



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Voith Hydro, Inc.

File: B-401244.2; B-401771

Date: November 13, 2009

William A. Shook, Esq., and G. Matthew Koehl, Esq., Shook Doran Koehl, LLP, for the protester.

R. Lee Mann III, Esq., Kilpatrick Stockton LLP, for Andritz Hydro Corp., an intervenor.

Sheryl L. Rakestraw, Esq., Sherry Kinland-Kaswell, Esq., and James L. Weiner, Esq., Department of the Interior, for the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's issuance of solicitations for work at power plants as providing for the award of construction contracts, rather than as commercial item acquisitions, was a reasonable exercise of the agency's discretion, based on its reasonable analysis of its needs and the best basis of accommodating them, the results of market research, and consultation with agency technical experts and a Department of Labor representative.

DECISION

Voith Hydro, Inc. of York, Pennsylvania protests the terms of request for proposals (RFP) No. 09SP200017 (-0017), issued by the Department of the Interior, for generator and excitation systems for the Folsom Power Plant at the Folsom Dam, Sacramento County, California, and RFP No. 09SP200121 (-0121), issued by the Department of the Interior, for an excitation system for the Nimbus Power Plant at the Nimbus Dam, Sacramento County, California. Voith Hydro argues that the solicitations, which were issued as negotiated acquisitions under part 15 of the Federal Acquisition Regulation (FAR) and include certain clauses set forth in part 36 of the FAR pertaining to construction contracts, should have been issued in accordance with the terms of part 12 of the FAR, governing the solicitation and award of contracts for commercial items.

We deny the protests.

The agency issued RFP -0017 for the work at the Folsom Power Plant on January 4, 2009, and issued RFP -0121 for the work at the Nimbus Power Plant on July 21.¹ The RFPs provide for the award of fixed-price construction contracts on a best value basis considering the evaluation factors set forth in the solicitations. RFP -0017 seeks “proposals for all necessary labor, equipment, materials, supplies, transportation, travel and per diem necessary for mobilization and site preparatory work” for the “rewind of three generators and removal, modification, and disposal of the excitation system” at the Folsom Power Plant, as well as “the design, installation, and testing and training for a new functioning and complete excitation system” for the Folsom Power Plant. Agency Report (AR) (B-401244.2) at 1. RFP -0021 seeks “proposals for all necessary labor, equipment, materials, supplies, transportation, travel and per diem necessary for mobilization and site preparatory work” for the “removal, modification, and disposal of two highly deteriorated excitation systems” at the Nimbus Power Plant, as well as “the design, installation, and testing and training for two new functioning and complete excitation systems” for the Nimbus Power Plant. AR (B-401771) at 1.

Voith Hydro previously filed a protest with our Office (docketed as B-401244) on April 1, challenging the terms of RFP -0017. In that protest, the protester argued that the agency’s determination that it would award a contract for construction was unreasonable, and that the solicitation thus improperly included a number of provisions related to construction contracting in accordance with part 36 of the FAR. The protester explained that in its view, the items and work being solicited were commercial items and services, and that the solicitation should have been issued as a commercial item acquisition under part 12 of the FAR.

In response to the protest, the agency informed our Office and the protester that it would “re-examine [its] procurement approach,” and “conduct further market research and analysis to determine whether commercial items are available that could meet [the agency’s] requirements.” The agency stated that if it “conclude[d] that commercial items are appropriate, it [would] cancel the current solicitation . . . and solicit the requirement in accordance with FAR Part 12.” The agency added that if it “determine[d] that the original acquisition approach was proper, it [would] advise the protester of its conclusion and continue the procurement under [RFP -0017].” Agency Letter to GAO (June 8, 2009). Our Office concluded that the agency’s actions rendered the protest academic, and dismissed Voith Hydro’s protest on June 9.

¹ The Folsom Power Plant has three generators with the combined capacity of 198,720 kilowatts of electric power, and generates 10 percent of Sacramento, California’s power needs. AR (B-401244.2) at 2. The Nimbus Dam and Power Plant are located 7 miles downstream from the Folsom Dam; the Nimbus Power Plant reregulates the releases of water for power made through the Folsom Power Plant. AR (B-401771) at 1.

The record reflects that the agency, among other things, reviewed its requirements for the Folsom Power Plant project, conducted market research regarding the work required, and consulted with individuals familiar with the technical requirements set forth in RFP -0017 and a United States Department of Labor representative as to whether RFP -0017 included “construction work.” AR (B-401244.2) at 6-12. The agency ultimately concluded that the Folsom Power Plant project should not be solicited as a commercial item, but rather, as a negotiated acquisition providing for the award of a construction contract, and thus informed Voith Hydro and the other firms that had submitted proposals in response to RFP -0017 of the agency’s determination. The agency had also, by this time, issued RFP -0021 as a solicitation providing for the award of a construction contract for the work required at the Nimbus Power Plant.

Voith Hydro protests that the agency improperly concluded that the work required at the Folsom Power Plant, as set forth in RFP -0017, and the work required at the Nimbus Power Plant, as set forth in RFP -0021, primarily involved “construction,” as that term is defined in the FAR. In Voith Hydro’s view, the agency was required to issue the solicitations as commercial item acquisitions in accordance with part 12 of the FAR, rather than as negotiated acquisitions under part 15 of the FAR with certain clauses pertaining to the issuance of construction contracts under part 36 of the FAR.

Specifically, the protester argues that the actual items and services that are required to be furnished under the solicitation meet the definition of “commercial item” as set forth in the FAR. The protester first points out here that FAR § 2.101 defines “commercial item” as “[a]ny item, other than real property, that is of the type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes,” which has been sold or offered for sale to the general public. The protester continues by noting that the FAR’s definition of commercial items specifically includes items that would satisfy the above definition “but for . . . [m]odifications of a type customarily available in the commercial marketplace,” as well as “[i]nstallation services, maintenance services, repair services, training services, and other services” as long as certain requirements are met. FAR § 2.101. The protester next provides a breakdown of each RFP by contract line item (CLIN), and in addition to calculating the approximate price associated with each CLIN, explains why, in its view, the particular CLINs must be considered commercial items, based primarily on the protester’s view that the particular items required under the majority of the CLINS set forth in each solicitation, as well as what the protester characterizes as “services,” are “of a type customarily available in the commercial marketplace.” The protester concludes here that because “[t]here is no doubt” that the majority of the RFPs’ CLINs constitute commercial items (or services), the work required at the Folsom Power Plant (RFP -0017) and the Nimbus Power Plant (RFP -0021) meets the definition of “commercial item” as set forth in the FAR, and the agency was thus without discretion to issue the solicitations as other than commercial item acquisitions in

accordance with part 12 of the FAR. Protest (B-401771) at 5; see Protest (B-401244.2) at 16 (contending that “the vast majority of the value of this Solicitation involves items and services which indisputably meet the definition of a ‘commercial item’”). The protester further argues that, contrary to the agency’s view, neither the Folsom Power Plant project (RFP -0017) nor the Nimbus Power Plant project (RFP -0021) can properly be considered “construction” under the definition of that term in the FAR. See FAR § 2.101.

We have long held that the contracting agency has the primary responsibility for determining its needs and the best method of accommodating them, and that this principle applies to the contracting format used to purchase the items which the agency has determined necessary. Library of Congress--Obligation of Guaranteed Minimums for Indefinite-Delivery, Indefinite Quantity Contracts under the FEDLINK Program, B-318046, July 7, 2009; James Foos & Assoc., B-249496.2, Jan. 6, 1993, 93-1 CPD ¶ 22 at 2; see Mills Mfg. Corp., B-224004; B-224005, Dec. 18, 1986, 86-2 CPD ¶ 679 at 2. Our Office will not object to an agency’s determination in this regard unless the protester shows that it is clearly unreasonable. Crescent Helicopters, B-284706 et al., May 30, 2000, 2000 CPD ¶ 90 at 2; James Foos & Assoc., supra.

FAR part 12 prescribes policies and procedures unique to the acquisition of commercial items and implements the preference established by, and the specific requirements in, the Federal Acquisition Streamlining Act of 1994, 41 U.S.C. § 264b (2006), for the acquisition of commercial items that meet the needs of an agency. FAR part 12 was intended to establish acquisition policies more closely resembling those of the commercial marketplace as well as other considerations necessary for proper acquisition planning, solicitation, evaluation, and award of contracts for commercial items. Crescent Helicopters, supra. FAR part 12 specifies the solicitation provisions and clauses to be used when acquiring commercial items.

Agencies are required to conduct market research pursuant to FAR part 10 to determine whether commercial items are available that could meet the agency’s requirements. FAR § 12.101(a). If market research establishes that the government’s needs can be met by a type of item (including services) customarily available in the commercial marketplace that would meet the definition of a commercial item at FAR § 2.101, the contracting officer is required to solicit and award any resulting contract using the policies and procedures in FAR part 12. FAR §§ 10.002(d)(1), 12.102(a); Crescent Helicopters, supra, at 2-3. Determining whether or not a product or service is a commercial item is largely within the discretion of the contracting agency, and such a determination will not be disturbed by our Office unless it is shown to be unreasonable. Crescent Helicopters, supra, at 2.

The agency explains with regard to both of the RFPs that, in order to address the concerns by the protester in its initial protest (B-401244), the agency conducted market research by posting a request for information (RFI) regarding the project on the agency’s website and soliciting the views of the firms that had submitted

proposals in response to RFP -0017. Specifically, the agency explains that in addition to posting the RFI on the agency's website, it "submitted the RFI directly to the [DELETED] prospective bidders for the [Folsom Power Plant] project," and received responses from two of the "major market participants."² AR (B-401244.2) at 7.

One vendor commented, among other things, that "[t]his type of equipment requires a design build to match the wide range of customer requirements," and explained in some detail as to why, in this vendor's view, the work required was unique to the Folsom Power Plant. AR (B-401244.2), Tab E, [DELETED], at 1. In this regard, this vendor outlined a number of items that would need to be "design[ed]" or would involve "[c]ustom manufacturing" to meet the technical requirements of the solicitation, and that each of these processes "would entail several thousand hours." Id. This vendor continued by explaining that the work required is "specific and unique to Folsom," and, with regard to certain of the items required for the Folsom project, that "new tooling [will be] designed and manufactured" and "new programs [will be] written for the manufacturing" of the items required, and that "[u]pon completion of the job a majority of the tooling is scrapped or modified for other jobs." Id. at 2-3. In response to a question asking whether the vendor had "established catalog prices . . . for this type of requirement," this vendor commented that it did not, and explained that "[t]his type of equipment requires a design build to match the wide range of customer requirements." Id. at 1. This vendor continued by explaining that "[t]hese products are sold as improvements and alterations to existing real property." Id. On the other hand, this vendor, in detailing the numerous aspects of the work required under the RFP that would have to be "[c]ustom" or specifically designed and built for the Folsom Power Plant project, also answered "[y]es" to a question asking whether the "modifications" required for the Folsom Power Plant were "of a type customarily available in the commercial marketplace." Id.

The other responding vendor answered a market research question asking whether the work required at the Folsom Power Plant could be characterized as commercial items by stating "[n]o." AR (B-401244.2), Tab E, Andritz Hydro Response, at 1. This vendor continued by discussing another solicitation issued by the Army Corps of Engineers for work that the vendor characterized as "similar in nature" to the work required at the Folsom Power Plant, and concluding that based upon its experience with that solicitation as well as RFP -0017, "it is clear that concerns or questions that Voith raises about FAR 12 in the Folsom bid is their isolated opinion and their view is not shared by other vendors or manufacturers." Id. at 1-2. This vendor also retained counsel and intervened in this protest, detailing its views as to why the

² The agency submitted its RFI for publication on the FedBizOpps website, but learned later that no such notice appeared on the FedBizOpps website due to technical issues. AR at 7 n.3.

agency's needs at the Folsom Power Plant cannot be accomplished through a commercial item acquisition due to the number of items that are unique to the work required. Intervenor's Comments at 1-5.

The record also includes a lengthy and detailed statement from an agency senior electrical engineer, explaining, for example, that RFP -0017 "is for the retrofitting of an existing hydroelectric facility by reusing some existing components, rewinding [refurbishing] and upgrading others, and providing some new components that must be custom made for the Project so that they will work with the existing components and dimensional constraints." AR (B-401244.2), Tab I, Statement of the Agency Senior Electrical Engineer, at 2. This individual adds that "[i]n addition, the Project requires: a technical evaluation of the mechanical limitations of the existing generators that are going to be retrofitted; custom designed and installed equipment platforms and walkways; environmental work consisting of asbestos removal and a five-year extended warranty for the completed system." Id. In addition to providing further detailed explanation as to why certain items of work involve "one-of-a-kind construction," while others are "clearly site and job specific and must be customized for the Folsom job," the senior electrical engineer concludes that the work required cannot be "bought pursuant to Part 12 of the FAR." Id. at 2-3.

The record reflects that the agency also contacted a representative of the U.S. Department Labor (DOL) to obtain DOL's views as to whether the provisions of the Service Contract Act, 41 U.S.C. §§ 351-358 (2006), which generally covers services or maintenance work, or the Davis Bacon Act, 40 U.S.C. §§ 276a-276a-7 (2006), which generally covers construction work, including alteration and repair work, were applicable to the solicitation. AR (B-401244.2) at 9; see Dismantlement and Env'tl. Mgmt. Co., B-257632, Oct. 24, 1994, 94-2 CPD ¶ 151 at 3 n.3. The DOL representative found that RFP -0017 "did contain construction work and that the laborers involved would be covered under the Davis-Bacon Act, not the Service Contract Act." AR (B-401244.2) at 9. The agency points out that it estimates that "in excess of [DELETED] labor hours" of "onsite" work will be required to complete the work required under RFP -0017, and that although certain service work will be required, "these services were not the majority of the work and were not severable from the work because the contractor that designs the systems must provide training on that system." Id.

The agency also points out that the FAR § 2.101 defines "construction" in relevant part as "[c]onstruction, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other real property," and that "[f]or purposes of this definition, the terms 'buildings, structures, or other real property' include, but are not limited to, improvements of all types, such as . . . dams [and] plants." FAR § 2.101. The agency argues that in its view the dam, its power plant, and equipment installed therein, such as the generators and excitation system, fall within this definition of real property, and that such a view is consistent with the "Department of the Interior Real Property Financial Management Policy Guide," which provides

that “[r]eal property is defined as any interest in land, together with improvements, structures and fixtures, appurtenances, and improvements of any kind located thereon,” and specifically includes electrical utility systems and hydroelectric power generation within this definition. AR (B-401244.2) at 5; Tab G, Department of the Interior Real Property Financial Management Policy Guide, at 5.

Finally, the agency notes that, contrary to the protester’s characterizations, the agency is not procuring a number of individual items and services, but rather, a complete system that “requires a customized system design, fabrication and installation of multiple components to form a complete system which is unique for these units to meet the ratings and performance requirements of the solicitation.” Contracting Officer’s Statement (B-401244.2) at 4; see AR (B-401244.2) at 2. The agency also states that because “this system of integrated multiple components are customized in a unique manner to suit Folsom generators and specification requirements, there is no commercial product or modified commercial item, which could be used to fulfill the solicitation requirements.” Id.

We find the agency’s determinations that the work and items required under RFP -0017 should be acquired under a construction contract, and cannot be acquired as commercial items using part 12 of the FAR, to be a reasonable exercise of the agency’s discretion. Although the protester clearly disagrees, and has presented arguments as to why the agency’s market research and conclusions drawn from the market research results are flawed, as well as a detailed breakdown of the requirements of the solicitation and why, in the protester’s view, the requirements must be met through a commercial item acquisition, rather than through a negotiated acquisition under part 15 of the FAR with FAR part 36 construction contract clauses, these arguments fail to establish, based upon our review of the record, that the agency’s views are unreasonable. In this regard, we find reasonable the agency’s view that the market research responses can fairly be read as providing that while there are vendors that manufacture and install equipment similar to that being acquired here, such equipment would have to be custom manufactured or built based upon unique specifications to such an extent that it cannot be considered as commercial items or, when designed and built, cannot be considered “of a type” available in the commercial marketplace given the unique requirements of the complete system sought here. Additionally, as indicated above, the agency’s determination that the solicitation should be viewed as for construction, rather than for commercial items and services, is consistent with DOL’s views. Finally, in this regard, we cannot find unreasonable the agency’s determination that the work required constitutes construction, given, in addition to the views of DOL, the lengthy and detailed description of the work required to build the equipment and alter the power plant, including extensive on-site work involving substantial “construction” labor hours, in order to fulfill the requirements set forth in the solicitation.

As indicated, the contracting agency has the primary responsibility for determining its needs and the best method of accommodating them. Law Library of Congress--

Obligation of Guaranteed Minimums for Indefinite-Delivery, Indefinite Quantity Contracts under the FEDLINK Program, *supra*. Based on our review of the record, the agency reasonably analyzed its needs and determined that this RFP should be for construction and was not an acquisition of commercial items. While it may be that the individual construction components here would be considered commercial items if acquired individually, *see* FAR § 2.101, we agree with the agency that the RFP here was for a construction project that used and integrated construction components, and is not for the acquisition of a commercial item.³

The agency relied in part on the market research conducted and the DOL opinion obtained during the agency's review of RFP -0017 in determining and defending its view that the work required at the Nimbus Power Plant, and solicited under RFP -0021, also cannot be acquired as commercial items or services and should be considered to be construction. Contracting Officer's Statement (B-401771) at 3-5. The agency also similarly determined with regard to RFP -0021 that while "[i]ndividually some of the components may be commercially available . . . however it is only through the effective combined integration of these components that a complete workable system can be achieved," and that "[t]here is no commercial system available which with minor modifications (or for that matter with major modifications), could meet [the agency's] specification requirements" for the excitation system for the Nimbus power plant. Contracting Officer's Statement (B-401771) at 2.

The protester makes arguments with regard to the terms of RFP -0021 similar to those it made in challenging the terms of RFP -0017. The protester also argues that the agency erred in considering the market research conducted in connection with RFP -0017 in determining that RFP -0021 was not a commercial item acquisition under part 12 of the FAR, given the difference in the estimated cost of the two projects (RFP -0017 estimated at more than \$10 million and RFP -0021 estimated at \$1 million to \$5 million), and the fact that the "type of work and products being acquired are different." Protester's Comments (B-401771) at 10; RFP -0017 (Standard Form (SF) 1442) at 1; RFP -0021 (SF 1442) at 1. With regard to the difference in work, as indicated, RFP -0021 requires that the successful contractor remove, furnish and install excitation systems, as opposed to removing, furnishing, and installing excitation systems and generators under RFP -0017.

We find that the agency acted reasonably in considering the market research conducted with regard to RFP -0017 in considering the appropriate terms to include in RFP-0021. In this regard, although the requirements in the solicitations differ, they are similar, and the FAR expressly authorizes the review "of the results of market

³ There are some situations where construction services fall within the definition of commercial items. *See, e.g., Sletager, Inc.*, B-237676, Mar. 15, 1990, 90-1 CPD ¶ 298 at 3.

research undertaken to meet similar or identical requirements.” FAR § 10.002(b)(2)(ii). Additionally, the record reflects that the agency considered the work solicited under RFP -0021, and determined that “the work associated with removing, modifying, disposing, furnishing, installing, and testing constituted . . . 79% of the total estimated value,” and that the approximately [DELETED] hours of on-site work involved would be performed by “foreman and high voltage workers which are labor categories under the Davis Bacon Act.” Contracting Officer’s Statement (B-401771) at 5. The agency reports that because of this, it determined that “the work would be treated as construction and thus a construction contract was the most suitable.” Id.

Again, we find that Voith Hydro’s protest challenging the terms of RFP -0021, while clearly evidencing the protester’s disagreement with the agency’s position, does not show that the agency’s determination not to issue the solicitation under part 12 of the FAR, and to issue this solicitation as providing for a construction contract under parts 15 and 36 of the FAR, was unreasonable. As described above, the agency’s analysis of its needs and the best method of accommodating them was, in our view, thoughtful and based on appropriate market research.

The protests are denied.

Lynn H. Gibson
Acting General Counsel