

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE EXECUTIVE DIRECTOR OF
THE ALASKA ENERGY AUTHORITY**

In the Matter of:)
)
POWERCORP ALASKA, LLC.)
)
Appellant.) OAH No. 05-0074-PRO
_____) AEA ITB No. REG-05-067

PROPOSED DECISION

I. Introduction

This is a protest appeal. It concerns Invitation to Bid (ITB) No. REG-05-067, issued by the Alaska Energy Authority for the purchase of paralleling switchgear.

On December 20, 2004, prior to the due date for bids, Powercorp Alaska, LLC [Powercorp] filed a protest. The energy authority denied the protest on January 3, 2005, bids were opened on January 5, 2005, and on January 11, 2005, Powercorp filed this appeal. On January 13, 2005, the energy authority's Executive Director, Ron Miller, authorized the award of the contract in lieu of a stay. The matter was referred to the Office of Administrative Hearings, and a hearing was conducted on May 2-3, 2005.

Based on the testimony at the hearing and the evidence in the record, the administrative law judge recommends that the protest appeal be denied.

II. Facts

The background to this protest appeal is set out in a decision issued in a protest appeal involving the same parties that arose in a preceding solicitation, ITB No. REG-04-230:

Approximately 171 remote rural Alaskan villages are located off the electrical grid system and receive their electrical power from one or more local power plants. In 51 villages, the electrical utility is operated by the Alaska Village Electrical Cooperative [AVEC]. In the remaining 120 villages, typically smaller and more remote, the electrical utility is operated by a locally owned electrical utility company. Historically, the locally owned and operated utilities have operated at a cost that cannot be supported by local users, and have provided unsatisfactory levels of reliability. For at least fifteen years, AEA has been a major provider of

technical and managerial expertise and a major funding agency for the locally owned and operated rural electrical utilities. ...

In recent years, with significant decreases state funding of energy programs and with increased federal funding through the Denali Commission that is perceived as unlikely to be maintained in the long term, policymakers have increasingly focussed on achieving a reliable, sustainable rural electrical system statewide. AEA's Rural Power System Upgrade [RPSU] program was implemented to work towards sustainability by upgrading powerplants throughout rural Alaska. As part of that program, AEA developed a prioritized list of all 120 villages under its oversight and set out to overhaul as many as possible while Denali Commission funding was available, anticipating completion of all the villages within about ten years.

The RPSU program includes, among other things, exploring and expanding the use of alternative energy sources, primarily wind, at remote sites. It also includes increasing the efficiency of electrical generation at rural power plants by installation of automatic paralleling switchgear, which matches power generation with demand on a continuous, automatic basis. Paralleling switchgear can reduce fuel consumption by 5-10%, but can cost \$150-\$200,000.

AEA is also interested in increasing its ability to remotely monitor powerplant operations.... Beginning in mid-2002, AEA's RPSU program manager, Kris Noonan, and a project manager assigned to the RPSU program, Lenny Landis, had been looking into alternatives for remote monitoring. By July 2003, their efforts had led them to Powercorp, which had installed a number of remote monitoring and control systems in Australia and elsewhere, including Antarctica. ...The Powercorp system had been used in a number of locations for hybrid diesel/alternative energy systems control, which was of interest to AEA because wind generation (and heat co-generation) are areas highlighted as potential contributors to sustainability in the Alaska Rural Energy Policy plan.

The critical components in a paralleling switchgear system are a supervisory (or master) controller, one or more engine controllers, contactors, and the operator interface unit. The system includes sensors that detect load and demand as well as generator conditions (e.g., temperature, speed). The supervisory controller takes the data sent to it by the sensors and based on pre-programmed parameters instructs the engine controllers to adjust the generators to the optimum operating speed. The contactors connect the engine controllers to the generators. The operator interface unit (a monitor screen and keyboard) allows an on site operator to monitor conditions and make adjustments.

Programmable logic controllers [PLC] are the industry standard for supervisory controllers. PLC's are manufactured by a number of manufacturers, including Allen-Bradley, General Electric, and others. A PLC uses ladder logic to derive commands for the engine controllers from

the data submitted by the sensors. PLC-based systems utilizing an Allen-Bradley supervisory controller had been supplied to AEA under term contracts for more than ten years. Allen-Bradley controllers are installed in thousands of locations, including many in Alaska, and are recognized in the industry as reliable. Within the electrical power generation industry, they are widely distributed, commonly available from multiple distributors, frequently installed, and familiar to experienced operators.

The Powercorp system supervisor controller relies on a personal computer [PC] rather than a PLC to derive the commands sent to the engine controllers. The Powercorp system is the only PC-based system currently being marketed in Alaska. Both PC- and PLC-based systems are programmed to derive and communicate commands based upon preset parameters. Both the PC and the PLC can be programmed to any number of different configurations deemed suitable by the operator. However, the PC-based controller provides additional programming flexibility and adaptability, such as the ability to incorporate multiple power generation sources. In addition, because it is computer based, remote monitoring (given an online connection) is built into the Powercorp system and the programming for the PC can be manipulated online in a manner that affords a greater degree of remote control than is possible with a PLC system.

ITB No. REG 04-230 was the first solicitation for paralleling switchgear in the energy authority's planned ten-year program to upgrade rural powerplants across Alaska. The invitation to bid specified an Allen-Bradley PLC as the supervisory controller and had other specific equipment requirements that made Powercorp's proprietary PC-based system non-responsive. Powercorp file a protest asserting that the bid specifications rendering the Powercorp system non-responsive were unduly restrictive and improperly brand-specific. In addition, Powercorp asserted that no solicitation should have been issued until a demonstration project in Golovin utilizing the Powercorp system had been fully evaluated. The protest and appeal were denied, and the matter is now on appeal to the superior court.¹

¹ The findings of fact recited above are adopted for purposes of this decision, notwithstanding that they remain subject to the outcome of the appeal. To the extent that testimony and evidence from the hearing in this case is relevant to the quoted findings, it does not alter the quoted findings. In particular, although Brian Gray offered the opinion that a PC-based system, such as the Powercorp system, does not provide "additional programming flexibility and adaptability," and that it does not "afford... a greater degree of remote control than is possible with a PLC system," the basis for that opinion (in technical terms) was not addressed in any significant degree, and therefore the record in the current case does not warrant a change in the prior findings.

The second solicitation in the energy authority's ongoing ten-year powerplant upgrade program was Invitation To Bid No. REG-05-067, issued on December 6, 2004. The invitation solicited bids to provide automatic paralleling switchgear for installation at five Alaskan villages on the Kusokwim River. As a result of the controversy regarding the first solicitation, the energy authority had resolved to revise the next solicitation to make alternative systems responsive, while at the same time avoiding undue variability with respect to layout and construction, as well as system components. With that goal, the new invitation to bid required the submission of bids incorporating an Allen-Bradley supervisory controller and the energy authority's proprietary software as Option No. 1, but also allowed the submission of bids incorporating alternative controllers and software as Option No. 2.

The solicitation stated:

Option #2 is provided to allow bidders to propose an equivalent system with substitution of alternate manufacturers of individual items. Equipment substitutions are strictly limited to the following items: (1) Primary PLC, (2) Backup PLC, (3) Genset Control Package (GCP), (4) Protective Trip Relay (PTR), (5) Contactor, and (6) Electric Power Meter (EPM). ...The bidder must...provide manufacturer's technical literature for every substitute item that clearly demonstrates how the proposed substitute meets or exceeds the performance of the original specified item. Failure to adequately demonstrate equivalence will result in the bid for Option #2 being declared non-responsive.

The solicitation advised bidders that "Award will be made based on the lowest priced responsive and responsible bid for either Option 1 or Option 2. [AEA] may decide to choose between Option 1 or Option 2 if selection of either option would not change the ranking of the bidder."

Powercorp understood the invitation to bid to mean that the energy authority retained discretion to select the lowest bid offered for either Option No. 1 or Option No. 2 from among all of the bids submitted. As Powercorp understood the invitation, even if Powercorp's bid for the Powercorp system was lower than any other bid, including all of the Option No. 1 bids, the energy authority would have had the discretion to reject the Powercorp system and choose the lowest-priced Option 1 bid. For that reason, and

because it had no intention of supplying a system in conformity with Option 1, Powercorp filed a protest and did not submit a bid on either option.

As stated in the protest decision issued on January 3, 2005, two days before bids were opened on January 5, 2005, the energy authority's intent was that the award would be made to the bidder who made the lowest bid for either Option No. 1 or Option No. 2 from among all of the bids submitted, and that the authority retained discretion to choose that bidder's other option, but only if that bidder's other option was also the lowest bid for that option. Under the authority's understanding, if Powercorp's Option No. 2 bid (the Powercorp proprietary system) was the lowest of all bids on either option, then the authority was obligated to award the contract to Powercorp, and could only switch to Option No. 1 (the energy authority's system) if Powercorp's Option No. 1 bid was also the lowest bid on that option.

III. Discussion

A. Controller and Software Specifications.

In its protest and on appeal, Powercorp asserts that the bid specifications are unduly restrictive because: (1) alternative, non-energy authority software is precluded; and (2) a brand name specification was used (a) contrary to applicable regulations and (b) in the absence of any unique features.

(1) Powercorp argues that under Option No. 2 it was not allowed to submit a bid incorporating its own software. It points out that the alternative controllers allowed by the invitation to bid are limited to the primary and backup PLC controllers, with no reference to software. It argues that the terms of the invitation to bid do not expressly indicate that alternative software may be bid, as well. But the energy authority's proprietary software, which was specifically designed to interface with the Allen-Bradley PLC, would not run on a PC-based controller. To read the bid as allowing a PC-based controller, but not allowing alternative software, would render the provision allowing a PC-based controller meaningless. Such a reading would be unreasonable.

The substitutions clause did not expressly allow or preclude the substitution of software, because it addressed equipment only. Powercorp filed a protest rather than requesting clarification regarding the substitution of software. In its protest, Powercorp

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did not assert that the substitutions clause precluded the use of a PC-based controller in Option 2.² The energy authority's decision on the protest, issued prior to the due date for bids, expressly advised Powercorp that it could submit, as Option 2, a bid incorporating Powercorp's PC-based controller and its associated software. The invitation to bid should be interpreted as allowing the use of alternative software under Option 2.

(2) Option No. 2 did not restrict bidders to the energy authority's software. Given that interpretation of the invitation to bid, Powercorp's objection to the brand specific specification in Option 1 is moot: Powercorp lacks standing to raise that issue in this case, just as it lacked standing to raise the same issue in the prior protest, because Powercorp had no intention of submitting a bid on Option No. 1. Powercorp's objection is to the requirement that Option No. 1 bids be submitted at all, not to fact that it is brand-specific or otherwise objectionable.

B. AEA Did Not Abuse its Discretion in Proceeding with the Solicitation

In this appeal, as in its prior protest, Powercorp argues that by proceeding with the switchgear solicitation before completing its evaluation of the Powercorp switchgear at the Golovin test site, the energy authority will effectively "lock in" the Allen-Bradley/energy authority software for the remainder of the ongoing powerplant upgrade program. The energy authority says that it is open to the use of alternative systems in future procurements, and that its switchgear specifications have in the past and will in the future continue to evolve.

Powercorp did not establish that the energy authority abused its discretion by issuing the solicitation when it did. As noted in the prior decision, the acquisition of switchgear is driven by a construction schedule for overall powerplant upgrades that is set by policy considerations and the availability of funding. Switchgear is only one part of the upgrade program. Powercorp did not establish that the energy authority abused its discretion by continuing with its overall construction schedule despite the lack of a final report on the Golovin demonstration project.

² Powercorp's protest asked that it "be allowed to not only use our PC base supervisory controls but also, our own...software." Neither Powercorp's appeal nor its specification of error asserts that the invitation to bid precluded offering a PC-based controller under Option 2.

More fundamentally, Powercorp's argument is directly contradicted by the solicitation in this case, because the solicitation allows alternative systems to be bid. Since there is no evidence that the energy authority will not continue to allow alternative systems to be bid, there is no factual basis for Powercorp's argument that this solicitation will "lock in" the Allen-Bradley/energy authority software system.

C. The Requirement for Submission of Option 1 Is Moot

The central point of Powercorp's protest and appeal is that it should not have been required to submit a bid on Option No. 1 in order to submit a bid on Option No. 2. It contends that the requirement to include an Option No. 1 bid is unduly restrictive.

The energy authority asserts that the requirement for an Option No. 1 bid was reasonable. In its decision on the protest, the energy authority explained that a bid on Option No. 1 was required "in order to ensure that bidders fully understand our system requirements and provide a system that offers similar performance and has similar layout and construction". It added that the energy authority anticipated multiple bids, and that Powercorp had not shown that it was unable to submit a bid on Option No. 1.

Assuming that the requirement to include a bid on Option No. 1 was unduly restrictive, Powercorp has not shown that it would be entitled to any relief with respect to the contract that was awarded. The selection of an appropriate remedy depends on all of the circumstances, including the seriousness of the procurement deficiency, the degree of prejudice to other interested parties or to the integrity of the procurement system, the good faith of the parties, the extent the procurement has been accomplished, costs and other impacts on the purchasing agency, and the urgency of the procurement to the welfare of the state.³

When a contract has been awarded, the remedies available to the protestor are limited to an award of bid preparation costs or cancellation of the contract. In this case, because Powercorp did not submit a bid, there can be no award of the costs of preparing a bid. The only other remedy available to Powercorp is cancellation of the contract.

Cancellation would be appropriate if the requirement to submit an Option 1 bid was included in bad faith, but Powercorp did not establish that the requirement was

³ AS 36.30.585(b).



included in bad faith. To the contrary, the evidence establishes that the energy authority instituted changes in this solicitation with the intent to open the door to a bid from Powercorp. With respect to the other relevant circumstances, in this case the contract has already been awarded, performance is underway, and there would be substantial costs to the energy authority and the successful bidder in the event of cancellation.⁴ Furthermore, Powercorp has not shown that the requirement of submitting a bid on Option No. 1 was prejudicial to it, because there is no showing that but for the requirement, Powercorp would have been the successful bidder.⁵ Under these circumstances, cancellation is not an appropriate remedy.⁶

Because there is no appropriate remedy available to Powercorp with respect to the prior solicitation and the resulting contract, Powercorp's protest regarding the requirement of a bid on Option 1 is moot. Nonetheless, at the hearing Powercorp asked for a decision that would preclude use of a similar requirement in the next switchgear solicitation.

A ruling that is moot as to a pending case may be appropriate in certain situations where the issue concerns a matter of procurement policy that is likely to arise in the future. But Powercorp's protest to the Option 1 requirement does not raise any general

⁴ Powercorp asserts that the costs incurred by the agency should not be considered as grounds for declining to cancel the contract, because the agency, not Powercorp, was responsible for the award of the contract notwithstanding the pending protest and appeal. Powercorp relies in part on federal procurement cases based on federal law, under which a stay of award must be granted unless the contracting agency finds "urgent and compelling" reasons to proceed, and under which the Comptroller General is required to make recommendations "without regard to any cost or disruption from terminating, recompeting, or reawarding the contract." 31 U.S.C. Sec. 3554(b)(2). But under Alaska law, there is no presumptive stay. To the contrary, under Alaska law the contract may be awarded unless a specific finding is made that a stay is in the best interests of the state. Furthermore, in determining an appropriate remedy, the costs to the agency must be considered, among other factors. See AS 36.30.585(b). These provisions show that the Alaska legislature has struck a different balance than Congress. See generally Appeal of Bachner Company and Bowers Investment Co., No. 02.06/07, at 18-19. (Department of Administration, October 16, 2002).

⁵ In federal procurements, in order to have standing a bidder must show that but for the error, the bidder would have been next in line for the contract award. Mr. Meiners' testimony at the prior hearing indicated that the Powercorp system is more expensive than the Option No. 1 system.

Powercorp argues that it has standing to raise this issue, even though it did not submit a bid. But the federal cases it cites involve situations in which the potential bidder could not meet the existing specification. In this case, Powercorp was capable of submitting a responsive bid as to Option No. 2. In any event, even if Powercorp has standing to raise the issue, the issue is moot unless Powercorp can show grounds for canceling the contract.

⁶ See generally Appeal of Bachner Co., Inc. and Bowers Investment Co., No. 02.06.02/07 at 16-19 (Department of Administration, October 9, 2002); Appeal of Waste Management of Alaska, Inc., No. 01.08 at 17-20 (Department of Administration, April 25, 2002).

issue of procurement policy: it concerns whether under a particular set of facts a particular bid requirement was an abuse of discretion. Furthermore, whether a future solicitation for switchgear would incorporate a similar requirement is speculative. For these reasons, the general rule against deciding moot cases should be adhered to, with respect to this particular issue.

D. The Invitation to Bid was Not an Abuse of Discretion

Powercorp makes two related objections to the invitation to bid format. First, it objects that the solicitation should have been by competitive sealed proposals (*i.e.*, request for proposals), rather than by competitive sealed bids (*i.e.*, invitation to bid). Second, it objects that if the invitation to bid format was proper, the specifications should have been based on functional requirements (“desired performance”), rather than design standards.

These objections, if correct, would not warrant cancellation of the existing contract, for the same reasons noted in connection with the prior objection, and are therefore moot for purposes of this solicitation. However, both objections involve significant issues of procurement policy, and both will necessarily arise in the context of the next solicitation. For these reasons, both issues will be addressed even though moot in this case.

(1) Type of Solicitation

Powercorp’s post-hearing memorandum does not argue that competitive sealed bids were precluded. However, that argument was asserted in its pre-hearing specification of error. The energy authority contends that the use of a competitive sealed bids was appropriate, citing to 15 C.F.R. §24.36(d), which states:

(d) Methods of procurement to be followed. ...

(2) ...The sealed bid method is the preferred method for procuring construction, if the conditions in Sec. 24.36(d)(2)(i) apply:

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price....

Alaska law is less direct. AS 36.30.100 states that "except as otherwise provided in [the Procurement Code], or unless specifically exempted by law, an agency contract shall be awarded by competitive sealed bidding." Competitive sealed proposals may be used "when the procurement officer determines in writing with particularity that the use of competitive sealed proposals is more advantageous to the state than competitive sealed bidding."⁷ Because the use of competitive sealed proposals involves an evaluation of alternatives in which price is only a portion of the competition,⁸ Alaska law effectively calls for the use of competitive sealed bids whenever price or price-related matters are the sole significant factors upon which the competition will be based.

Under both federal and Alaska law, the decision to proceed by competitive sealed proposals rather than competitive sealed bids is a matter within the discretion of the purchasing agency, and is reviewed for abuse of discretion.⁹

In this case, Powercorp's basic argument is that the award should not have been made primarily on the basis of price, but rather in substantial part on the basis of a comparative evaluation of the relative merits of the competing systems, and that for this reason the use of competitive sealed proposals would have been "more advantageous to the state than competitive sealed bidding."

The energy authority determined that it does not need any enhanced functionality over and above the functionality provided by its standard Allen-Bradley system incorporating the energy authority's software. Powercorp did not submit evidence that the energy authority needed increased functionality. In the absence of any showing that the energy authority should have provided for competition on the basis of performance, there is no basis for concluding that the energy authority abused its discretion by issuing an invitation for bids rather than a request for proposals.

⁷ AS 36.30.200(b). *See*, 2 AAC 12.215.

⁸ AS 36.30.250(a); 2 AAC 12.260.

⁹ Specialized Contract Services, Inc., No. B-257321, 94-2 CPD ¶90 (September 2, 1994).

(2) Format of Specifications

Powercorp's second objection is to the use of design specifications rather than performance specifications.

Performance specifications, rather than design specifications, are generally preferred.¹⁰ The failure to use performance specifications in an invitation to bid may preclude a bidder from offering a lower-priced item that meets the agency's needs in terms of performance, but is of a different design than the specified design. But "[s]pecifications emphasizing functional or performance criteria are primarily applicable to the procurement of supplies and services and might not be practicable in construction, apart from the procurement of supply type items for a construction project."¹¹

The energy authority's specifications for Option No. 1 are design specifications, not performance specifications. But Option No. 2, while not providing any particular "performance specifications," allows alternative components, so long as the system meets the performance standards of the equipment and design specified in Option No. 1. As structured, the invitation to bid in effect calls for a particular item (Option No. 1) or any equivalent (Option No. 2). This format (a specific brand "or equivalent") is routinely employed for system components, and this particular invitation to bid simply extends the format to the system as a whole.

While it might have been preferable and practicable for the energy authority to more precisely articulate what specific performance standards in the Option No. 1 system are necessary to meet the agency's actual needs, there is no evidence that the Powercorp system, if it had been offered, would have been deemed non-responsive. Furthermore, Powercorp has not identified any particular performance specification that was not articulated that should have been, or that was articulated and was unduly restrictive (other than the Option No. 1 requirement that is addressed elsewhere).

¹⁰ "Specifications must, to the extent practicable, emphasize functional or performance criteria necessary to meet the needs of the state." 2 AAC 12.080(b).

¹¹ *Id.*

Because Powercorp did not establish that the use of design specifications was prohibited, an abuse of discretion, or unfairly prejudicial to Powercorp, the objection to the use of design specifications is rejected.

E. AEA Has Adequately Reviewed Alternatives

Powercorp's post-hearing memorandum characterizes the solicitation as precluding alternative systems, which it does not. Powercorp argues that an independent evaluation should be required because the energy authority has reached negative conclusions about the Powercorp system that are unwarranted, and that an independent evaluation would establish that the Powercorp system is superior.

These arguments are relevant only in the context of a request for proposals. Since the energy authority is not comparing performance in the evaluation of bids, and Powercorp's system has not been deemed non-responsive for purposes of Option 2, the demand for an independent evaluation is, in substance, a repetition of Powercorp's arguments that (1) the selection of a particular system in this solicitation will "lock in" all future solicitations to the same system, and that (2) the use of an invitation to bid was erroneous. Those arguments have already been rejected, and Powercorp's argument on this issue is rejected as well.

IV. Conclusion

ITB No. REG-05-067 complies with applicable law. Powercorp did not establish by a preponderance of the evidence that the Alaska Energy Authority abused its discretion. The protest appeal should be denied in its entirety.

DATED December 6, 2005.

Andrew M. Hemenway
Administrative Law Judge

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Alaska Industrial Development and Export Authority

AIDEA/AEA

Alaska Energy Authority

December 12, 2005

VIA CERTIFIED MAIL

Mr. Dennis Meiners
Powercorp Alaska LLC
135 Christensen Drive, Suite 200
Anchorage, Alaska 99501

RE: Powercorp Protest: AEA ITP No. REG05-067

Dear Mr. Meiners:

After reviewing the record and the Hearing Officer's proposed decision in this matter attached hereto, I have decided to adopt the proposed decision as my own.

This is the final administrative decision regarding your protest and appeal. You may appeal my decision to the Alaska Superior Court. An appeal must be filed within third (30) days of the date this letter is mailed to you in accordance with the Alaska Rules of Appellate Procedure. For further information on the appeal process please contact the Clerk of Court.

Sincerely,

Ron Miller
Executive Director

RWM:bjf

cc: Thomas Wickwire, Esq.
Mike Mitchell, Esq.
Krag Johnsen, Chief of Staff, Denali Commission
Chris Rutz, Procurement Manager