



Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Essex Electro Engineers, Inc.

File: B-253301

Date: August 31, 1993

Charles E. Raley, Esq., Israel and Raley, for the protester.
Craig E. Hodge, Esq., and Bernadine Feller McGuire, Esq.,
Department of the Army, for the agency.
Barbara C. Coles, Esq., and Christine S. Melody, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Protest that solicitation is defective because it included a preproduction evaluation (PPE) clause requiring offerors to factor into their prices the anticipated cost of correction of errors in the technical data package is denied where there is no indication in the record that the clause superseded the Changes clause in the solicitation or that the clause precludes equal competition among all offerors, including the contractor that prepared the technical data. Protester's supposition that the agency included the PPE clause to obfuscate its failure to inquire about defects is not supported by the record.

DECISION

Essex Electro Engineers, Inc. protests the terms of request for proposals (RFP) No. DAAA09-92-R-0349, issued by the Department of the Army for 121 computer control panels. Essex contends that the agency improperly included a preproduction evaluation (PPE) clause in the solicitation.¹

We deny the protest.

¹The protester initially also argued that the solicitation is defective because the PPE clause exceeds the agency's minimum needs. The agency rebutted this argument in its agency report. The protester, in its comments on the agency report, did not address this issue; therefore, we deem it abandoned. See Heimann Sys. Co., B-238882, June 1, 1990, 90-1 CPD ¶ 520.

The RFP, issued on August 28, 1992, contemplated the award of a firm, fixed-price contract. Clause C-4 of the solicitation, as amended, contained the standard PPE clause, which advised offerors that the technical data package (TDP), which had been used for manufacturing a limited number of models, "needed to be proven out" for full-scale production even though the TDP had been prepared and checked in accordance with accepted engineering practices. 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 deficiency in technical data which may preclude practical manufacture or assembly, or which may preclude the attainment of required performance."

Essex challenges the requirement that offerors conduct a preproduction evaluation of the technical data and include the cost of both major and minor changes in their respective prices. The protester argues that the agency effectively has supplanted the Changes clause at Federal Acquisition Regulation (FAR) § 52.243-1, which is required to be included in all fixed-price contracts.

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

1. attainment of functional or performance requirements 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 said that any other changes to the technical data would be processed in accordance with the Changes clause of the contract, which was incorporated by reference in the RFP.

The record does not support the protester's allegation that the PPE clause supersedes the Changes clause in the solicitation. Rather, 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. The contractor will be paid for changes to specifications, designs, or drawings through its contract price for changes properly encompassed by the PPE clause or through an equitable adjustment under the Changes clause for changes outside the PPE 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 file a claim for an equitable adjustment or other relief in accord with the procedure set out in the Disputes clause, FAR § 52.233-1. See Engineered Air Sys., Inc., 69 Comp. Gen. 172 (1990), 90-1 CPD ¶ 75, where we rejected a protester's argument that the standard PPE clause--with the same requirements that are present here--constituted a deviation from the standard Changes clause.

The protester also argues that the PPE clause is improper because it relieves the TDP contractor of its contractual obligations to pay for all corrections to the TDP and places the TDP contractor in the sole position of being able to prepare a rational and reasonable offer.

The Army explains that it decided to include the PPE clause in the solicitation because historical practice has shown that when converting from a sole source to a competitive procurement of an item, there are minor "bugs" that need to be corrected. While the agency states that it is not aware of any specific defects in the technical data, it ultimately determined that it was in its best interests to include the PPE clause in the solicitation in order to limit the risk to the agency that there may be defects in the data. The agency also states that it has achieved excellent results using the standard PPE clause on prior first-time buys for similar items.

As a preliminary matter, the protester challenges the agency's assertion that it is not aware of any defects in the technical data and argues that the "agency is feigning" uncertainty regarding the nature of any defects in the data. According to the protester, the agency opted to include the PPE clause in the solicitation "in an attempt to obfuscate" either the TDP contractor's failure or the agency's failure to disclose superior knowledge regarding the accuracy of the data.

Prejudicial motives will not be attributed to contracting officials on the basis of unsupported allegations, inference and suppositions. Systems & Processes Eng'g Corp., B-232100, Nov. 15, 1988, 88-2 CPD ¶ 478. Here, there is no evidence in the record that supports the protester's speculation that the agency is being less than candid regarding

its knowledge about the technical data. Rather, the protester merely infers bad faith based on the fact that the TDP contractor has provided the part on a sole source basis to the government in the past. The protester also cites Defense Federal Acquisition Regulation Supplement (DFARS) § 227.403-74, which requires the TDP contractor to certify that the data to be delivered under a particular contract is complete and accurate to the best of the contractor's knowledge and belief. The protester, however, completely ignores the agency's reasonable assertion that minor defects in technical data are typically found when an agency converts from a sole source to a competitive procurement of an item. The protester also ignores the fact that while a contractor may certify to the best of its belief that there are no defects in its data, certification alone does not guarantee that there are none. In sum, the protester's contention is based on unsupported inference and supposition, which is insufficient to prove its claim. See Monarch Enters., Inc., B-233303 et al., Mar. 2, 1989, 89-1 CPD ¶ 222.

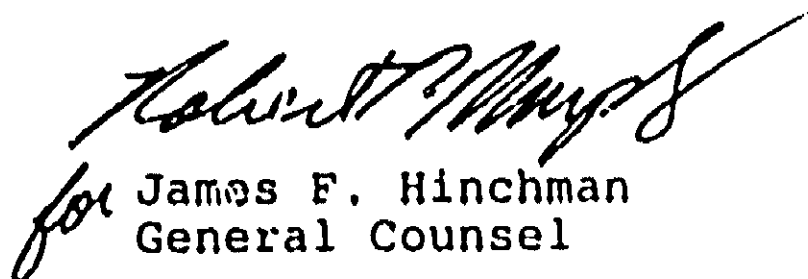
As for the protester's claim that only the TDP contractor can intelligently prepare an offer under the RFP, the fact that a solicitation contains a PPE clause that shifts to the contractor the risks in government specifications and drawings does not by itself render the solicitation defective where the agency reports that it is not aware of any specific defects in the technical data. Engineered Air Sys., Inc., supra. There is no legal requirement that a solicitation be so detailed as to eliminate all performance uncertainties; such perfection, while desirable, is manifestly impractical in some procurements, and the mere presence of a risk factor does not render a solicitation improper. AAA Eng'g & Drafting, Inc., B-236034, Oct. 31, 1989, 89-2 CPD ¶ 404. Since an agency may properly impose substantial risk upon the contractor and minimal risk upon itself, offerors reasonably are expected to use their professional expertise and business judgment in anticipating risks and computing their offers. J&J Maintenance, B-244366, Oct. 15, 1991, 91-2 CPD ¶ 333.

The record here does not support the protester's claim that only the TDP contractor can intelligently prepare an offer under the solicitation. Contractors are often called upon to estimate production costs of complex equipment procured on the basis of a performance specification alone and they do so without undue difficulties. We see no reason to believe that it would be more difficult to estimate costs on the basis of drawings which are, according to the agency, essentially sound. All offerors were furnished the same TDP for review and preparation of offers; we do not view the difficulties incident to estimating the costs to review and identify errors and to propose corrections to overcome defects to be any greater than estimating costs under

performance specifications alone. Nor do we believe that such difficulties may be viewed as affecting the common basis for competition among offerors. See 48 Comp. Gen. 750 (1969).

Similarly, we are not persuaded by the protester's suggestion that the solicitation is defective because, according to the protester, the inclusion of the PPE clause unduly favors the offeror who prepared the technical data. There is no requirement that solicitations be structured so as to eliminate or reduce the competitive advantages of incumbent or past contractors unless such advantages result from a preference or unfair action by the agency. Varo, Inc., B-193789, July 18, 1980, 80-2 CPD ¶ 44. As discussed above, there is no indication in the record that the agency included the PPE clause to unfairly favor the TDP contractor. Rather, the record establishes that the agency reasonably included the clause to put offerors on notice that the technical data may contain defects; that they should review the data to determine whether defects are present; and that their offers should include the cost of correcting the defects.

The protest is denied.


for James F. Hinchman
General Counsel