L. Glass

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Todd Pacific Shipyards Corporation

File: B-242311

Date: March 29, 1991

Hans K. Schaefer for the protester.
George G. Amir for NKF Engineering, Inc., and Carl S. Holland for American Development Corporation, interested parties.
Paul Fisher, Esq., Department of the Navy, for the agency.
Linda C. Glass, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that solicitation for a modular elevated causeway system discriminates against West Coast offerors by designating Norfolk, Virginia, as the exclusive test site rather than allowing the use of San Diego, California, as an alternative test site, is denied where the agency reasonably concluded that the site chosen had the best test environment to demonstrate the required design parameters.

2. Protest that agency showed favoritism toward a potential offeror by relaxing a requirement is denied where record shows that agency relaxed the requirement after determining that the use of a less expensive substitute would meet its minimum needs.

3. Protest that solicitation should provide for a cost-reimbursement contract is denied where there is no evidence that the agency's choice of firm, fixed-price contract type is unreasonable.

4. Agency properly excluded solicitation for a modulated elevated causeway system from domestic shipyard restriction of 10 U.S.C. § 7309 (1988), since restriction applies to procurement of any vessel by a military department, and agency reasonably concluded that required system was not a vessel.

5. Agency properly did not include, in a solicitation for a modular elevated causeway, the higher progress payment rates authorized by 10 U.S.C. § 7312 (1988), since that provision applies only to contracts involving the repair, maintenance, or overhaul of a naval vessel.

DECISION

Todd Pacific Shipyards Corporation protests the terms of request for proposals (RFP) No. N47408-89-R-2024, issued by the Naval Facilities Engineering Command for a modular elevated causeway (ELCAS (M)) system. We deny the protest.

BACKGROUND

This solicitation was issued on September 6, 1990, on a firm, fixed-price basis and is a reprocurement of a defaulted contract which was awarded to Fairey Marine Ltd. in 1986 and terminated in 1989. The closing date for receipt of proposals was extended to January 17, 1991.

The procurement is for the design, construction, successful testing, and delivery of a prototype 3,000-foot ELCAS (M) system with an option to order production items. The ELCAS (M) system serves as a portable pier system that can be transported in one container ship. It is intended to facilitate the on-loading and off-loading of cargo vessels during emergencies. The ELCAS (M) system is to be composed of a beach ramp, elevated roadway, and pierhead which in turn may be composed of modular pontoons. The elevated roadway and pierhead is to be anchored to the sea bottom by pilings. The solicitation required the successful contractor to conduct a contractor demonstration test at a Norfolk, Virginia site. On December 10, 1990, prior to the closing date for receipt of proposals, Todd filed this protest objecting to certain terms of the solicitation. Several proposals were subsequently received by the revised closing date.

GEOGRAPHIC RESTRICTION FOR TEST SITE

In its initial protest submission, Todd contended that the solicitation requirement that the contractor demonstration test be performed only at the Little Creek Amphibious Base in Norfolk, Virginia, was unduly restrictive and discriminated against West Coast offerors like Todd since the Coronado Base in San Diego, California, was just as convenient and adequate to support the demonstration test. Todd maintained that both locations were equally suited and zoned for "waterborne beach assault," and that competition would be enhanced by allowing the demonstration at both locations.

An agency is required to specify its needs and select its procurement approach in a manner designed to promote full and open competition. Interior Elements, Inc., B-238117, Mar. 29, 1990, 90-1 CPD ¶ 341. Restrictive provisions should only be included to the extent necessary to satisfy the agency's minimum needs. The contracting agency, which is most familiar

with its needs and how to fulfill those needs, must make the determination in the first instance. Id.

The agency reports that the ELCAS (M) is intended for worldwide use under a variety of adverse geological and oceanographic conditions. The agency states that the Virginia site was chosen because it is considered the best test environment for demonstration of the ELCAS (M) as it is more representative of the realities of international installation sites in terms of weather, surf conditions, and soil conditions. According to the agency, the conditions at the Norfolk, Virginia site are more difficult than at the Coronado site, and if the ELCAS (M) performs well in Norfolk, it will most likely meet the agency's needs anywhere in the world. The agency also states that it is less costly to the government to provide the Norfolk site because the demonstration test requires the use of a Transport Auxiliary Crane Ship to be provided by the government which is readily available in the Norfolk area. The agency states that to provide this ship for the Coronado area would cost approximately $500,000 because the ship has to travel from either Portland, Oregon, or Tacoma, Washington, remain on station during the entire test, and return.

We think the need to test the ELCAS (M) system under the most likely operational conditions is a legitimate consideration in determining an agency's minimum needs for a test site that provides the required variety of adverse geological and oceanographic conditions. In order to ensure that the proposed system actually meets the requirement, the need to conduct the demonstration of the ELCAS (M) system under the more rigorous conditions at Norfolk (in addition to the reduced cost of such demonstration at Norfolk) provides, in our view, a reasonable basis to limit the demonstration to the Norfolk area. The protester's mere disagreement with the agency's conclusion does not make that determination unreasonable.

In its comments on the Navy's report on its protest, Todd for the first time argues that the discrimination against West Coast offerors occurs not because of the agency's insistence on a Norfolk test site but because the solicitation pricing structure does not reflect shipping costs associated with transporting the system to Virginia. Todd maintains that such shipping costs should be separately priced and excluded from the evaluation of each offeror's technical and cost proposal.

This allegation is untimely and will not be considered. Our Bid Protest Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues; where a protester later supplements a timely protest with new and independent grounds of protest, the later raised allegations

must independently satisfy the timeliness requirements of our Regulations. Joseph L. De Clerk & Assocs.--Recon., B-233166.3, Apr. 6, 1989, 89-1 CPD ¶ 357. Protests based upon alleged improprieties in a solicitation which are, or should have been, apparent prior to the closing date for receipt of proposals must be filed prior to closing. 4 C.F.R. § 21.2(a)(1) (1990); Golden Triangle Management Group, Inc., B-234790, July 10, 1989, 89-2 CPD ¶ 26. It was apparent from the solicitation that shipping and demonstration costs would not be excluded from the evaluation, and this issue should have been raised when Todd filed its initial protest. Because the protester failed to do so, we will not consider this matter.

RELAXED SPECIFICATION

Todd contends that the Navy showed favoritism toward a potential offeror by changing the specifications to allow the substitution of cheaper and easier truss (bridging) elements for specified pontoons. Todd maintains that one offeror was given advance notice of this change which improperly gave that offeror additional time to revise its proposal in response to the change.

The record shows that one potential offeror raised several questions concerning the use of trusses and proposed using trusses on the ELCAS (M) system. The Navy conducted a technical review and determined that trusses would be a suitable substitute for some of the pontoons. This offeror was advised by letter dated November 9, 1990, that trusses would be considered for replacement of certain specified pontoons but was also advised that the exact parameters the trusses must meet would be contained in amendment No. 0003.

Amendment No. 0003 was issued on November 19 to all potential offerors. The amendment provided that the government would consider proposals that propose the use of truss and/or bridging elements to replace the center pontoons in the roadway portion and/or some pierhead locations of the ELCAS (M) pier. The amendment further provided that the truss elements are to be used as optional replacements for the selected pontoons and the design shall be such that the truss elements can be replaced with pontoons, and fully meet the requirements of the RFP. The amendment specifically designated the pontoons the truss elements could replace. Amendment No. 0003 did not extend the closing date, which was at that time January 3, 1991.

We are not persuaded that the facts of this case reflect other than legitimate reasons for relaxing the specifications. The record shows that the Navy relaxed the requirement to allow the substitution of less expensive truss elements for

certain specified pontoons after a careful examination and determination that the use of truss elements would meet its minimum needs. In fact, we have been advised that several additional offers were received as a direct result of the relaxed requirement.

We also do not believe that the advance notice given one potential offeror concerning the Navy's issuance of amendment No. 0003 afforded that offeror a competitive advantage.

As previously stated, by letter dated November 9, 1990, a potential offeror was advised that the Navy would consider the use of truss elements to replace certain pontoons but that the exact parameters the truss elements must meet would be contained in amendment No. 0003. Amendment No. 0003, issued on November 19 to all offerors, contained detailed instructions concerning the use of truss elements, without which an offeror who proposed the use of truss elements could not adequately demonstrate compliance with the solicitation requirements. There is nothing in the record to show that merely having a 10-day advance notice of the Navy's decision to accept proposals using truss elements, without the details contained in amendment No. 0003, gave the offeror a competitive advantage.1/

FIRM, FIXED-PRICE CONTRACT TYPE

Todd objects to the use of a firm, fixed-price contract and maintains that the solicitation contains significant development work that would be best undertaken on a cost-reimbursement basis.

The selection of a contract type is in the first instance the responsibility of the contracting agency; our role is not to substitute our judgment for the contracting agency's but to review its actions for compliance with applicable statutes and regulations. Spectrum Technologies, Inc., B-239573, Sept. 11, 1990, 69 Comp. Gen. ___, 90-2 CPD ¶ 196.

1/ Todd, in its initial protest, argued that certain other solicitation requirements were defective and inconsistent, such as the government's disclaimer of the accuracy of the technical data provided by the defaulted contractor. The agency in its report responded to these issues, and Todd in its comments did not rebut the agency's response. We consider these issues to be abandoned by the protester and will not consider them. See TM Sys., Inc., B-228220, Dec. 10, 1987, 87-2 CPD ¶ 573. We have also reviewed the remainder of Todd's allegations concerning defective and inconsistent solicitation requirements and find them to be without merit.

The Navy states that although the solicitation contains an extensive and elaborate performance specification which requires a considerable design effort on the part of the successful offeror, only existing technologies are required. The Navy maintains that the use of pontoons as the basic building block of temporary piers and bridges used by the military has been around for decades and while the requirement is complex, the costs associated with the project are all reasonably quantifiable. Further, reasonable prices can be established based on the competition obtained (several proposals were received) and also through a comparison of prices received under the competitively awarded prior contract.

Todd disagrees and argues that because of the numerous changes and corrections to the specifications and the possibility of more than one interpretation of the specifications, it is not in the best interest of the government to require a firm, fixed-price contract.

The Federal Acquisition Regulation (FAR) provides that a firm, fixed-price contract is suitable for acquiring supplies on the basis of reasonably definite specifications where the contracting officer can establish fair and reasonable prices such as when, as here, there is adequate price competition. FAR § 16.202-2. The solicitation here contains definitive specifications that are somewhat complex. However, the record shows that the labor, material, and equipment involved to design the ELCAS (M) is reasonably quantifiable since the use of pontoons to build temporary piers and bridges involves the integration of existing components using standard technology. We therefore cannot conclude that the agency's use of a firm, fixed-price contract was unreasonable.

DOMESTIC SHIPYARD RESTRICTION

Todd contends that the restrictions of 10 U.S.C. § 7309 (1988), is applicable to this procurement because the basic building block of the ELCAS (M) is the pontoon which is capable of being used as a means of transportation on the water, and consequently the ELCAS (M) is a vessel within the meaning of that statute, which provides, in part:

> "(a) Except as provided in subsection (b), no naval vessel, and no vessel of any other military department . . . may be constructed in a foreign shipyard."

The Navy maintains that the presence of pontoons in the ELCAS (M) alone does not make the system a vessel. The Navy states that here it is buying a mobile pier system, a minor portion

of which may temporarily be configured as "barges" so that the pier system can be transported from ship to shore in order for assembly to begin. The Navy contends that this mobile pier system is a land-based structure and any temporary use of some component parts as a means to transport the remainder of the pier system from the vessel transporting it to the shore is merely incidental to the system's function as a pier and is insufficient to change the character of the procurement from the purchase of a mobile pier system to the acquisition of a vessel within the meaning of 10 U.S.C. § 7309.

Neither 10 U.S.C. § 7309 nor its legislative history expressly defines the term "naval vessel." Its purpose, however, is the preservation of adequate domestic shipbuilding capacity; it seeks to do this by barring Department of Defense (DOD) procurement of ships from foreign shipyards. B-218497, July 23, 1985; see also Marine Indus., Ltd., B-225722, May 21, 1987, 87-1 CPD ¶ 532. This was prompted by congressional concern that a dwindling domestic shipbuilding capacity would have a serious negative impact on the nation's ability to respond to national emergencies. Id. We cannot say that the agency was unreasonable in determining that the ELCAS (M) system is not a vessel subject to the restrictions of 10 U.S.C. § 7309. The ELCAS (M) system's primary function is to serve as a movable pier, and although it is capable of movement and can move from ship to shore, any transportation function it performs is incidental to its function as a pier. See Ellender v. Kiva Constr. & Engineering, Inc., 909 F.2d 803 (5th Cir. 1990).

PROGRESS PAYMENTS

Todd objects to the Navy's inclusion in the solicitation of a progress payment clause that allows only 80 percent payment based on costs incurred. Todd maintains that for this type of contract the Navy customarily invokes the NAVSEA Progress Payment Clause which according to Todd provides for 90 percent progress payments up to the point of 50 percent completion, 97.5 percent to the three-quarter point, and 100 percent thereafter.

The Navy contends that the Progress Payment Clause Todd argues should be included in the RFP is designed to give relief to shipbuilders and, since what is being procured here is a pier composed of pontoons and not a ship, that provision is inapplicable.

Generally, the contracting officer has the discretion to determine whether and under what terms a provision for progress payments should be included in the solicitation. PTI Servs., Inc., B-225712, May 1, 1987, 87-1 CPD ¶ 459. The

solicitation here incorporated by reference the basic progress payment clause found at FAR § 52.232-16 which allows for 80 percent recovery of cost.

It appears that Todd is arguing for the application of 10 U.S.C. § 7312 (1988). For contracts involving the repair, maintenance, or overhaul of a naval vessel, 10 U.S.C. § 7312 provides for higher rates of progress payments. As previously stated, however, this is not a procurement for the construction or repair of a naval vessel. Consequently, we find that it was not unreasonable for the Navy to determine that the government's interests are protected by the use of the basic progress payment provisions of the FAR.

OTHER ISSUES

Todd also argues that the Navy did not allow sufficient time to prepare a proposal, especially in view of the fact that significant changes allegedly were made to the requirements by amendment between issuance of the solicitation and the closing date. A contracting officer must determine if a closing date needs to be changed when amending a solicitation and may not award a contract unless any amendments made to an RFP have been issued in sufficient time to be considered by prospective offerors. FAR § 15.410(b). The record shows that the closing date was extended several times and that the Navy allowed more than 4 months between the date the RFP was issued and the date on which proposals were due. Further, regarding amendment No. 0003, which the protester alleges contained the most significant changes, while the amendment did not extend the closing date, 5 weeks remained until the scheduled closing date. The record does not show that the contracting officer abused his discretion in not extending further the closing date; the protester did not establish that the time allowed was unreasonable or insufficient.

Todd contends that the Navy was slow in its response to questions posed by potential offerors. The record shows that numerous questions from potential offerors were received by the November 30, 1990, "cutoff" date for submission of questions. The record further shows that most of the questions were answered by the time amendment No. 0003 was issued and the remainder were answered over 4 weeks prior to the closing date for receipt of proposals. In our review of the record, we find that the agency answered all questions in a responsive and timely manner.

Todd also argues that the Navy was slow in providing "informational drawings" obtained from the previous defaulted contractor. The agency states that the drawings were sent on

the day Todd requested them and when Todd called again to say they had not been received, a second set was sent that same day. There is no evidence here that the Navy deliberately delayed providing the protester the drawings. The protester actually received the drawings 1 month after its initial request, which still gave it enough time (approximately 3 months) to prepare its proposal.

The protest is denied.

for James F. Hinchman
General Counsel