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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Engineered Air Systems, Inc.

File: B-236932

Date: January 19, 1990

DIGEST

1. Contention that agency should have held discussions with protester before requesting best and final offers so that protester could revise its proposal to correct any deficiencies is considered abandoned where agency reported that discussions were not necessary because protester's initial proposal was technically acceptable, and protester did not rebut or otherwise comment upon agency's assertion.

2. Protest is considered timely where it was filed in the General Accounting Office (GAO) within 10 working days after agency's initial adverse action on agency-level protest (issuance of amendment demonstrating that agency was not going to delete solicitation clause as requested by protester). Even though agency denied agency-level protest by letter more than 10 working days before protester filed protest with GAO, where protester denies receipt of agency's letter and record contains no evidence to show receipt by protester, we resolve doubt concerning timeliness in favor of protester.

3. Offeror whose direct economic interest would be affected by award of a contract under protested procurement is an interested party for purposes of protesting that preproduction evaluation clause deviates from Changes clause required by Federal Acquisition Regulation and should be deleted from solicitation.

4. Preproduction evaluation clause requiring contractor to evaluate production drawings/specifications and to suggest and accept engineering changes for certain purposes before beginning production with no increase in price or delay in delivery is to be read in conjunction with Changes clause which was incorporated into the solicitation as required by the Federal Acquisition Regulation (FAR), and therefore does not represent a deviation from the FAR Changes clause or a

new procurement regulation requiring publication for public comment.

5. Use in production contract of preproduction evaluation (PPE) clause in order to shift burden to contractor to evaluate production drawings/specifications and to suggest and accept engineering changes for certain purposes before beginning production with no increase in price or delay in delivery is proper where the contractor will be compensated for its PPE efforts as part of the overall contract price.

DECISION

Engineered Air Systems, Inc. (EASI), protests award of any contract pursuant to request for proposals (RFP) No. DAAA09-89-R-0060, issued by the Department of the Army for 110 trailer-mounted weld shops and 9 weld machines (a component of the weld shops). EASI protests that the Army improperly requested best and final offers (BAFOs) without first conducting meaningful discussions, thereby depriving EASI of a fair opportunity to identify and correct deficiencies in its proposal. EASI also contends that the solicitation improperly incorporated a preproduction evaluation (PPE) clause that deviates from the Changes clause set forth in the Federal Acquisition Regulation (FAR) that was also incorporated into the RFP.

We deny the protest.

Issued by the United States Army Armament, Munitions and Chemical Command on May 30, 1989, the RFP contemplated award of a firm, fixed-priced contract. The closing date for receipt of initial proposals was August 18. The RFP was amended several times, but only amendments 0001, 0003, and 0004 are pertinent.

Amendment 0001 was issued on June 30; among other things, this amendment incorporated clause H-23, entitled "Basic Preproduction Evaluation Contract Clauses (PPE)," into the RFP. In its preamble, the clause stated:

> "Prospective offerors are cautioned that, although all of the engineering drawings included in the technical data have been prepared and checked in accordance with accepted engineering practices, said technical data may require updating or correction for compatibility with the assembly and performance requirements of this contract. For instance, some items described by commercial

> or government part numbers may now be obsolete or otherwise unavailable, and government approval of contractor submitted ECP's [engineering change proposals] is required prior to use of substitute components or assemblies."

Consequently, the PPE clause required the contractor to perform a detailed evaluation of all technical data furnished under the contract in order to identify and propose correction of "any discrepancy, error, omission, or other problem which may preclude the attainment of required performance." The clause further directed that the preproduction evaluation and all problem documentation and related activities, including preparation and submission of ECP's, should not be separately priced but should be included in the overall price quoted for the entire production contract. However, offerors were required to list for informational purposes the incremental price increase ascribed to the PPE clause requirements.

The PPE clause also listed the types of technical data changes the contractor would be required to make as part of the preproduction evaluation as those essential for:

1. attainment of functional or performance requirement of the end item specifications;

2. compatibility between quality assurance provisions and the physical or functional requirements of the specifications and drawings;

3. compatibility between engineering parts lists and other technical data;

4. correction of impossible or commercially impractical manufacturing requirements;

5. correction of impossible or commercially impractical assembly requirements;

6. procurement of physically and functionally suitable parts and materials; and

7. correction of mutually recognized errors in the end item specifications, where such correction will provide greater compatibility with the existing detail design.

The PPE clause stated that any other changes to the technical data would be processed in accordance with the Changes clause of the contract.

Amendment 0003 was issued on July 19. This amendment specifically asked offerors to present any technical data deficiencies that were not correctable under the PPE clause or any questions pertaining to the requirements of the clause. In response, by letter of July 28, EASI expressed several concerns it had regarding the PPE clause. Among other things, EASI expressed concern that the PPE clause would work to the competitive advantage of the incumbent contractor, because the incumbent is the only contractor that knows what the specific defects are in the technical data, while all other offerors would have to offer prices not knowing what defects, if any, they would have to correct at their own expense. EASI asked the Army to correct any known defects in the technical data and to delete the PPE clause from the solicitation. By letter of August 16, the procuring contracting officer declined to delete the PPE clause, explained that the Army was providing level three drawings so that the contractor could manufacture any parts that had previously been source-controlled, and explained that the Army was expecting the contractor to update the technical data package and incorporate changes that do not affect form, fit, or function as part of the preproduction evaluation effort.

After initial proposals were submitted, amendment 0004 was issued on September 7. This amendment provided that negotiations would close with receipt of BAFOs. The amendment also attempted to clarify the requirements of the PPE clause as follows:

> "PPE is required on sole source items to the extent that the information provided in the technical data package is verified. It is not intended that the design of the sole source part be evaluated."

On September 14, EASI filed its protest in our Office. Five offerors, including EASI, submitted BAFOs by the September 20 closing date.

We will not consider the protester's argument that the Army should have held discussions so that EASI could have identified any deficiencies and revised its proposal accordingly. The Army reported that EASI's initial proposal was considered technically acceptable and, therefore, there was no need to hold discussions with the firm. EASI filed comments on the Army's report, but did not rebut or

otherwise comment upon the Army's assertion that discussions were not necessary. Consequently, we consider this issue to be abandoned. See Rhine Air, B-226907, July 29, 1987, 87-2 CPD ¶ 110.

With regard to EASI's challenge to the PPE clause, the Army first argues that EASI's protest is untimely. According to the Army, since the PPE clause was incorporated into the RFP by amendment 0001 (issued on June 30), EASI was required to protest before the August 18 closing date for receipt of initial proposals in accord with our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1989). Since EASI did not file its protest in our Office until September 14, the Army requests that we dismiss the protest as untimely.

We find that EASI's protest is timely. As noted above, in response to amendment 0003, EASI complained about inclusion of the PPE clause to the contracting activity by letter of July 28 and specifically asked that the PPE clause be deleted. While EASI did not specifically state that it was protesting at that time, we construe EASI's letter as a protest because it clearly articulated EASI's concerns about the PPE clause and specifically suggested a remedy (i.e., deletion of the clause) to the Army. Thus, EASI filed what we consider to be a timely protest with the contracting agency in accord with our regulations, 4 C.F.R. § 21.2(a)(1), (3).

While the Army responded to EASI's agency-level protest by letter of August 16, EASI claims that it had never received the Army's letter. It is our practice to resolve doubts about timeliness in favor of the protester. See Fairfield Mach. Co., Inc., B-228015, B-228015.2, Dec. 7, 1987, 87-2 CPD ¶ 562. As there is no evidence in the record to show that EASI actually received the Army's denial of its protest, we regard EASI's protest as timely filed, because it was filed within 10 working days after the Army's first adverse action on EASI's protest (i.e., the September 7th issuance of amendment 0004 clarifying the PPE clause and demonstrating that the Army would not delete the clause as requested). See 4 C.F.R § 21.2(a)(3).

The Army next argues that EASI is not an interested party to maintain the protest. The Army reports that EASI's evaluated price is the highest of the five offers submitted, several million dollars higher than the lowest priced offer. Moreover, the Army has provided for our in camera review an abstract of the BAFOs which shows that at least three of the other offerors took no exception to the RFP's requirements. Accordingly, the Army argues that, since the RFP indicated that the contract will be awarded on the basis of the

lowest priced, technically acceptable offer, EASI does not have any prospect of winning this competition and, therefore is not an interested party. We disagree.

EASI is arguing that the RFP is defective, that the PPE clause should be deleted, and that the competition should be reopened on the basis of the amended requirement. If we were to sustain EASI's protest and recommend that the competition be reopened after the PPE clause were deleted, EASI would be able to compete on the basis of the relaxed requirements. Accordingly, EASI is an offeror whose direct economic interest would be affected by award of a contract under this procurement and, therefore, is an interested party for the purpose of protesting. See 4 C.F.R. § 21.0(a).

EASI protests that inclusion of the PPE clause is improper because it deviates from or modifies the Changes clause, FAR § 52.243-1, that is required to be included in all fixed-priced contracts in accord with FAR § 43.205(a)(1). EASI points out that, under the Changes clause as set forth in the FAR, a contractor is entitled to an equitable adjustment in the price or delivery schedule for changes to drawings, designs, or specifications, when such changes cause an increase or decrease to the cost of, or the time required for, performance of the work. EASI argues that the PPE clause modifies the Changes clause, because the PPE clause requires the contractor to suggest ECP's and accept the types of changes listed in the PPE clause without increase in the price or delay in delivery. EASI further contends that, because the PPE clause deviates from the Changes clause, the Army was required to, but did not, publish the deviation in the Federal Register for public comment as a new regulation.

We are not persuaded by the protester's arguments. The RFP specifically incorporates both the Changes clause (FAR § 52.243-1) and the Disputes clause (FAR § 52.233-1) as set out in the FAR. It is clear from reading the solicitation as a whole that the PPE clause is intended to be read in conjunction with the Changes clause, and that the contractor will be paid for any changes to specifications, designs, or drawings under either the PPE or the Changes clause. To the extent that the contractor does not agree with the contracting officer that a particular change is covered under the PPE clause, the contractor may make a claim for an equitable adjustment in price or other relief in accord with the procedure set out in the Disputes clause. Thus, we do not believe that the Army has modified the Changes clause by adding the PPE clause or that the PPE clause represents a

deviation from the FAR-mandated clauses. See Varo, Inc., B-193789, July 18, 1980, 80-2 CPD ¶ 44, where we rejected a protester's argument that a PPE clause constituted a change to the standard Changes clause.

With regard to the rationale for including the PPE clause in the RFP, the Army reports that the technical data package consists of approximately 1,500 drawings that are being used on 2 existing contracts for this item, and that neither contract has produced an end item as yet. Further, the Army states that it is not aware of any deficiencies in the technical data requiring correction in order to meet the assembly and performance requirements of the end item being procured. However, in recognition that the technical data may contain some errors, the Army has attempted to obligate the contractor to correct any such errors and, in essence, to bear the risk that it will discover any such errors before production and will be able to produce the required end items.

We have examined and approved the use of similar clauses on several occasions in the past. In AMF Inc. Elec. Prods. Group, 54 Comp. Gen. 978 (1975), 75-1 CPD ¶ 318, we upheld the use of contract provisions that required the contractor to examine the technical data package and to find and correct all patent defects therein as part of the statement of work for a fixed-price contract. We held that it was reasonable for the agency to pay a contractor as part of the fixed-price bid for the contractor's best engineering efforts in reviewing the technical data package in an effort to assign the risk of defective specifications to the contractor rather than to the government and to avoid the prospect of extensive litigation that had resulted in the past because of defective specifications. See also Varo, Inc., B-193789, supra. In Electrospace Corp., 52 Comp. Gen. 219 (1972), we approved the use of a "Production Evaluation Concept" clause that was strikingly similar to the clause in the present RFP; in fact, the clause in Electrospace Corp. included the first six types of changes that are listed in the present PPE clause as changes for which the contractor would receive no additional compensation above the fixed price the contractor had bid.

We have also held that the fact that including this type of provision in an RFP can be construed as shifting to the contractor assumption of the risk of deficiencies in government specifications and drawings does not of itself render the solicitation provision invalid. See International Telephone and Telegraph Corp., Electron Tube Div., B-169838, B-169839, July 28, 1970. Where, as in the present case, the agency reports that it is not aware of any

specific defects in the technical data and drawings, but nonetheless acknowledges that the technical data package may contain defects, we think that use of the PPE clause is appropriate. Furthermore, we note that the Army has attempted in amendment 0004 to make it clear that the PPE clause will not obligate the contractor to evaluate the design of source-controlled parts. Thus, we conclude that the Army's use of the PPE clause is proper.

The protester argues that the Army's reliance on several of the above-cited cases is inapposite because those cases predated the implementation of the FAR. We do not agree. The above cases were, in fact, decided under the Armed Services Procurement Regulation, the precursor to the FAR. However, the legal principles upon which those protests were based have not changed. Therefore, we believe the cases discussed above provide ample precedent supporting our finding that the Army's use of the PPE clause is proper.

Finally, after reviewing the abstract of offers in camera, we do not think that the protester has been competitively prejudiced in the present competition by inclusion of the PPE clause. While we are not at liberty to divulge the fixed prices contained in those offers, we note that EASI's offered price was significantly higher than the lowest offer. Moreover, EASI's offer stated that the amount it was charging for the PPE-related requirements was approximately one-fourth of the difference between EASI's total price and the lowest offeror's total price. Thus, it appears that even if the RFP did not contain the PPE clause, EASI would not have lowered its price sufficiently to have displaced the lowest priced offer. See KET, Inc., B-190983, Dec. 21, 1979, 79-2 CPD ¶ 429.

The protest is denied.

James F. Hinchman
General Counsel