



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Diversified Energy Systems; Essex Electro Engineers, Inc.

File: B-245593.3; B-245593.4

Date: March 19, 1992

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DIGEST

Compelling reason exists to cancel an invitation for bids after bid opening where the agency determines that the specifications on which the competition was based overstate the government's minimum needs.

DECISION

Diversified Energy Systems (DES) and Essex Electro Engineers, Inc. protest the cancellation after bid opening of invitation for bids (IFB) No. DTFA-02-90-B-00612C, issued by the Federal Aviation Administration (FAA), Department of Transportation, for the supply of engine generator sets (EGS). The protesters agree in their contention that canceling the IFB was improper, but each contends that it and not the other is entitled to award of the contract.

We deny the protests.

The agency used two-step sealed bidding procedures for this procurement. The request for technical proposals (RFTP) (step one) sought proposals for the design, development, integration, testing, logistical support, and delivery of 17 different standby power engine generators and components. The RFTP required each offeror to furnish technical data that established compliance with the specifications and identified the manufacturer of each listed component: engine, governor, generator, bypass/isolation and automatic transfer switch (ATS), and power plant housing. Technical

data were evaluated on a pass-fail basis and an offeror's failure to meet the minimum requirements for each EGS was cause for a finding of technical unacceptability and removal from the competition.

Each EGS component and its specifications were separately detailed in specification FAA-E-2837A [hereafter, 2837A], dated April 23, 1991, and revised as of July 3, 1991. Among other features, the specifications for the automatic transfer equipment required that each EGS include a two-way bypass switch to permit isolation of the automatic transfer switch from all source and load power conductors. The specifications also provided for an interface between the remote monitoring system (RMS) and the EGSs. Paragraph 3.3.5 of specification 2837A, "Interchangeability," requires that the unit components be standard products and provides that "specially fabricated components, modified standard components, or components not meeting these criteria are not acceptable."

Four offerors, including DES and Essex, submitted technical proposals under step one by the June 14, 1991, closing date. The proposals were evaluated and written discussions were conducted with DES, Essex, and a third offeror. The fourth offeror withdrew its proposal before evaluations were completed. The remaining offerors submitted revised proposals and all were found acceptable.

The step two IFB was issued on July 19, 1991, to all three offerors. Only DES and Essex submitted bids by the August 21 bid opening date, with Essex submitting the apparent low bid. On September 10, DES filed a protest with our Office, contending that award to Essex would be improper, based upon DES' belief that Essex's products did not meet the specifications. During its review of the matter, the FAA identified ambiguities in the specifications and ascertained that both DES and Essex intended to use ATSS which had been modified to meet FAA specifications. Since such components would violate the solicitation's interchangeability specification, the FAA concluded that both bids were nonresponsive. Thereupon, the FAA canceled the solicitation and we dismissed DES' protest as academic. Subsequently, both DES and Essex protested the cancellation, each arguing that it should be the awardee upon reinstatement of the solicitation.

Because the solicitation was canceled after bids were opened under the second step of the procurement, the applicable standard for determining the propriety of the cancellation is Federal Acquisition Regulation (FAR) § 14.404-1(a)(1), which applies to sealed bid procurements. Aero Innovations, Ltd., B-227677, Oct. 5, 1987, 87-2 CPD ¶ 332. A contracting agency must have a compelling reason to cancel an IFB after

bid opening in order to resolicit bids for the same requirement because of the potential adverse impact on the competitive bidding system of resolicitation after bid prices have been exposed, FAR § 14.404-1(a)(1); Southwest Marine, Inc., B-229596; B-229598, Jan. 12, 1988, 88-1 CPD ¶ 22. The fact that a solicitation is defective in some way does not justify cancellation after bid opening if award under the solicitation would meet the government's actual needs and there is no showing of prejudice to other bidders. Aero Innovations, Ltd., supra. However, FAR § 14.404-1 (c) (10) specifically permits cancellation, consistent with the compelling reason standard, where cancellation is clearly in the government's interest; a contracting officer's desire to obtain enhanced competition by materially modifying specifications to make them less restrictive, constitutes a valid reason under this FAR standard. See Aero Innovations, Ltd., supra.

The FAA asserts that cancellation of the IFB was proper because it intended to require adherence only to the ANSI/UL standards and that the more stringent testing standards overstate its minimum needs. The protesters respond that the solicitation should be reinstated because award to one of them will meet the agency's actual needs.

The FAA states that this solicitation was intended to reflect the agency's acquisition policies to acquire commercial, off-the-shelf supplies and non-developmental items. Its use of the ANSI/UL standard and its interchangeability provision prohibiting modified standard components was intended to ensure delivery of equipment standard in every way. However, in reviewing the specifications and considering input from the ATS suppliers proposed by the protesters, the FAA realized that some of the ATS features were not standard,¹ and that the specific references to certain testing standards were more stringent than the ANSI/UL standards which met its minimum needs. The FAA also learned that to meet the stricter endurance testing standard, the supplier used stronger springs in the ATS and

¹These features included a separate fuse for logic modules; use of Type THHN or Type XHHW wiring in the ATS panel; and use of ring tongue lugs for power cable connections and certain conductors. One supplier indicated that its standard switch had been modified to meet the operational requirements of the FAA's specification. While the other supplier maintained that its product was standard, it also identified the various changes which it made to its standard ATS.

had assigned a special model number for this ATS to designate it as meeting the FAA specifications.

In determining to cancel the solicitation, the agency reasoned that requiring contractors to meet standards exceeding ANSI/UL would unnecessarily limit competition to those able to meet the more stringent standards and that products meeting these restrictive standards might not be readily available in the marketplace. The agency then undertook a complete revision of its specifications to ensure that it specified only its minimum requirements and to make clear that only standard products were solicited.

Although the revisions to specification 2837A are not yet final, the FAA has provided our Office a memorandum outlining its planned revisions. With regard to the ATS specifications which required modification to standard items, the specification is to be reworded to clarify that references to ring tongue connectors apply only to control panel and engine wiring, and not to other specified items. Relevant endurance testing specifications are to be revised to reflect only the ANSI/UL standard. In addition, the FAA intends to delete requirements for an RMS interface and for combination of a bypass switch with the ATS, which it estimates will reduce the cost per unit by \$13,000. It also plans to revise the interchangeability provision to use the FAR § 11.001 definition of commercial products-- "product . . . sold or traded to the general public in the course of normal business operations at prices based on established catalog or market prices"--to increase competition in future procurements.

We agree with the FAA that a compelling reason existed to cancel the IFB after bid opening. The original solicitation specified features and standards unnecessary for the agency's requirements and in some instances required modification of a component, notwithstanding the solicitation's prohibition against such modification. The

²The protesters contend that the ATS was not modified within the meaning of the solicitation's prohibition. Specifically, DES refers to the modifications as optional components for a standard ATS. However, with the exception of a reference to special lugs, DES has not submitted evidence that the items concerned are regularly offered options. Further, while DES argues that the items which comprise the modifications are standard, unmodified "components" for an ATS, we find that the solicitation requirement for standard components refers to components of the ZGS units, such as the ATS, not to items making up the component ATS. Thus, it is clear that the protester's ATSS are modified within the meaning of the solicitation.

Competition in Contracting Act of 1984, 41 U.S.C. § 253(a)(1)(A) (1988), requires that solicitations be designed in a manner to achieve full and open competition and contain restrictive specifications only to the extent necessary to satisfy the contracting agency's minimum needs. Since less restrictive specifications generally result in increased competition and lower prices, in most cases, where an agency discovers that a solicitation overstates the government's minimum needs, the best interests of the government require that no award be made under the restrictive solicitation. See Control Concepts, Inc., B-233354.3, Apr. 6, 1989, 89-1 CPD ¶ 358.

Here, we find that cancellation is in the best interests of the government because the new, less restrictive specifications should have a substantial impact on costs to the government. The agency advises that the revisions deleting the combined bypass switch and the RMS interface alone will lower the cost of each EGS by approximately \$13,000, consequently lowering the cost of the procurement by an estimated \$2.9 million.¹ Accordingly, we find that the FAA, having overstated its minimum needs, was justified in canceling the solicitation on the basis of the need for revised specifications which accurately reflect its minimum needs. Id.; Aero Innovations, Ltd., supra.

Our conclusion is not changed by the protesters' arguments that the more stringent specifications have been used by the FAA for similar procurements for several years. While the record reflects that the FAA has used the more stringent specifications in the past and apparently has accepted modified ATS equipment as standard, we do not agree that the FAA must continue to do so. The determination of the government's minimum needs and the best method of accommodating them are primarily the responsibilities of the procuring activity, IVAC Corp., 67 Comp. Gen. 531 (1988), 88-2 CPD ¶ 75, and since each procurement is a separate transaction, the agency's past acceptance of modified equipment does not prevent it from determining that such equipment exceeds its needs. See FXC Corp., B-227375.2, Nov. 6, 1987, 87-2 CPD ¶ 454.

Finally, in view of our conclusion that the IFB was properly canceled, we need not consider the other grounds offered by the FAA in support of the cancellation or the protesters'

¹It also is reasonable to expect that less restrictive specifications, with an emphasis on commercial products, will result in increased competition. In this regard, the record reflects that 41 concerns received the RFTP under step one, but only four submitted proposals and only two submitted bids.

contentions regarding which would be the appropriate awardee under the solicitation.

The protests are denied.

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