J. Formica

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: AUTOFLEX, Inc.

File: B-240012

Date: October 16, 1990

Luis D. MacDonald for the protester.
Roger D. Waldron, Esq., Office of the General Counsel, General Services Administration, for the agency.
John Formica, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Solicitation issued by the General Services Administration to meet the requirements of the Alternative Motor Fuels Act of 1988 may properly restrict competition for the supply of alternative fuel motor vehicles to original equipment manufacturers because the restriction is consistent with the requirements of the Act.

2. Protester that cannot comply with solicitation requirement that alternative fuel motor vehicles be supplied by original equipment manufacturers is not an interested party to challenge other solicitation provisions.

DECISION

AUTOFLEX, Inc. protests its exclusion from the competition under request for proposals (RFP) No. FCAP-G7-12391-SN issued by the General Services Administration (GSA) for the purchase of alternative fuel motor vehicles. AUTOFLEX, a firm which converts motor vehicles for operation on natural gas, argues that limiting the competition to the original equipment manufacturers (OEMs) of the vehicles is not necessary and unduly restricts competition.

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

BACKGROUND

The Alternative Motor Fuels Act of 1988 requires that the Department of Energy (DOE) ensure that the federal government acquire for its use the maximum practicable number of alternate fuel automobiles and light trucks. According to the statute, these vehicles must be: (1) alcohol powered; (2) dual energy (alcohol and gasoline or diesel powered);

(3) natural gas powered; or (4) natural gas dual energy (natural gas and gasoline or diesel powered). 42 U.S.C. § 6374(a)(1) and (g) (1988). The Act further provides that the vehicles be supplied by OEMs. 42 U.S.C. § 6374(a)(3). Subsequent to the passage of the Act, DOE and GSA entered into an interagency agreement whereby GSA is responsible for the acquisition of the alternative fuel vehicles.

GSA issued the RFP on May 14, 1990, for the purchase of automobiles in the four alternative fuel configurations listed in the Act. The solicitation contained one line item per each type of vehicle, for a total of four line items. The RFP required, in accordance with the Act, that the vehicles be supplied by OEMs. The solicitation provided that the term OEM "means a motor vehicle manufacturer who is responsible for the vehicle fuel economy under the mandatory provisions of 49 C.F.R. Part 531. Passenger Automobile Average Fuel Economy Standards." This regulation in turn cites the Motor Vehicle Information and Cost Savings Act, which states essentially that the term "manufacturer" means to be "engaged in the business of manufacturing automobiles", and that firms which "produce or assemble" automobiles are considered to be automobile manufacturers. 15 U.S.C. §§ 2001(8) and (9) (1988). As such, GSA's definition of OEM in the solicitation refers to firms which produce or assemble automobiles. According to the agency, this limits the competition to firms like Ford, Chrysler, and General Motors, which manufacture motor vehicles.

After AUTOFLEX filed its initial protest, the agency amended the solicitation to provide that the award for each line item could be split with the first low offeror receiving 60 percent of the award for the line item, and the second offeror receiving 40 percent of the award for the line item. The agency also on July 13 executed a justification and approval (J&A) for use of other than full and open competitive procedures, citing 41 U.S.C. § 253(c)(3) as the authority to limit the competition to OEMs and to provide for the award to be split among two or more firms. This provision allows the head of an executive agency to use other than competitive procedures in awarding a contract to maintain a facility, producer, manufacturer, or other supplier available for furnishing property or services in case of a national emergency or to achieve industrial mobilization.

GSA explains that the development of an industrial base for alternative fuel vehicles consisting of the existing auto manufacturers will help reduce the country's dependence on imported oil, which is necessary for the achievement of long term energy security, and will result in important environmental benefits as alternative fuel vehicles produce less air pollution than vehicles powered by oil-based fuels.

The agency asserts that it is necessary to restrict the competition for such vehicles to OEMs because only these sources have the manufacturing and distribution capabilities necessary to achieve industrial mobilization. Most important, GSA points out that it is necessary to restrict the competition to OEMs because of the requirement in the Alternative Motor Fuels Act that the alternative fuel vehicles specified in the solicitation "be supplied by original equipment manufacturers." 42 U.S.C. § 6374(a)(3).

AUTOFLEX objects to the restriction contending that an industrial base for the production of alternative fuel vehicles can be achieved without restricting the competition to OEMs. The protester further argues that the solicitation should be amended to permit offers from firms other than manufacturers who can meet the government's requirement. Finally, the protester disagrees with the agency's position that the Act requires that the vehicles be supplied by OEMs in all instances, contending that the restriction is only meant to be applicable "to the extent practicable."

ANALYSIS

We think that the agency's explanation that the restriction of this acquisition to OEMs will stimulate an industrial base of alternate vehicles is reasonable.1/ More important, we believe that the solicitation restriction was a proper one as it reflects the requirements of the Alternate Motor Fuels Act.

It is clear from the legislative history of the Act that Congress intended that it stimulate the major automobile manufacturers to produce and commercialize alternate fuel vehicles. For example, in discussing the Act, the Conference Report states that the [Conferees intended that] funds to be appropriated pursuant to the Act will "[a]llow auto manufacturers a consumer test of alternate fuel vehicles prior to their general sale to the public." H.R. Rep. No. 929, 100th Cong., 2d Sess. 16, reprinted in 1988 U.S. Code Cong & Admin. News 3029,3030. Further, in the same report the Conferees state: "Encouraging wide participation by manufacturers in the program will help them gain experience and refine technology." Id. We think that the definition of OEM as

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1/ The protester argues that the J&A is invalid as it was executed after the closing date for receipt of proposals. Since a J&A citing 41 U.S.C. § 253(c)(3) need only be executed prior to award, the fact that it was executed after the closing date does not affect its legal sufficiency. See 41 U.S.C. § 253(f)(1).

developed by GSA is consistent with the Act and therefore we have no legal basis upon which to recommend that the restriction be changed.

Nevertheless, AUTOFLEX argues that even if the definition was correct the presence of the phrase "[t]o the extent practicable" in 42 U.S.C. § 6374(a)(3) limits the agency's use of the restriction. The phrase appears in the following sentence:

> "To the extent practicable, both vehicles capable of operating on alcohol and vehicles capable of operating on natural gas shall be acquired in carrying out this subsection, and such vehicles shall be supplied by original equipment manufacturers," 42 U.S.C. § 6374(a)(3).

It is clear that the phrase "[t]o the extent practicable" was not intended to refer to the source of the vehicles, but instead pertains to the acquisition of both alcohol and natural gas powered vehicles.

The protester also argues that the solicitation should provide for the lease of the vehicles and complains that the method of award clause is unclear. In view of our determination that the solicitation was properly restricted to OEMs, we find that AUTOFLEX is not an interested party to object to these solicitation provisions. See Bid Protest Regulations, 4 C.F.R. §§ 21.0(a) and 21.1(a) (1990); Infection Control and Prevention Analysts, Inc., B-238964, July 3, 1990, 90-2 CPD ¶ 7.

The protest is denied in part and dismissed in part.

James F. Hinchman
for General Counsel