



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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October 29, 1973

The Honorable
The Secretary of the Army

Dear Mr. Secretary:

We refer to the protest of Capital Industries Inc. (Capital) with respect to request for proposals (RFP) DAAE07-73-R-0020, as amended and the protests of Dempster Brothers Inc. (Dempster) with respect to invitations for bids (IFB) Nos. DAAE07-73-B-0087, as amended and -0097. The protests were the subject of letters dated May 9, June 21 and July 30, 1973, from the Deputy General Counsel, Headquarters United States Army Materiel Command.

The above-referenced solicitations for various refuse collection trucks and equipment were issued by the United States Army Tank-Automotive Command, Warren, Michigan. Although the procurements are the responsibility of the Army, the equipment, with few exceptions, is being secured for the Navy and the Air Force.

In view of the complexity of the facts and issues presented, we are addressing our decision to you, rather than to the protestants, and will consider each procurement individually.

Solicitation RFP -0020

This solicitation seeks to procure for the Navy front container hoisting refuse trucks with compaction bodies (per MIL-T-46748C) and tilting frame trucks which will be used with detachable cargo bodies of various types and sizes (per MIL-T-46701B). Additionally, the RFP seeks offers on refuse containers of various types and sizes (per MIL-R-23954A) and other refuse related equipment. It is reported that for optimum efficiency, it is mandatory that each truck and body combination of a given type be mechanically compatible. It is also a requisite of proper operation that the refuse containers be compatible with the hoisting device and related equipment of the refuse truck system.

[Protests of Army Solicitations]

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Capital makes four contentions to support its protest under this solicitation. First, it protests the "grouping" in the RFP of certain items--bodies, refuse containers and trucks. The effect of this grouping requires offerors to submit proposals on trucks, refuse containers, and bodies as a "system." Manufacturers are precluded from submitting proposals on one part of such system. This requirement was incorporated in the RFP pursuant to instructions by the Navy, the requisitioning agency, that "all items must be furnished as a complete system by the same manufacturer."

Capital Industries does not produce refuse trucks, but does manufacture refuse containers. It is Capital's contention that the "all or nothing" grouping requirement unnecessarily restricts competition by effectively eliminating from consideration for award manufacturers unable to produce a complete system. Capital argues that the "all or nothing" requirement is unnecessary because Capital can guarantee that its refuse containers can be manufactured so as to be compatible with refuse trucks manufactured by another company. This would be accomplished, according to Capital, by contacting the successful manufacturer of the refuse trucks immediately after award of the contract and inquiring as to the technical specifications which are to be used by the manufacturer in producing the trucks. Capital would then manufacture its containers according to these specifications to insure compatibility of components.

In 47 Comp. Gen. 701 (1968), we were faced with a similar situation. There, a manufacturer of refuse containers was protesting against an "all or nothing" requirement in the solicitation which required prospective bidders to bid on both refuse trucks and containers as a system. In denying the protest we stated at page 704:

"Clearly, in the orderly conduct of the Government's business, the Government as a buyer may not be placed in the position of having to purchase a portion of an advertised system from a potential supplier who is unable or unwilling to supply the entire system but only certain components of the system. Moreover, the technical and/or engineering question as to whether the desired compatibility of components may be attained other than through the purchase of a complete rubbish collection system is not for resolution by our Office. Rather, in accordance with our established rule in areas such as here involved, we must rely upon the technical judgment of the procurement activity."

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In the present situation, it should be noted that the "all or nothing" requirement in the RFP applies to only part of the total number of refuse containers which are to go to Navy installations having no existing refuse disposal system; therefore, trucks as well as containers are needed. On the other hand, Capital, or any other manufacturer of containers, may submit proposals on those refuse containers which are to go to installations with existing refuse disposal systems.

The Navy justifies the "all or nothing" requirement in the initial purchase of refuse disposal equipment by first pointing out that the container specification (MIL-R-23954A) is a performance specification as opposed to a design specification. Therefore, it is possible for different manufacturers to produce containers of various designs in accordance with the specification. Since there are no refuse trucks at these "initial purchase" installations, a container manufacturer could not assure compatibility of his product with a particular truck until the truck had been delivered and the two components were tested together. Such an arrangement, the Navy states, would not be feasible because if the containers were not compatible with the trucks, the containers would have to be modified thus incurring not only additional expenses, but also delays in placing the system in operation. The Navy cites past experiences where trucks and containers furnished by different manufacturers proved to be incompatible. As a result, the Navy suffered losses measured by excess administrative expense and resulted in component modifications and operational delays.

Because of the reasons stated by the Navy, our Office finds no basis for holding that the use of the "all or nothing" requirement in the RFP is not based upon a bona fide determination that such a provision is necessary to insure compatibility of components. Under the facts of record, our Office will not substitute its judgment concerning the technical judgment of the requisitioning or procuring activity.

Capital raises the argument that other agencies in processing similar equipment have both (1) removed containers from the grouping requirement and (2) requested that successful bidders for trucks furnish technical and dimensional data within 30 days of bid acceptance so that the Government could modify existing containers to conform with the new trucks before delivery. Indeed, both of the above actions were taken with respect to IPB -0087. In IPB -0087,

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bidding on the containers was initially subject to a similar grouping restriction, however, that restriction was removed by amending the IFB. Furthermore, the Air Force subsequently determined that its existing containers should be modified and used. Therefore the container section of IFB -0087, was deleted and no new containers will be purchased thereunder.

In B-174140, B-174205, November 17, 1972, we considered a situation analogous to the present one. There two agencies took positions practically diametrically opposed concerning the means required to meet their actual needs. We held that where substantial merit exists as to both positions, we would not say that the specification requirement stated by one agency would not meet its particular actual needs. We think that there is merit in both the Navy's position regarding the systems approach and the Air Force's independent buy or container modification approach. We therefore will not question the Navy's intention to procure this equipment as a system rather than as a collection of individual pieces of equipment.

Capital's third contention concerns lack of independence of the contracting officer. However, we find no evidence in the record of any person or office interfering with the contracting officer in the performance of his duties. Moreover, the Navy, as the requisitioning agency, has the right and the responsibility to assure that the RFP accurately reflects its needs.

Capital's fourth contention concerns the length and complexity of the RFP. We are unable on the record before us to offer any substantive comment on this allegation. Capital also questions the propriety of using negotiated procedures (10 U.S.C. 2304(a)(10)) as opposed to formal advertising procedures. In this regard, one of the exceptions to the requirement for formal advertising is where it is determined that the purchase is for property for which it is impracticable to obtain competition.

The instant procurement was negotiated under 10 U.S.C. 2304(a)(10) because Dempster allegedly holds patents on a number of the special features called for in the solicitation. Nevertheless the RFP was mailed to 17 potential sources. However, ASPR 3-210.2 indicates, and our prior decisions have held, that the mere existence of such a patent right does not, in and of itself, justify the use of this authority to negotiate. 38 Comp. Gen. 276 (1958), B-166072(1)

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March 28, 1969. The reasons stated for not advertising this procurement are that in past IFBs, Dempster has been the only responsive, responsible bidder "because of their patents on the special features." While another manufacturer performing such a Government contract may not be able to produce equipment conforming to the specifications without infringing Dempster's patent(s), 28 U.S.C. § 1498, effectively provides for Government indemnification of such a manufacturer in the event of a suit for infringement. However, it should be noted that ASPR 9-103 requires patent indemnity in the case of a contractor who might infringe a patent during the performance of a Government contract which was awarded under formal advertising.

As noted by our recent decision, B-176676, January 17, 1973, it is apparent that the procuring activity has had difficulty in obtaining competition when procurements of this nature have been formally advertised. Indeed, in the cited case, our Office concurred in the agency's determination of nonresponsiveness where a bidder took exception to the mandatory patent indemnification clause in the IFB.

In 38 Comp. Gen. 276, 278, we stated that:

"Nor do we believe that negotiation under 10 U.S.C. 2304(a)(10) would be authorized in other cases merely on the basis that the procurement involved patented articles, but rather that the determining factor should be whether or not it seems likely that persons or firms other than a patent holder, capable of performing in accordance with the Government's specifications, would be interested in submitting bids."

The record indicates that only one responsive bid was received on each of three prior procurements, and it is reasonably

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apparent from the record that the patent problem, together with the inclusion of a patent indemnity clause, severely restricted participation in the procurements. In view of this history, we feel that recourse to the negotiation authority in 10 U.S.C. 2304(a)(10) was proper.

Solicitation IFB -0087

This IFB, covers an Air Force requirement for refuse trucks and detachable cargo bodies of various sizes (MIL-T-46701B), and containers (MIL-R-23954A) which were removed by amendment. This requirement for containers as noted previously was initially subject to a bid grouping restriction similar to that in RFP -0020. This restriction was, however, removed by amendment 0002 to the IFB. Thereafter, the Air Force determined to delete the container requirement and to utilize existing containers which would be modified, at Government expense, to conform to the dimensions and characteristics of the low bidder's equipment. Primarily, these single pick-up point containers would be modified to accept either single or dual point pick-up.

Amendment 0004 to the IFB dated May 23, 1973, provides as follows:

"The successful bidder is, therefore, required to furnish certain (non-proprietary) hoisting operation technical criteria and drawings pertaining to the hoisting equipment so that the Air Force may successfully carry out the required container modifications. This hoisting operation technical criteria and drawings, are required by 30 days after receipt of contract and include the following:

"(1) Length, width, depth, and end (point) configuration of the forks.

"(2) Inside, clear distance between the forks.

"(3) Recommended clear inside length, width, and depth of the container hoisting sleeve.

"(4) Recommended maximums of length, width, height, gross container plus payload weight, and cubic volume capacity of containers operable with the hoisting equipment and chassis.

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"(5) Any limiting container dimension(s) and/or hoisting sleeve positioning dimension(s) which would prohibit or restrict the hoisting or emptying operation into the demountable body (IPB item 3), or which if exceeded could damage the truck chassis (item 1) or demountable body * * *.

"(5) Any limiting factors of container design (such as length, width or direction of top-lid swing, etc) which would prohibit or restrict hoisting or emptying operations or would damage the chassis, hoisting mechanism, or compaction body * * *.

"The requested data specified above is considered to be normal operational performance data and does not involve proprietary information. * * *."

Dempster contends that:

(1) The use of the existing containers as modified would create a substantial delay since testing and improvising would be required upon delivery of the trucks to insure container compatibility and the workability of the entire system;

(2) The requirement to furnish certain dimensional data could lead to misinterpretations of that information with disastrous results while the further requirement for information on limiting factors regarding container design and dimension could make the contractor liable for damages;

(3) Solicitation RFP -0020 was on a "systems basis" because a systems purchase is best.

In essence, Dempster contends that initial purchases of refuse collection equipment for a designated base should be done on a system basis. The Air Force does not question this contention but justifies its initial action in removing the grouping requirement on the containers on the basis that a protest by Capital might be avoided. The Air Force admits that testing of the system using modified containers would be required upon delivery of the trucks to assure safe and workable operation. However, it denies that many additional months would be required for such testing.

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Rather, the Department anticipates that because of the substantial time given for delivery of the trucks and the required prompt furnishing by the successful bidder of dimensional and operational data, such testing should be completed within a reasonable time after the delivery of the trucks.

Much of the data requested of the successful bidder clearly could be obtained upon delivery of the trucks by measurement and observation. Therefore, a request to furnish data before delivery does not seem unreasonable. Dempster does not argue that this information is in any way proprietary and it is willing to supply its purely dimensional data. However, Dempster states that it is unwilling, should it be the low bidder, to make recommendations regarding the operational limits of containers other than its own. Dempster apparently feels that this requirement of the IFB, set out in amendment 0004, puts the successful bidder effectively in the role of a consultant. They claim that this role could create a legal liability should its recommendations prove erroneous with resultant damage.

The solicitation provides no warranty with respect to the furnishing of data. Moreover, we do not believe that a basis exists for implying a warranty as to the correctness of the successful bidder's recommendations.

There is justification for the planned procurement of trucks only and the modification and utilization of existing containers. The complete system plan is also unobjectionable from our point of view. The fact that the procurement agency here chose to use one approach while another procurement agency chose a different one is not determinative of the propriety of either solicitation. See B-174140, B-174205, supra. As we have noted in regard to RFP -0020, the fact that the Navy chose a system approach while the Air Force seeks to purchase only the trucks does not suggest that either method is an unreasonable way of obtaining a workable trash removal system. Each agency must determine its particular minimum needs. We have often stated that the determination of needs and the equipment required to meet those needs are matters of administrative judgment which we regard as conclusive absent, as here, bad faith or arbitrary action in that regard. B-176395, June 15, 1973, 52 Comp. Gen. _____ (1972).

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Solicitation IFB -0097

The subject IFB was issued in response to an Air Force requirement for 21 front container hoists compaction type body, refuse collection trucks, per MIL-T-46748C. These trucks were to be replacements for similar trucks which use a single point hoisting and container system.

The single pick-up point system is presently covered by a patent held by LoDal Inc. A prior attempt to procure such single pick-up point equipment was cancelled due to a protest by Dempster which alleged that the solicitation was restrictive in that only LoDal could supply the trucks as described in the specifications. Thereupon, the Air Force decided that since LoDal would have a definite competitive advantage over any dual point truck manufacturer, the solicitation was drafted to allow dual point truck manufacturers to bid, provided that such bidders agree to make the existing single point containers compatible with their hoist mechanisms by agreeing to furnish a modification kit. Such a kit would allow for dual as well as single point pick-up.

Dempster complains against the inclusion of the kit provisions of the IFB since LoDal, the sole single point manufacturer, if bidding its single point system, need not furnish the kit, whereas, all dual point manufacturers would be required to do so, thereby giving LoDal a distinct advantage. Dempster also questions the requirement for a 6,000 lbs. arm on the hoist equipment when it asserts that a lighter arm would be adequate.

With regard to the latter contention, the Air Force has reexamined its needs and reiterates its requirement for the 6,000 lbs. arm. While it is true that in IFB -0087, which seeks to procure a quantity of self-loading detachable body trucks, the Air Force is requesting only 4,500 lbs. arms, the items there being procured are of a prototype nature. The Air Force also states that it anticipates the use of 6,000 lbs. arms in future procurements of detachable body trucks. While Dempster raises technical problems with this position, we fail to see the relevance of its position to the procurement of the equipment called for in the present solicitation. Indeed, sufficient evidence has not been produced which would cause our Office to question the reasonableness of the stated need for the use of a 6,000 lbs. arm in this procurement.

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There is no question that there exists a number of potential sources for dual point equipment, including LoDal, and that the Air Force desires that these existing containers have both single and dual point capabilities. Indeed, the Air Force has recommended a change to the container specification (MIL-R-23954A) to insure that all containers would have "universal" capability.

On this record, we feel that the requirement in the IFB for the container modification kits would provide some incentive for manufacturers other than LoDal to participate in the procurement. While this procurement does contain some restrictive features, to the extent that LoDal may have some advantage over other prospective manufacturers, there is no reason apparent from the record why reputable manufacturers could not furnish appropriate equipments by also furnishing modification kits.

Accordingly, the protests are denied.

We recognize that the procurement of refuse equipment has in the past been and continues to be a troublesome area. Accordingly, we suggest that the using and procuring agencies review their needs and procedures, keeping in mind the issues dealt with in this decision.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States