



Comptroller General
of the United States

115755

Washington, D.C. 20548

Decision

Matter of: Essex Electro Engineers, Inc.; Alturdyne

File: B-259832; B-259832.2

Date: May 3, 1995

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A.L. Haizlip, Esq., and Michael R. Burton, Esq., Department of Transportation, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest objecting to solicitation's benchmark testing requirement is denied where record shows that both the requirement for testing as well as the size of the test sample are reasonably related to the agency's minimum needs.

2. Protest relating to terms of solicitation's delivery schedule is denied where record shows that items being acquired are critical in nature, and delivery schedule is necessary for agency to meet its need to replace a large number of the devices.

DECISION

Essex Electro Engineers, Inc., and Alturdyne protest the terms of invitation for bids (IFB) No. DTFA02-94-B-40061, issued by the Department of Transportation, Federal Aviation Administration (FAA), for engine generator sets (EGS). The protesters argue that the IFB's delivery schedule and requirement for benchmark testing of the EGSs are unduly restrictive. In addition, Alturdyne maintains that the IFB's lack of a progress payment provision also is unduly restrictive of competition.

We deny Essex's protest and dismiss Alturdyne's protest.

This acquisition, a two-step sealed bid procurement, is being conducted in connection with the FAA's national EGS replacement project. Currently, the FAA owns in excess of 3,000 EGSs of varying sizes and configurations, and this

acquisition is designed to permit the agency, within its funding limitations, to replace what it describes as a rapidly aging inventory of the devices. The EGSSs are used by the agency to generate emergency power to support a wide array of sophisticated air traffic control hardware in instances where, for one reason or another, the ordinary electrical power supply is interrupted.

The solicitation is broadly divided into three groups or packages of EGSSs. These packages are comprised of groups of different sized generators, and the IFB requires offerors to bid on an all-or-nothing basis within each package. For example, package C of the solicitation is comprised of some 20 separate contract line items that are basically divided into six smaller groups of EGSSs as follows: 4 types of 175 kilowatt (kw) EGSSs, 4 types of 200kw EGSSs, 2 types of 250kw EGSSs, 4 types of 300kw EGSSs, 4 types of 400kw EGSSs and 2 types of 600kw EGSSs. All of the EGSSs to be furnished under the solicitation are to be the bidders' commercial off-the-shelf products.

As relevant for purposes of this protest, the IFB contains benchmark testing requirements. As originally issued, the IFB permitted the agency to select at random up to two generators for benchmark testing from each package offered by a firm. Thus, for example, if a firm submitted an offer for package C, the FAA could select up to two of the EGSSs proposed for benchmark testing. In addition, the IFB as originally issued permitted the agency to make its selection of EGSSs within 2 weeks of technical proposal submission, and required that testing commence within 3 weeks of proposal submission.

As for the delivery schedule, the IFB as originally issued required offerors to make delivery within 30 days after receipt of the agency's order (ARO) for small EGSSs, within 60 days ARO for somewhat larger EGSSs, within 90 days ARO for relatively large EGSSs, and within 120 days ARO for very large EGSSs.

ESSEX'S PROTEST

Essex contends that the benchmark testing requirement is unduly restrictive of competition. According to the protester, if it were to bid on any one of the packages, it would have to have an unreasonable number of fully manufactured EGSSs on hand virtually at the time it submitted its technical proposal. Essex uses package C to illustrate its point, maintaining that it would essentially have to have 20 separate EGSSs manufactured so that it could respond to the FAA's request for any two of the EGSSs in package C. Essex asserts that this requirement exceeds the minimum needs of the agency, and that it imposes an unreasonable

burden on small businesses that may not have the financial or manufacturing resources necessary to meet the requirement. Essex maintains that post-award inspection and acceptance procedures are adequate to meet the agency's need for ensuring that the products delivered in fact conform to the solicitation's requirements.

We review benchmark testing requirements using the same standard applied to any other challenge of a solicitation's evaluation procedures; the establishment of testing or qualification procedures is a matter within the technical expertise of the procuring activity, and we will not object to the imposition of such a requirement unless it is shown to be without a reasonable basis. Exide Power Sys. Div., ESB, Inc., 57 Comp. Gen. 653 (1978), 78-2 CPD ¶ 106; Westinghouse Info. Servs., B-204225, Mar. 17, 1982, 82-1 CPD ¶ 253.

The agency's requirement for benchmark testing is reasonable. As noted, the EGSSs to be purchased are to provide emergency power to support critical air traffic control hardware, equipment that is necessary for air traffic controllers to manage incoming and outgoing flights in a safe and effective manner. The agency cites a number of instances to illustrate the critical nature of the equipment, for example, an airplane crash in Charlotte, North Carolina which caused a power outage that interrupted the power supply to critical air traffic control equipment. Given the importance of the EGSSs to flight safety, the agency clearly has a legitimate need to ensure that the proposed equipment will perform properly. Furthermore, since many of the EGSSs are in need of replacement², we

¹Essex maintains that the agency is required to demonstrate that its solicitation provision is the only means by which it can meet its minimum needs; in support of its position, Essex cites our decision in Altex Enters., Inc., 67 Comp. Gen. 184 (1988), 88-1 CPD ¶ 7. The protester is simply incorrect. The decision in Altex correctly states the applicable legal standard that an agency is required to show only that a solicitation provision is reasonably related to its minimum needs.

²The FAA explains that the typical useful life cycle for EGSSs is approximately 15 years. The majority of the EGSSs currently in place are more than 15 years old; some 1,500 of them are more than 30 years old, and some are as many as 40 years old. (The agency states that in many instances, it is unable even to obtain replacement parts for these older EGSSs.) The FAA also has a significant number of instances where it requires new EGSSs because there currently are none
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think the FAA reasonably determined that it was preferable to conduct testing before award to avoid the possibility that a post-award testing failure would necessitate a reprocurement and thus, a further delay in acquiring new EGSSs. Benchmark testing is designed to provide agencies with pre-award assurances that the potential contractor is capable of manufacturing equipment that will perform as required; it is designed precisely for circumstances where post-award testing and acceptance procedures do not provide the agency with adequate assurances against unanticipated delays due to failure of the manufacturer to meet the post-award acceptance and inspection procedures. Exide Power Sys. Div., ESB, Inc., supra.

As for the number of EGSSs to be tested, questions relating to the scope, complexity, or sample size to be evaluated during a benchmark testing procedure are largely a matter for determination by the agency's technical experts; our review of the matter is governed by the test of reasonableness. Westinghouse Info. Servs., supra.

As an initial matter, following the filing of this protest, the FAA reexamined its minimum needs as they relate to the number of EGSSs to be tested in response to industry comments received at a preproposal conference. As a consequence of this review, the FAA has determined that it can meet its requirements by testing only one (instead of two) EGSSs per package, and will amend the IFB accordingly. The agency also explains that it intends to extend the time frame for the testing; whereas the IFB originally provided that the agency would notify offerors of its selection of an EGS 2 weeks after technical proposal submission, with testing occurring 3 weeks after proposal submission, the IFB will be amended to provide that notice will occur 2 to 3 weeks after proposal submission, with testing not beginning until 6 weeks thereafter.

The agency also states that Essex's challenge is based on a misunderstanding of the requirement; according to the FAA, the protester's assertion that it will be required to have, for example, 20 EGSSs available for possible testing under package C, is incorrect. The FAA points to one of the IFB's salient characteristics that requires all EGSSs in a particular size group to be capable of "reconnection

²(...continued)

in place. In these cases, there is not even a currently available emergency power system. The FAA explains that it already is significantly behind schedule in both its replacement installation and new installation efforts, and states that it has developed a 2-year installation plan that it simply cannot afford to have further delayed.

configuration." The FAA explains that, as a consequence of this requirement, all EGSS in a particular size category will have the same engine and generator assembly (the major components of the device). To illustrate this point, the FAA states that, in package C, while firms are required to offer four differently configured 175kw EGSS, all four of these EGSS can be configured from the same engine and generator assembly. Under package C, therefore, although some 20 different configurations are called for, only 6 sizes of engine and generator assemblies are necessary. For package C, therefore the protester will be required to have on hand only 6 EGSS, rather than the 20 it claims are required.

Essex does not rebut the agency's position except to allege that any requirement that it manufacture EGSS prior to award is unduly burdensome. Given our conclusion that benchmark testing is unobjectionable, the agency's explanation as to why it needs to test the EGSS and the fact that the IFB as amended will relax the test time frame and require only one EGS to be tested for each of the solicitation's packages, we have no basis to object to the size and scope of the benchmark test. Westinghouse Info. Servs., supra.

Essex maintains that it should be afforded a waiver from the benchmark testing requirements because it currently is manufacturing EGSS for the agency. The protester contends that it should be able to use the inspection and acceptance data available under these contracts as a substitute for the benchmark test results required here.

This argument is also without merit. Agencies may properly tailor their benchmark testing requirements to fulfill the particular needs of the agency as they relate to the items being acquired. See Exide Power Sys. Div., ESB, Inc., supra. Essex has submitted no supporting evidence to demonstrate that it has manufactured the particular EGS configurations being solicited here, and the record shows that, with respect to at least one of the contracts cited by the protester, the requirement was for the development and production of a prototype EGS. In addition, there is nothing in the record to show that the inspection and acceptance testing procedures used under these other contracts are similar to the benchmark test procedures here, or that those test results will be of any probative value for purposes of demonstrating Essex's compliance with the benchmark test requirements here. Under these circumstances, we have no basis to object to the FAA's requirement for benchmark testing for the particular EGSS being solicited. Id.

Finally, Essex objects to the IFB's delivery schedule requirements. As with the benchmark test requirements, the

FAA reexamined its minimum needs in response to industry commentary at the preproposal conference. The FAA states that it will issue an amendment providing for a 30-day start-up period after award but before any orders are placed. The delivery schedule thus will be as follows: 60 days after contract award for small EGSSs; 90 days after award for somewhat larger EGSSs; 120 days after award for relatively large EGSSs; and 150 days after award for very large EGSSs. The agency points out that its revised delivery schedule requirements are similar to, and in some instances more relaxed than, delivery requirements for similar equipment available under Federal Supply Schedule contracts. The FAA notes as well that, in any event, its delivery requirements are necessary in order for it to meet its critical EGS replacement schedule.

In its comments responding to the agency report, Essex does not rebut the agency's position, and states only that the agency has not yet issued an amendment that actually reflects the revised delivery schedule. The FAA has represented to our Office that it intends to issue its amendment as described in its report, and there is no basis for assuming that it will not do so. We thus have no basis to object to the agency's delivery requirements.

ALTURDYNE'S PROTEST

Alturdyne's letter of protest stated that it concurred with the allegations raised by Essex, and that it also objected to the fact that the IFB did not have a progress payment provision. The agency specifically responded to Alturdyne's progress payment allegation in its agency report. Alturdyne did not file comments in response to the agency report. We therefore dismiss Alturdyne's protest. 4 C.F.R. § 21.3(j) (1995); Prio-Leau Culinary Servs., Inc.--Recon., B-236373.6, Jan. 23, 1990, 90-1 CPD ¶ 90.

Essex's protest is denied and Alturdyne's protest is dismissed.

\s\ Michael R. Golden
for Robert P. Murphy
General Counsel