The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Tek-Lite, Inc.

File: B-227843.2

Date: October 2, 1987

DIGEST

1. Addition of evaluation factor to offered prices for items manufactured under a value engineering change proposal (VECP), to reflect royalty fee government must pay for VECP items, is unobjectionable--even when the factor is added to offer of the firm that developed the VECP--since the evaluation factor represents an actual cost to the government of contracting for a VECP item.

2. Allegation that agency may accept nonconforming goods under contract is not for review since the General Accounting Office will not anticipate improper agency action.

3. Allegation that value engineering program is not being administered properly concerns policy matter not reviewable by General Accounting Office.

DECISION

Tek-Lite, Inc. protests the award of any contract under request for proposals (RFP) No. DLA400-87-R-5564, issued by the Defense Logistics Agency (DLA) for quantities of flashlights. The RFP invited offers based on a standard military specification or, alternatively, on a value engineering change proposal (VECP)1/, which modifies the standard specification and was developed by Tek-Lite under an earlier contract. Since Tek-Lite receives a $.415 royalty fee for each item furnished to the government based on the VECP, the RFP provided, under clause M24, for the addition of a $.415 evaluation factor to offers based on the

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1/ Value engineering is a Department of Defense program designed to encourage contractors to offer cost saving ideas on products being purchased for military use. If an idea is accepted, it is in the public domain, and the contractor receives one-half of the direct savings for 3 years in the form of royalty fees from the government.

VECP. Tek-Lite challenges the use of this evaluation factor. We deny the protest.

Tek-Lite first maintains that adding the clause M24 evaluation factor to its bid, since it is the firm that developed the VECP, is unfair because Tek-Lite then must reduce its bid by the amount of the evaluation factor to remain competitive with firms bidding items built to the standard specification. In effect, Tek-Lite complains, it is being forced to give up its VECP royalty payment to which it is entitled from a prior contract in order to win this and other future contracts based on its VECP.

We find that the clause M24 evaluation factor was properly included in the solicitation and applied to Tek-Lite's bid, since the $.415 royalty fee represents a cost to the government; notwithstanding that Tek-Lite developed the VECP, since the royalty will have to be paid to Tek-Lite if it receives the award based on furnishing VECP items, it is reasonable to add the royalty amount to Tek-Lite's bid for evaluation purposes. See Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.605 (1986) (price or cost to the government shall be included as an evaluation factor in every source selection). Tek-Lite correctly points out that evaluation of royalty fees in this manner is not mandatory and that many contracting agencies do not follow this approach. DLA obviously was determined, however, that evaluating royalty fees here is in the government's best interest, and we do not consider the evaluation of bids based on the actual total cost to the government to be unfair to any bidder.
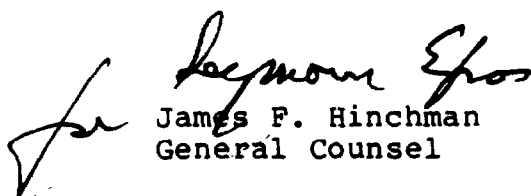
Tek-Lite also argues that procurements, such as the one here, that have allowed bids on either the standard specification or on the VECP, are not being conducted properly. Specifically, Tek-Lite claims that some firms have been bidding to furnish items under the standard specification to avoid application of the evaluation factor and then, after receiving the award on this basis, actually have furnished the less expensive VECP items. Tek-Lite claims that by accepting VECP items where the contractor's bid was based on the standard specification (and no evaluation factor), the agency is thwarting equal competition by Tek-Lite and other firms that bid honestly on a VECP basis. Tek-Lite seems to argue that this alleged problem should be solved by eliminating the evaluation factor. We reject this argument.

Tek-Lite has presented no independent evidence, not even specific contract numbers, showing that DLA improperly has accepted delivery of VECP items from firms awarded contracts

to furnish items under the standard specifications.
Moreover, DLA denies that it has accepted such nonconforming
items, and further points out that, as a practical matter,
it has not had the opportunity to do so since Tek-Lite's
VECP was not approved until September 1986. See generally
Scipar, Inc., B-220645, Feb. 11, 1986, 86-1 CPD ¶ 153.
Further, even had Tek-Lite shown that the government
previously had accepted nonconforming goods, we would find
no basis for assuming that it would do so under this
contract; our Office does not consider protests that
anticipate improper agency action. Western States
Management Services, Inc., B-225125, Jan. 6, 1987, 87-1 CPD
¶ 14. We point out, finally, that the remedy for acceptance
of nonconforming goods would be for the government to stop
the practice, not to eliminate the evaluation factor which,
as discussed above, we find unobjectionable.

Much of Tek-Lite's protest derives from the firm's
dissatisfaction with the government's administration of the
value engineering program, specifically, its view that firms
developing VECPs, instead of being adequately rewarded, are
being harmed by use of the evaluation factor. Our bid
protest functions does not encompass such policy decisions,
however; we generally address only protest issues involving
specific procurements, and will not object to agency actions
so long as they are consistent with statutory, regulatory,
and other legal requirements. Dictaphone Corp., B-216264,
et al., Feb. 25, 1985, 85-1 CPD ¶ 229. We thus will not
consider Tek-Lite's argument that the value engineering
program should be operated differently.

The protest is denied in part and dismissed in part.

James F. Hinchman
General Counsel