
CASES & DECISIONS

Comp. Gen. Interprets Statutory Requirements For Awarding Energy Savings Performance Contracts To Prequalified Firms

To help Government agencies reduce their consumption of energy, 28 USC 8287(a)(1) authorizes them to award energy savings performance contracts (ESPCS) for periods of up to 25 years. Under an ESPC, a private contractor evaluates, designs, finances, installs, and maintains energy savings equipment at a Government installation. The contractor only receives compensation for its efforts if and when the Government realizes energy cost savings.

To accelerate the use of these contracts and rescue the administrative effort and cost of doing so, 10 USC 2865 (c) authorizes the Secretary of Defense to develop a simplified method of awarding ESPCS. The statute provides that, based on qualification statements received from interested firms, DOD may designate the firms that are presumptively qualified to provide shared energy savings services. From that annually updated list of prequalified, DOD may (1) select at least three firms with which to conduct discussions regarding a particular project, (2) request technical and price proposals from each of the selected firms, and (3) determine which of those firms is most qualified for award. See 10 USC 2865 (c) (2) (A).

Implementing the statute, the Air Force decided that, rather than having each of its installations award a separate ESPC, it would divide the nation into six regions and award one 25-year ESPC (with an estimated value of over \$200 million) for each region. The present protest involves ESPC procurements by four of the six regions.

Those regions requested that interested firms on DOD's prequalified list for 1997 submit detailed information regarding their financial strength, technical capability, and ability to perform the specific effort being solicited. Region V, for example, issued its request for qualifications on November 14, 1997, with responses due by December 23,

1997. Because SRS was not on the 1997 list, it was informed that it could not submit a qualifications package.

The U.S. Comptroller General considers the following arguments SRA advances to support its protest against the conduct of these procurements.

(1) *Argument.*, On November 25, 1997, DOD released the 1998 prequalified list which was to go into effect on January 1, 1998 and included SRS's name. SRS contends that, because the AF will not select the firms with which to conduct discussions until 1998, it should use the 1998 list as the basis for its selection decision.

Comp. Gen.: Under 10 USC 2865, the agency has broad discretion in selecting the firms with which to negotiate. The statute does not require it to use competitive procedures or even seek maximum practicable competition. Under these circumstances, the agency's action is subject only to a test of reasonableness.

Since the selection decision in this case will not be made until 1998, observes the Comp. Gen., the AF can select any three firms for negotiation as long as those firms are on the 1998 list. However, in view of the agency's broad authority to select firms from the list on any reasonable basis, the mere fact that SRS appears on the 1998 list does *not entitle* it to be selected for negotiations.

Because the prequalified list contains no details regarding the qualifications of any particular firm, the Comp. Gen. finds that it was reasonable for the AF to seek additional information to determine which firms would best meet its needs. While the process was initiated at the end of 1997 and it was thus evident that the actual selection might not occur until 1998, it was also reasonable for the AF to limit its review at that point to firms on the 1997 list which was the only one available at that time-particularly given (a) the likelihood that firms on the 1997 list would also be on the 1998 list and (b) the impossibility of predicting whether firms that were not on the 1997 list would be on the 1998 list.

Nor does the Comp. Gen. object to the AF's refusal to consider a firm that was added to the list in 1998. A contrary conclusion would require the agency to

spend substantial time and effort considering the new firms' qualification at a point in time when the agency is ready to make its selection of firms with which to negotiate, The resulting delay and cost would be inconsistent with the simplified and cost-conscious selection process authorized by the statute and would not foster the statute's goal of accelerating the use of ESPCS.

(2) *Argument Under 10 USC 2319*, a qualification requirement may not be used to deny a potential offeror the opportunity to submit an offer it can demonstrate that it meets the qualification standards prior to the date of contract award.

Comp. Gen.: It is not clear that the prequalified list involved in this case is the type of qualification requirement contemplated by 10 USC 2319, which focuses approval of *products*. But even if it is, the Comp. Gen. does not believe that the AF's failure to permit SRS to submit an offer violated that statute. By its terms, 10 USC 2965 authorizes selection of only three firms with which to hold discussions leading to award of a contract. Thus, even if SRS had been on the 1997 list that was used to make the selection decision in this case, the AF was not required to select SRA as one of the firms with which to negotiate. As a result, it cannot be said that SRA was denied the opportunity to submit an offer "solely" because it was not on the qualified list as stated in 2319.

For these reasons, the Comp. Gen. denies the protest. STRATEGIC RESOURCE SOLUTIONS CORP., COMP. GEN. DEC. B-278732, 98-1 CF-D 74.

NOTE - The Comp. Gen. finds that the AF acted reasonably in seeking additional information from listed firms for the purpose of determining which firms were best qualified to meet its needs. SRS was added to the 1998 list on November 15, only one day after Region V requested submission of qualification statements and long before the December 23 qualification submission date. It is difficult to see how allowing SRS to submit such a statement and evaluating that statement would have imposed any meaningful time and effort on the agency.

Suppose that 10 USC 2319 actually does apply to the above situations fact that the Comp. Gen. assumes to be true for the purpose of deciding the protest. While the AF may have broad discretion in deciding which three particular firms to select for negotiations, it may be urged that this discretion is not so broad that it permits the agency to *entirely ignore* responses to the requested detailed qualification statements in making its selection decision. By refusing to permit SRS to submit such a statement because it is not on the applicable prequalified list, it can be argued that the AF is using the list as the "sole" reason for excluding SRS from a required segment of the selection process--an exclusion that would arguable violate 2319.

In view of the hundreds of millions of dollars potentially involved in these procurements, the appropriate answers to the above questions would appear to be of more than academic interests.

