



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

B-174467

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Dear Mr. Johnson:

We refer to letter 134G of November 3, 1971, from the Director, Supply Service, Department of Medicine and Surgery, reporting on the protest of G. Fred Swanson, Inc., against the award of a contract to DeVac, Inc., under invitation for bids (IFB) No. 650-17-72 dated August 19, 1971.

The invitation covered the supplying and installation of thermo-barrier windows at the Veterans Administration Hospital at Providence, Rhode Island. It stipulated that the drawings and specifications would be issued on September 6, 1971, to those bidders requesting such documents. After transmitting these bid documents to the interested firms, two bids were received and opened on September 20, 1971, one from DeVac, Inc. (\$26,987), and one from G. Fred Swanson, Inc. (\$24,700).

Section 23 of the specifications provided in pertinent part:

"23-1. Provide DeVac Thermal Barrier vertical sliding windows Model 660 or an approved equal per the following specifications.

* * * * *

"23-3. PERFORMANCE REQUIREMENTS: Windows delivered to site shall meet requirements of Physical Load Tests, including Air Infiltration Test and Water Resistance Test in following AAMA Specifications:

GENERAL: All bidders shall submit a test report 10 days prior to bid date on the window being bid, prepared by an approved testing laboratory. The report shall indicate that the window has been tested in strict accordance with the following methods and procedures."

There then followed a detailed description of the tests and the results to be obtained.

Swanson, however, failed to submit, 10 days prior to bid opening, a test report on the windows it proposed to furnish. At bid opening, Swanson advised that the test report had been mailed but, at that time,

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it could not identify the brand-name window it was proposing. The evaluation of bids was delayed, at Swanson's request, to provide Swanson an opportunity to submit the required test report. Since the Swanson test report had not been received by September 30, 1971, it was concluded that, inasmuch as ample time had been afforded Swanson to submit the report, Swanson's bid should be rejected. Thereafter, award of the contract was made to DeVac on October 1, 1971. Swanson timely protested to the Veterans Administration against the award for various reasons.

For the purposes of this decision we need consider only whether the Swanson bid, being low, should have been accepted as the lowest responsive bid. Upon consideration of the record, we conclude that the rejection of the Swanson bid was in error and that the award made to DeVac should, in the interest of preserving the competitive system, be terminated for the convenience of the Government.

Initially, it must be noted that the specifications, quoted in part above, resemble a "brand-name or equal" description. However, the specifications taken in their entirety seem to state with considerable detail the Government's exact requirements and, we assume, that the drawings provide the appropriate dimensional characteristics. Also, we note that the standard "brand-name or equal" clause requiring the submission of data, etc., to establish equality was not included in the IFB. The data to be supplied under a "brand-name or equal" clause related to the responsiveness of a bid; that is, compliance with the specifications. However, such is not the case here where detailed specifications negate any need for compliant data. See Federal Procurement Regulations (FPR) 1-1.307-5.✓

In the context of the IFB, we feel that the test report requirement affected the responsibility of bidders; that is, whether they were able to furnish windows meeting the Government's needs. B-169330, ✓ May 14, 1970. As a matter of responsibility, it was proper to permit the submission of the report after bid opening. B-173489, ✓ September 15, 1971, 51 Comp. Gen. _____. It is not shown that competition was lessened because of the 10-day requirement. Even if some firms were discouraged from bidding because of the test report requirement, such situation would not operate to dilute the responsibility characteristics of the requirement. B-173489, ✓ supra. Moreover, the requirement for a test report from the brand-name manufacturer would appear to be superfluous since the designation of a specific model by brand name suggests that it has been already determined to be an acceptable product.

Swanson has indicated in its bid that it is a small business concern. In matters of responsibility pertaining to lack of capacity or credit of

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a small business concern, the contracting officer is required to submit the matter to the Small Business Administration (SBA) before rejecting the bid. FPR 1-1.708-2. The contracting officer did not comply with this requirement. Therefore, the rejection of the Swanson bid without reference to the SBA for possible issuance of a certificate of competency was improper. See 43 Comp. Gen. 465 (1963). As the rejection without consideration by the SBA was improper, and since Swanson has furnished the test report--the absence of which was the basis for the rejection--our Office recommends that the award to DeVac be terminated for the convenience of the Government and that award be made to Swanson if it is otherwise eligible for award.

Any termination claim that might be presented by DeVac should be considered and settled under the clause set forth in section 9 of the General Provisions of its contract. With respect to the suggestion that DeVac might not be entitled termination costs because the award was based on an evaluation of a test report submitted in connection with another procurement, we observe again that the necessity for such a report from the designated brand-name manufacturer is questionable and that, in any event, the test report involves a matter of responsibility which may be complied with up to date of award.

Regarding the suggestion that the procurement be readvertised, we have often stated that procurement officials have authority to reject all bids and readvertise and that such authority is extremely broad and ordinarily will not be questioned. 40 Comp. Gen. 671, 674 (1961). However, it is equally well-settled that bids should be rejected and the procurement readvertised only where cogent reasons exist for such action. In circumstances where no cogent or compelling reasons have existed to reject all bids and readvertise, our Office has held such actions to be unwarranted and to require corrective action. 40 Comp. Gen. 671 (1961), and decisions cited therein.

Since the requirement for furnishing a test report has been met by Swanson, we see no compelling reason for readvertising when a proper award under the IFB may be made to the lowest responsive bidder without prejudice to other bidders in consonance with the competitive bidding procedure. See 49 Comp. Gen. 697 (1970).

Sincerely yours,

R.F.KELLER

Acting Comptroller General
of the United States

The Honorable Donald E. Johnson
Administrator, Veterans Administration

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Termination of contract

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R. L. MILLER

Special Agent in Charge
Federal Bureau of Investigation

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