict legal matter, the agency still has the spending flexibility where Congress has not imposed any restrictions as a matter of law to deviate from what Congress had in mind where it is necessary or desirable. Id. Thus, there is no basis for finding that the Army is required by the statute to do these things in procuring explosive subsystems for the TEXS. The legislative history cited by ANGUS simply does not constitute binding law.

COST COMPARISON

ANGUS contends that the Army performed an inaccurate comparison of the price of its nitromethane subsystems under RFP 0333 with the prices of the blasting agent subsystems proposed by the two awardees under RFP 0227 because the agency focused on only the Phase I development costs rather than the total proposed prices for both Phases I and II. (ANGUS points out that the evaluation criteria of the two RFP's provided for award based on the total cost of Phases I and II.) ANGUS alleges that the proposed price of its subsystem is only substantially more expensive than blasting

agent at the developmental stage, which represents less than 3 percent of the total price, and that a comparison of the overall prices of both subsystems shows a much narrower difference in price between the two. In specific, ANGUS points out that the Army's abstract of proposed offers reveals a total price (both Phases) of \$151,738,543 for its nitromethane subsystems as opposed to \$135,797,950 for the highest-priced blasting agent awardee--only approximately a 10 percent difference.

ANGUS is correct that the Army, at least initially, did place great emphasis on the fact that ANGUS' proposed Phase I was twice as high as the proposed prices of the two blasting agent awardees. According to the record, this is because the Army had limited appropriated funds for the Phase I developmental effort and the cost of awarding a contract to ANGUS plus awarding one contract to a blasting agent offeror under RFP 0227 would have exceeded the Army's funding limitations.

Nevertheless, the record further shows that, contrary to ANGUS' contention, the Army ultimately did consider the overall prices of ANGUS' nitromethane-based subsystems and the blasting agent subsystems of the two awardees under RFP 0227 in reaching its decision to cancel RFP 0333. The record indicates that the abstract prices did not represent all the costs involved in the production of explosive subsystems for the TEXS. The RFP's provided that the total offered price would be determined by adding the development price to the prices for all five of the 1-year production options. However, the RFP's were amended to require that estimated quantities of sets of pipe for each subsystem and certain explosive support items also be furnished. In order to obtain an accurate analysis of the cost of the production options, the Army went beyond the prices shown on the abstract and evaluated the offerors' proposed unit prices for the sets of pipe and explosive support items. Including these items, the total price to the government for nitromethane-based subsystems greatly exceeds the prices proposed by the blasting agent awardees. We see no legal basis on which to object to this evaluation.

Finally, we note that ANGUS also objects to the fact that the Army did not take into account disposal costs in making its price comparisons. ANGUS alleges that, unlike nitromethane, once blasting agent is pumped into the buried pipes it cannot be reused and must be disposed of if it is not exploded. Based on the circumstances under which the explosive agent will be pumped into the pipes, however, we do not think that it was necessary for the Army to consider disposal costs. The record indicates that the intended tactical use of the TEXS requires rapid filling of the pipe

subsystems with explosive agent so that the TEXS can be employed immediately in the face of imminent hostilities. Since it is virtually certain that the explosive agent will be detonated once it is pumped into the pipes, there is no need to consider disposal costs.

PRICE DISCUSSIONS

ANGUS asserts that the Army's written discussions of ANGUS' proposed prices were inadequate because the agency failed to inform ANGUS that its prices were unrealistically high. ANGUS alleges that while the Army's written notification pointed out those prices in the firm's initial proposal which the Army thought could not be justified or which appeared excessive, the agency never told ANGUS directly that its prices were unreasonable or that its prices for the Phase I developmental effort were twice as high as the prices of the two blasting agent awardees. ANGUS argues that had the Army conducted meaningful discussions and informed ANGUS that its proposed prices were far too high to be considered, ANGUS would have been able to find areas of cost savings for the government and, in turn, would have substantially reduced its proposed prices.

The record shows that on April 14, 1987, ANGUS was notified in writing that the Army had decided not to proceed with RFP 0333 because nitromethane was considered not to be "cost effective." In our view, ANGUS should have known from this advice the basis for its protest of the extent of discussions. Our Bid Protest Regulations provide that a protest must be filed within 10 working days of the date the protester was aware or should have been aware of the basis of protest. 4 C.F.R. § 21.2(a)(2) (1987). Since ANGUS did not raise the issue of meaningful price discussions until the bid protest conference held in our Office on May 27, ANGUS' protest on this issue is untimely and will not be considered. See Contel Information Systems, Inc., B-220215, Jan. 15, 1986, 86-1 C.P.D. ¶ 44.

ANGUS' protest is denied in part and dismissed in part.

for *Stephen E. Eros*
Harry R. Van Cleve
General Counsel