



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Global Diesel Systems, Inc.
File: B-229508.2
Date: May 31, 1988

DIGEST

1. Protest is dismissed in part where action taken by the agency subsequent to the filing of the protest has rendered the issues raised therein academic. The General Accounting Office (GAO) will not consider an issue of protest where the agency has altered its actions so that no useful purpose would be served by GAO's decision.
2. Protest that agency should have conducted discussions to clarify whether protester's offered price included duty that should not have been included is denied since agency properly inferred that no duty was included based upon solicitation clause not to include duty.

DECISION

Global Diesel Systems, Inc., protests the contract award to Fluid Mechanics, Inc., under request for proposals (RFP) No. DLA700-87-R-2067 issued by the Defense Construction Supply Center (DCSC), Defense Logistics Agency, for the purchase of fuel injector nozzles. Essentially, Global argues that DCSC has unduly delayed the technical evaluation of its alternate part, that the agency made award to an offeror based upon the use of a part not listed as an approved source in the solicitation, and that the lack of discussions resulted in an award to other than the lowest overall cost offeror.

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

The RFP was issued on May 12, 1987, and listed three approved sources but allowed offers of alternate parts if it could be established that they were equal to the approved parts. Global's alternate part offer was rejected because prior approval of Global's part had been rescinded as it was based on a commercial cross-reference list in connection with another solicitation, and the approval had not been authorized by the Engineer Support Activity (ESA). (DCSC decided in 1984 or 1985 that all alternate offers had to be forwarded to the ESA for approval). Global filed a protest

042322

with our Office based upon this rejection but withdrew the protest after it reached an agreement with DCSC that if Global was the lowest offeror after receipt of best and final offers (BAFOs), award would be delayed pending a technical evaluation by the ESA of its part. However, Fluid Mechanics subsequently offered the lowest unit price of \$28.50 while Global offered a unit price of \$29 and, accordingly, award was made to Fluid Mechanics.

Global filed this protest alleging delays in the technical evaluation of its part, improprieties in Fluid Mechanic's use of an unlisted approved source, and a failure by the agency to conduct discussions. With regard to discussions, Global contends that its price includes a duty charge which DCSC should have permitted Global to clarify during discussions as to whether its offer included or excluded the import duty fee, despite the RFP's "duty-free entry" clause which admonishes offerors to not include duty charges in their contract price for qualifying country end products. It is Global's contention that discussions would have revealed that Global's contract price included duty charges and, once subtracted, would make Global's offer lower than Fluid Mechanic's offer.

After Global's protest was filed, DCSC reviewed its approval of Fluid Mechanic's part (not listed as an approved source in the RFP)^{1/} and determined that the previous approval had been incorrectly granted because it had not been submitted to the ESA for testing. Inasmuch as the awardee's part was improperly accepted as an approved source, a stop work order has been issued and will remain in effect until the evaluation of both Fluid Mechanic's and Global's part is completed. If the awardee's part is determined to be technically acceptable, the stop work order will be canceled and Fluid Mechanics will be directed to proceed with performance. If the awardee's part is determined to be technically unacceptable, its contract will be terminated for the convenience of the government and the award will be made to Global, provided its part is determined to be technically acceptable.

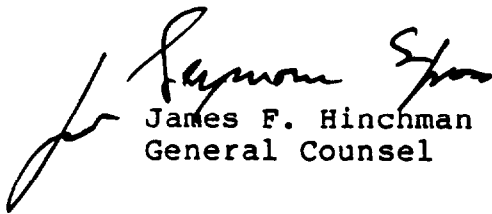
Because of the measures taken by DCSC after the filing of Global's protest, we believe the issues raised by Global concerning the technical evaluation of its part and failure to list an approved source have been rendered academic. Global will not be prejudiced in this procurement since its part is being considered for technical approval, and the failure to list the awardee's part as an approved source

^{1/} We accept the agency's explanation that failure to list Fluid Mechanic's part was inadvertent.

would have no effect on Global's proposal.^{2/} Moreover, we will not consider issues of protest where the agency has altered its actions so that no useful purpose would be served by our decision. See Abbott Laboratories, et al., B-223952, et al., Aug. 25, 1986, 86-2 CPD ¶ 222.

We also find Global's argument concerning lack of discussions to be without merit as the "duty-free entry" clause contained in the solicitation expressly and unambiguously states that no amount of duty will be included in the contract price of qualifying country end products. As Global's offered part is from a qualifying country, the Netherlands, no duty should have been included in the price and no offeror should have been reasonably misled. Global argues that in four of the five most recent DCSC contracts obtained by Global with this clause, the government obtained a duty-free certificate on only one occasion and only after being requested by Global to do so. Global also states that on that one occasion the government took a reduction in contract price reflecting the value of the import fee. We do not find Global's arguments concerning past practices of DCSC with respect to duty charges to be persuasive. The fact that the agency may or may not have improperly applied the "duty-free entry" clause in other procurements is irrelevant and does not justify repetition of the error. See Military Waste Management, Inc., B-228862, Oct. 30, 1987, 87-2 CPD ¶ 424. Accordingly, we deny this protest ground.

Since the protest is dismissed in part and denied in part, Global's claim for costs of preparing its proposal and pursuing the protest, including attorney's fees, is denied.



James F. Hinchman
General Counsel

^{2/} We note that the awardee's part is manufactured exclusively for Fluid Mechanics and, therefore, Global would not be able to offer this part in any event.