

**DECISION**



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

51003

FILE: B-183122

DATE: August 21, 1975

MATTER OF: Ballantine Laboratories, Inc.

97463

**DIGEST:**

Where record shows that literal compliance with RFP provision requiring offerors to possess production experience with item being procured was neither intended nor required by contracting agency, award to offeror not meeting literal requirements of RFP provision based upon offeror's experience with similar items of greater complexity will not be disturbed considering extensive delays involved in reprocurement of item. However, agency is advised not to use unnecessary provision tending to unduly restrict competition, and where such restriction is in fact necessary it should be applied in accordance with terms thereof.

Ballantine Laboratories, Inc. (Ballantine), protests an award to AUL Instruments, Inc. (AUL), of a contract for 871 electronic voltmeters, ME-30( )/U and related data, under request for proposals (RFP) No. DAAB07-75-R-1278, issued September 30, 1974, by the U. S. Army Electronics Command (Army), Fort Monmouth, New Jersey. By the October 30, 1974, closing date for submission of proposals, six firms, including Ballantine and AUL, submitted offers.

The following provision was included in the RFP:

"A.4 NOTICE - To be eligible for award the proposal must demonstrate that the offeror has had experience in the volume (at least 200 units) production of electronic voltmeters for measuring AC voltages having the following two major measurement parameters:

'Frequency range: At least within  
20 Hz to 4MHz.

'Voltage range: At least from .01  
volts to 100 volts.

at a rate comparable to that contained in the solicitation."

The contracting officer's stated purpose in requiring that the prospective contractors comply with the above provision was to assure that the Government would be purchasing end items from offerors who "had either produced a ME-30( )/U voltmeter, produced a similar item, or had demonstrated capability to produce such an item," so as to reduce the risk of not having a contractor capable of performing the resulting contract.

On November 4, 1974, the six proposals were forwarded to the Production Engineer (PE) for technical evaluation. Two proposals were determined unacceptable, and the four remaining offerors were advised of the areas in their respective proposals which required clarification. Each offeror received technical questions pertinent to its particular proposal and was requested to furnish written responses for further evaluation. A subsequent evaluation of the responses resulted in all the proposals being deemed acceptable.

Furthermore, all the offerors were found to possess the production experience required under paragraph A. 4 of the RFP. In this regard, the record indicates that while Ballantine and the other two acceptable offerors submitted data demonstrating the production experience required by paragraph A. 4, AUL did not literally comply with the requirements of the provision since it had not previously produced a voltmeter that measured across the parameters outlined in the solicitation. However, in response to paragraph A. 4, AUL included in its proposal a chart entitled "Synopsis of Government Contracts for Similar and Related Production Effort to the ME-30( )/U," which provided information concerning previous military contracts awarded to the firm, including identifying the items procured under such contracts. On the basis of this data, Army technical personnel determined that AUL's production and delivery of its "Signal Generator AN/USM-205A" under two previous contracts demonstrated that firm's capability to produce precision instruments of far greater complexity than the voltmeter being procured, thus satisfying the intended purpose of paragraph A. 4. The contracting officer then requested "best and final" offers. The lowest priced technically acceptable offer was from AUL, and on January 24, 1975, AUL was awarded the contract.

Ballantine's protest is based on the contention that AUL's offer was "nonresponsive" to the RFP's production experience requirements set forth in paragraph A. 4. Specifically, Ballantine contends that AUL's signal generator, relied upon by AEC as indicating compliance with paragraph A. 4, is a test oscillator and that while an internal voltmeter reads the output of the oscillator, neither the signal generator nor its voltmeter meets the voltage range measurement parameters required by the RFP. Furthermore, it is alleged that neither of the two previous contracts under which the signal

generator were procured required a production rate comparable to the rate called for by the instant solicitation. Ballantine emphasizes that it was the clear intent of the Army, as expressed in the RFP, to award the contract to a firm with previous experience in the volume production of voltmeters satisfying the requirements of paragraph A. 4, and not to a firm with experience in the production of similar or even more complex items. It is argued that while AUL may have manufactured generators of greater complexity, this was not what the Government had specified in the RFP as qualifying an offeror for award and, therefore, AUL's failure to demonstrate the requisite production experience in the category of equipment being procured rendered the firm's offer unacceptable.

On the basis of the information developed in connection with the protest it is clear that AUL did not meet the literal requirements of the solicitation. Nevertheless, the agency technical personnel concluded that AUL's experience in producing precision instruments of greater complexity and at a comparable rate satisfied the purpose of the provision. Furthermore, the contracting officer states that had he been aware of AUL's noncompliance prior to the award:

"I could have either rejected the AUL proposal as not being acceptable or amended the special standards requirement. A rejection of the proposal could not have been supported considering that AUL's proposed item was the only one that met all of the very rigid technical requirements \* \* \* and AUL was a responsible contractor. Instead, I would have amended the solicitation rather than cancelling and resoliciting because I believe that a rewording of A. 4 to include 'items of substantially equal complexity' would have resulted in the same degree of competition as existed here.

"The action available to me today would be to cancel the award and resolicit.

"In view of the status of AUL Instruments as a responsible contractor, the solicitation would of necessity be revised so as not to exclude AUL from participation. Such a revision would have no effect on the prices, and therefore the relative standing, of the offerors. I believe that we have not restricted competition any more than is intended in any case where special standards are used. Thus a resolicitation would serve no purpose other than to establish an auction as the prices of AUL have been revealed to Ballantine and the industry.

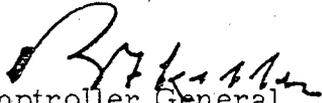
"In Summary: AUL had submitted a technically acceptable offer and had been determined to be

a responsible contractor; a rejection of AUL could not be supported in view of these affirmative determinations of acceptability and responsibility; a cancellation and reopening would result in an auction; due to the default of the previous producer and extensive delays in reprourement, the ME-30 has been classified 'Hard-Hardcore', any further delay would not be in the best interests of the Government. "

It appears, therefore, that the statement of the experience requirements in the mandatory terms used was unnecessary to the needs of the agency since literal compliance therewith was neither intended nor required. Although the protester contends that AUL's proposal should have been rejected as "nonresponsive" to paragraph A.4, it should be noted that the concept of responsiveness, as used in formally advertised procurements, has no place in negotiated procurements. Teledyne Ryan Aeronautical, B-180448, April 29, 1974. Moreover, even under advertised procurements an experience requirement of the type specified in A.4 (a requirement that a supplier have prior production experience with the item being procured) is regarded as a matter of bidder responsibility rather than bid responsiveness, and therefore literal compliance with an experience clause is not required if the bidder is determined to be capable of performing the contract providing the apparent literal requirement did not have an adverse effect on competition. 52 Comp. Gen. 647 (1973).

However, we are not prepared to agree with the contracting officer that a rewording of paragraph A.4 to include "items of substantially equal complexity" would have resulted in the same degree of competition under a resolicitation as existed here. It seems to us that potential offerors in the same category as AUL might have been persuaded not to compete because of the mandatory language in paragraph A.4. At the same time we agree with the contracting officer that such a rewording of the paragraph would not have affected the relative standing of the other offerors. Moreover, we recognize that cancellation of the award would not be in the best interests of the Government, considering the extensive delays involved in a reprourement of the item.

Accordingly, we do not propose to disturb the award. We are, however, advising the Secretary of the Army of our view that appropriate steps should be taken to preclude use of an unnecessary provision which tends to unduly restrict competition and where such restriction is in fact necessary that it be applied in accordance with the terms thereof.

  
Acting Comptroller General  
of the United States