



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Diverco, Inc.
File: B-241978
Date: March 12, 1991

Charles E. Raley, Esq., Israel and Raley, for the protester.
Thomas M. Hillin, Esq., Defense Logistics Agency, for the agency.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that solicitation failed to incorporate Department of Defense Federal Acquisition Regulation Supplement § 208.7801 et seq. requirement for domestic forgings is denied where contracting agency properly was granted a deviation from the regulation.

DECISION

Diverco, Inc. protests request for proposals (RFP) No. DLA700-91-R-0008, issued by the Defense Logistics Agency (DLA), Defense Construction Supply Center (DCSC), for tie rod assemblies. Diverco contends that the RFP was defective because it did not incorporate clause I-81, Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 252.208-7005 (1988 ed.), Required Source for Forging Items, which generally requires the use of domestically manufactured forgings in various automotive parts on combat support vehicles. See DFARS § 208.7801 et seq. This regulation implements Department of Defense (DOD) policy to maintain the defense mobilization base for domestically forged items. See Diverco, Inc; Metalcastello s.r.l., B-240639.2 et al., Dec. 21, 1990, 90-2 CPD ¶ 512.

We deny the protest.

The RFP was issued by DCSC on October 17, 1990, to obtain tie rod assemblies for combat support AM General M998 series trucks. The RFP did not contain clause I-81. On November 6, Diverco protested that clause I-81 should have been included in the RFP, since the tie rod assemblies are covered by DFARS § 208.7801 et seq. Proposals were received on November 16 without the clause being in the RFP. The Defense Acquisition

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Regulatory Council granted a class deviation dated December 7 to DLA for a period of 3 years from the requirement in DFARS § 208.7801 et seq. that domestic forgings be used in designated automotive spare parts.

Diverco contends that notwithstanding the class deviation, clause I-81 is still applicable because the RFP was issued prior to the effective date of the deviation. Diverco also maintains that the basis for the class deviation is suspect, given the specific mechanisms contained in DFARS for overriding the domestic forging requirement.^{1/}

DCSC reports that the deviation was sought and granted because DCSC had encountered serious problems implementing clause I-81 in previous procurements.^{2/} DCSC advises that many of the automotive spare parts it purchases are "common use" spare parts that may be used on multiple vehicles. Thus, DCSC advises that it was a difficult decision and a significant administrative burden to determine when solicitations are issued whether or not automotive spare parts would be used in combat or combat support vehicles.

DCSC further reports that while clause I-81 was mistakenly omitted at the time the RFP was issued, no corrective action was taken because of the agency's pending request for a class deviation. Further, DCSC reports that while it did receive offers under the RFP, it intends to recompet the procurement among previously interested contractors, including Diverco, because of this pending protest and deviation request.

Here the record shows that DCSC properly processed the class deviation in accordance with applicable regulations. See DFARS subpart 201.4. The deviation is not inconsistent with any statute, but is a properly authorized deviation from the DOD policy intended to maintain the domestic mobilization base.

1/ For example, DFARS § 208.7803 provides that clause I-81 may be omitted where (1) the equipment does not contain a listed forging item, (2) when purchases are made overseas for overseas use, and (3) if the quantity being acquired is greater than that necessary to maintain the domestic defense mobilization base (provided the quantity above mobilization base needs constitutes an economical buy quantity).

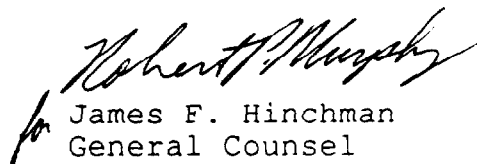
2/ For example, see Diverco, Inc; Metalcastello s.r.l., B-240639.2 et al, supra, where we held clause I-81 was applicable to various gearshaft spurs and helical gears on combat or combat support vehicles and that DLA made improper awards for these items without requiring that this clause be applied.

for forged items. The deviation is for a limited period of 3 years. Under the circumstances, we do not find the propriety of the deviation to be objectionable. See Coliseum Constr., Inc., 67 Comp. Gen. 234 (1988), 88-1 CPD ¶ 128.

We also find that DCSC can use this deviation as authority to omit clause I-81 from this RFP, even though the deviation had not been authorized when the RFP was issued and initial proposals were received. DCSC was cognizant of the waiver request when proposals were received and Diverco and other offerors will be provided the opportunity to submit proposals with the omission of clause I-81 properly authorized. See Logistical Support, Inc., B-212218; B-212219, Feb. 23, 1984, 84-1 CPD ¶ 231.

Diverco argues that since DCSC admits that clause I-81 was initially required to be in the RFP, its protest should be sustained based on the agency's own admission. Diverco thus contends that it is entitled to the reasonable cost of filing and pursuing the protest, including attorneys' fees. The applicable regulation prohibits defense agencies from entering into contracts for certain forgings without clause I-81. DCSC did not do so, and is not now required to do so because it obtained authority to deviate from the regulations. Thus, no violation of law or regulation occurred warranting the award of protest costs. Moreover, DCSC represents that, although Diverco did not submit an offer in response to the RFP, as stated above, it will be given that opportunity when a new closing date for receipt of proposals is established. Under the circumstances, the protester was not prejudiced by DCSC's deletion of clause I-81 before it obtained authorization. Consequently, the protester presents no basis for the reimbursement of costs.

The protest is denied.


James F. Hinchman
General Counsel