Lebowitz

Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Swanson General Contractors, Inc.

File: B-253741

Date: October 13, 1993

Robert B. Swanson, Jr. for the protester.
Edward Yarmak, Jr., Arctic Foundations, Inc., and Bradley K. West, Construction & Rigging, Inc., interested parties.
Thomas P.F. Kiely, Esq., Department of Transportation, for the agency.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging as restrictive of competition a technical specification for a coating on an airport navigational-type structure and the number of days for project completion after issuance of the notice to proceed is denied where the specification and the project completion period reasonably reflect the agency's minimum needs.

DECISION

Swanson General Contractors, Inc. protests the terms of invitation for bids (IFB) No. DTFA04-93-B-10005, issued by the Federal Aviation Administration, Department of Transportation, for construction of a medium intensity approach lighting system with runway alignment indicator lights (MALSR) at Cold Bay, Alaska. Swanson generally contends that a technical specification and the number of days for project completion are restrictive of competition.

We deny the protest.

The IFB was issued on May 10, 1993. The IFB specifications required the contractor to install in the ground at specific points along the runway steel spiral-like piles, or columns, which would be the foundation for each MALSR light station. The piles were required to be installed at specific

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positioning tolerances, and if these critical tolerances were exceeded, the contractor would be required to remove and replace the piles. The specifications required the contractor to apply to the outside surfaces of the piles a "fusion bonded epoxy coated finish over a flame or arc sprayed aluminum coating." The specifications listed the required characteristics of the fusion bonded epoxy, including thickness, temperature and time for curing, type of finish, number of units, frictional resistance level, and abrasion and corrosion resistance levels. The specifications also defined the particular thickness of flame or arc sprayed aluminum--types of welding/coating processes--required to be applied to the surfaces of the piles and the particular thickness of epoxy required to be applied over the aluminum.

The IFB stated that the contractor was required to complete contract performance within 45 calendar days after receiving the notice to proceed. Following the filing of this protest, the agency issued an amendment postponing bid opening indefinitely.

Swanson believes that the agency has overstated its needs by requiring the application of a flame or arc sprayed aluminum coating to the surfaces of the piles prior to the application of the fusion bonded epoxy. Swanson alleges that only one firm can accomplish this two-step application process, thereby making the process proprietary to that firm and precluding competition. Swanson believes that requiring only the application of the epoxy to the surfaces of the piles would be sufficient to meet the agency's needs and would allow for competition.

In preparing for the procurement of supplies or services, the procuring agency must specify its needs and solicit offers in a manner designed to achieve full and open competition so that all responsible sources are permitted to compete. 41 U.S.C. § 253(a) (1988). A solicitation may include restrictive provisions only to the extent necessary to satisfy the needs of the agency or as otherwise authorized by law. 41 U.S.C. § 253(a)(2)(B). Where a solicitation provision is challenged as restrictive, the procuring agency must provide support for its belief that the challenged provision is necessary to satisfy its needs. The adequacy of the agency's justification is ascertained through examining whether the agency's explanation is reasonable; that is, whether the explanation can withstand logical scrutiny. Absecon Mills, Inc., B-251685, Apr. 19, 1993, 93-1 CPD ¶ 332. Specifications that are based upon a particular product are not necessarily improper in and of

themselves; an assertion that a specification was "written around" design features of a particular product will not provide a valid basis for a protest if the record establishes that the specification is reasonably related to the agency's minimum needs. NITCO, B-246185.3, Sept. 17, 1992, 92-2 CPD ¶ 183; Infection Control and Prevention Analysts, Inc., B-238964, July 3, 1990, 90-2 CPD ¶ 7.

Here, the agency explains that it specified the two-step application process of a fusion bonded epoxy finish over a flame or arc sprayed aluminum coating based on design and engineering studies which showed that premature failures of navigational-type structures were primarily the result of early corrosion of the structures. Based on previous similar projects in Alaska, the agency states that it has found that the application of a flame or arc sprayed aluminum base coating on the piles provides a protective layer which is highly resistant to construction damage, for example, scratches and punctures, and is extremely resistant to frost abrasion and corrosion damage, common in the Alaskan environment and affecting the alignment accuracy of the piles. The agency also states that the application of the fusion bonded epoxy over the flame or arc sprayed aluminum coating makes the piles highly resistant to friction, thus allowing for the maintenance of the critical structural integrity and positioning tolerances of the piles. Since the MALSR system depends on precise angles of elevation, the agency states that even a slight movement of the angles of the piles caused by frost, corrosion, or friction would compromise the accuracy of the system and airport approach and landing safety.

The protester does not rebut the agency's explanation. Thus, in light of the environmental conditions in Alaska, the need to maintain the critical structural integrity and positioning angles of the piles, and concerns with safety, we conclude that the agency has reasonably justified its need for a two-step application process of a fusion bonded epoxy finish over a flame or arc sprayed aluminum coating.

Moreover, contrary to Swanson's assertion that only one firm can perform this two-step application process, the record shows that no firm holds a patent for this process. There is no support in the record for Swanson's position that the process is proprietary to any single firm. The fact that one firm may be particularly skilled in applying a fusion bonded epoxy finish over a flame or arc sprayed aluminum coating does not make improper the agency's decision to use this two-step application process since the process is necessary to satisfy the agency's minimum needs. We point

out that while Swanson and two firms it contacted may not be able to satisfy the two-step application process, the agency has identified a number of firms that can comply with the specification requirement. We further point out that two firms, including the one alleged by Swanson to have a patent on the two-step application process, have advised our Office in response to this protest that they can meet the specification requirement.

Swanson also contends that requiring completion of the project within 45 calendar days after receiving the notice to proceed is unrealistic and restrictive of competition.[1] Swanson suggests that a minimum of 75 calendar days after receiving the notice to proceed is necessary for completing the project.

In determining the performance period, the agency considered that over the past 8 years, it has administered in Alaska 18 other virtually identical MALSR contracts. Sixteen of these contracts (approximately 90 percent) were completed in 45 calendar days or less. Many of the contracts were satisfactorily performed by non-incumbent small and small disadvantaged businesses. In addition to its historical experience, the agency also based the performance period on the need to minimize disruption at the airport and the need to maintain airport safety by installing the lighting system as soon as possible.

In light of the agency's historical experience with contract performance periods on a significant number of identical projects under similar Alaskan environmental conditions, and its need to install the lighting system as soon as possible to minimize airport disruption and to maintain a safe facility, we have no basis to question the reasonableness of

[1]Swanson initially protested that it could not determine, based on the information in the IFB, the actual number of days the contractor would have to complete the project. Swanson also protested the specification concerning reseeding work. The agency addressed these issues in its agency report. Swanson, in its comments to the agency report, did not address these issues. Therefore, we deem these issues to be abandoned and we will not address them. Vanguard Research, Inc., B-242633; B-242633.2, May 30, 1991, 91-1 CPD ¶ 517.

the agency's decision to require completion of the contract within 45 calendar days from the time the notice to proceed is issued.[2]

The protest is denied.

Robert P. Murphy
for James F. Hinchman
General Counsel

[2]The agency explains that after the contractor is awarded the contract, the firm will have 10 days to submit bonds and to make required submittals (which must be approved or disapproved within a maximum of 7 working days). Once submittals are approved, the agency states that prior to issuing the notice to proceed, it will afford the contractor a "reasonable time" for procuring materials and mobilizing at the site. Swanson objects to the agency's failure to specify in the IFB an exact period of time for procurement and mobilization, complaining that this appears to be a "judgment call" for the agency and an "unjustified risk" to the contractor. We view Swanson's objection as one grounded in the belief that the agency will not act reasonably and in good faith. Protests that merely anticipate allegedly improper agency action are speculative and premature. ECI Constr., Inc., B-250630, Oct. 9, 1992, 92-2 CPD ¶ 239; General Elec. Canada, Inc., B-230584, June 1, 1988, 88-1 CPD ¶ 512.