



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Laidlaw Environmental Services

File: B-272139

Date: September 6, 1996

William E. Hughes III, Esq., Whyte, Hirschboeck, Dudek, S.C., for the protester. Joel E. Gregory for Day & Zimmermann, Inc., Darl J. Heffebower for Mason and Hanger Corporation, and Don Carrier for TPL, Inc., intervenors. Jeffrey I. Kessler, Esq., and Sandra L. Biermann, Esq., Department of the Army, for the agency. Linda C. Glass, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's prohibition of the use of open burn/open detonation technologies in the demilitarization of improved conventional munitions is unobjectionable where it reflects legitimate environmental concerns expressed by congressional committees.

DECISION

Laidlaw Environmental Services protests the terms of invitation for bids (IFB) No. DAAA09-96-B-0033, issued by the United States Army Industrial Operations Command (IOC) for the demilitarization of 8-inch improved conventional munitions. The protester contends that the solicitation's prohibition against the use of open burn/open detonation (OB/OD) technologies in the demilitarization of the munitions is unduly restrictive of competition and favors original manufacturers of the munitions.¹

We deny the protest.

The IFB, issued on April 10, 1996, as a two-step sealed bid procurement, with an amended May 24 closing date for receipt of technical proposals, prohibited the use of OB/OD technologies to demilitarize any component or end item contained in the solicitation. The statement of work (SOW) required offerors to provide all the necessary material, equipment, and personnel to perform conventional ammunition

¹OB/OD is a process in which burning is typically done in pans set out in an open area; items for detonation are sometimes placed in pits and covered with soil in an attempt to limit sound wave progression.

demilitarization by incineration and/or resource recovery, component reutilization and recycling.² The agency received six technical proposals by the closing date and is currently evaluating them.

Laidlaw contends that the restriction against the use of the OB/OD method improperly excludes it from participating in the procurement. Laidlaw maintains that the OB/OD method it uses is environmentally sound and is performed by Laidlaw within the restrictions set forth in its air permit. Laidlaw also maintains that since it complies with its air permit, Laidlaw's use of OB/OD does not pose any greater risk than incineration, a method of demilitarization allowed by the solicitation.

Determination of the agency's minimum needs and the best method of accommodating those needs are primarily matters within the agency's discretion. Glock, Inc., B-236614, Dec. 26, 1989, 89-2 CPD ¶ 593. Where, as here, a specification is challenged as unduly restrictive of competition, we will review the record to determine whether the restriction imposed is reasonably related to the agency's minimum needs. Tek Contracting, Inc., B-245454, Jan. 6, 1992, 92-1 CPD ¶ 28.

The agency reports that OB/OD has been used primarily for destruction of those types of ammunition which could not be successfully demilitarized via resource recovery or controlled incineration methods. According to the agency, OB/OD detonations are destructive processes which have given rise to environmental and health issues concerning air pollution, soil and water contamination, and noise. Consequently, OB/OD is no longer a preferred methodology; it is used only when a determination is made, based on finances and technical capability, that no other method of demilitarization is available. The agency states that there are some munitions for which alternative demilitarization technologies are not yet available.

The current IOC/Army policy is not to have OB/OD conducted by private contractors. When OB/OD is necessary, IOC does it in-house. The agency reports that IOC has performed all required OB/OD demilitarization in-house since 1977. According to the agency, when IOC contracts out for demilitarization of

²Resource recovery and recycling (R3) involves a broad spectrum of technologies. The agency reports that the typical R3 approach for the items listed in the IFB would be the following: (a) unpalletize projectiles; (b) remove lifting plug and base plate, scrap lifting plug and base plate; (c) remove sub-munitions and scrap projectile body; (d) incinerate sub-munitions or R3; (e) remove fuze and incinerate; (f) remove explosive material and incinerate or recycle; and (g) recycle sub-munition body. In accordance with the IFB, the contractor takes possession of the recovered material following demilitarization.

conventional munitions, use of OB/OD technologies is prohibited in order to foster the development of other, more environmentally friendly, means of demilitarization.

The Army states that while there are no federal statutes banning the use of OB/OD, it is attempting to move in the direction in which Congress, through its committees, has been urging the Army to proceed, namely the development of alternate demilitarization technologies. In this regard, in May 1993 the Chairman of the Senate Appropriations Subcommittee on Defense stated in a letter to the Army that "[i]t is the intention of the Committees that OB/OD be phased-out as soon as possible and that, wherever possible, conventional ammunition slated for disposal should be recycled." Subsequently, the Senate Armed Services Committee, in its report accompanying the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663, directed the Army to accelerate, where possible, the award of demilitarization contracts that make use of environmentally sound recycling and reuse technology. In addition, the committee directed the Army to work closely with the other military services to identify recycling and reuse technologies, or to use contained destruction where appropriate. According to the committee, this would allow the Army and other military services to stop OB/OD as soon as possible. S. Rep. No. 282, 103rd Cong. 2nd Sess. (1995).

Similarly, the House Appropriations Committee, in connection with the Defense Appropriations Bill for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (1996), expressed concerns about the Army's continuing practice of demilitarizing ammunition by OB/OD. H.R. Rep. No. 208, 104th Cong. 1st Sess. (1996). The committee stated that it believed other demilitarization methods may prove to be economically and environmentally sound alternatives, including technology which recycles and reuses waste products from the demilitarization of the ammunition. The Army was directed to submit by March 1, 1996, an analysis of the feasibility, benefits, costs, and savings of the recycle and reuse technologies compared to OB/OD.

Given the substantial congressional concerns about the adverse environmental impact of the OB/OD technology and the desire to develop more cost effective and environmentally friendly methods for demilitarization, concerns that the protester ignores, we cannot say that the agency was unreasonable in viewing its minimum needs as precluding the use of OB/OD under this procurement. The fact that there is no statute banning OB/OD does not prohibit an agency from making sound policy determinations that are consistent with congressional concerns about the environment. See Trilectron Indus., Inc., B-248475, Aug. 27, 1992, 92-2 CPD ¶ 130; American Management Enters., Inc., B-238134, Feb. 26, 1990, 90-1 CPD 234.

The protester contends that the exclusion of the OB/OD technology because of environmental risks is improper here because the solicitation allows for the use of incineration without consideration of environmental concerns about that

methodology. In support of this position, the protester cites our decision Bardex Corp., B-252208, June 14, 1993, 93-1 CPD ¶ 461, in which we held that while agencies properly may adopt otherwise restrictive specifications to implement legitimate environmental considerations, they may not use that policy of avoiding environmental risks to exclude one approach and at the same time ignore that policy in accepting another approach. The protester's reliance on that decision is misplaced. Here, in restricting the use of the OB/OD technology, the agency is reasonably acting in response to repeated congressional concerns about the environmental risks posed by and specific to the OB/OD technology. The protester has not identified any similar concerns that have been raised about incineration.

We note, finally, that the protester does not argue that the prohibition on the use of the OB/OD technology precludes it from participating in this procurement. In fact, an affidavit submitted by a Laidlaw official clearly indicates that Laidlaw also uses an incineration method that recycles by deactivating the explosive and recycling metal.³

In short, the protester has not shown that the agency was unreasonable in prohibiting the use of the OB/OD technology. Therefore, the protest is denied.

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³As to the protester's allegation that the restriction favors original manufacturers, the protester has not provided any substantiation for this allegation, and the record reflects that the agency has received six technical proposals in response to the solicitation, none of which is from an original manufacturer of this munition. Moreover, the agency's preliminary review indicates that all six proposals will be found technically acceptable.