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Richard Martin
Proc. II

DECISION



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

FILE: B-187814

DATE: February 14, 1977

MATTER OF: Engineering Research Inc.

DIGEST:

1. Cancellation of IFB after bid opening and resolicitation is not unreasonable where record indicates original IFB solicited bids for only half of quantity actually needed.
2. ASPR § 2-404.1 prohibiting, as a general rule, cancellation and resolicitation solely due to increased requirements does not prevent cancellation when IFB does not adequately define unchanged requirements.
3. Proper cancellation of IFB under ASPR § 2-404.1 does not constitute auction as that term is used in ASPR § 3-805.3(c) which refers to negotiated procurements.

Hoppmann Corporation (Hoppmann) protests the cancellation of invitation for bids, IFB No. N00024-76-B-6233, by the Naval Sea Systems Command, U.S. Navy (Navy). The solicitation called for the manufacture and delivery of rocket motor fins and was restricted to bidders with previous experience in manufacturing similar equipment. It permitted bids for quantities less than those specified and reserved to the Government the right to make an award for a quantity less than offered and at the unit prices offered unless the bidder specified otherwise. Hoppmann contends that its bid was the lowest responsive bid from a responsible bidder and that no compelling reason existed for the rejection of all bids and the resolicitation.

The initial IFB required delivery of 3200 each "Fin, Rocket Motor MK-0 Shipping (packing) condition" to be manufactured in accordance with "LD 269771, Revision B, including revisions thereon, more fully set forth in Addendum A." Actually, the Navy intended to solicit bids for 6400 motor fins packaged two to each container. Addendum A, which was attached to the IFB, lists as applicable documents, LD 269771 and 1330379, neither of which was furnished with the IFB. These drawings, in the form of aperture cards, could be obtained from the Naval Weapon Engineering Support Activity in Washington, D.C. upon a returnable deposit of \$100. The subject

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of LD 269771 is stated as Shipping (Packing) Condition (For Two Motor Fins)" and lists as total pieces required for "one subject item" two motor fins. The Navy's actual requirement was for 3200 sets, each consisting of two fins or a total of 6400 fins.

No request for clarification of the IFB as to quantity was made and 14 companies submitted bids. The unit prices for the five lowest bids received are as follows:

Modern Manufacturing Inc. (Modern)	bid \$63.16 per unit
Lockley Manufacturing Inc.	bid \$83.29 per unit
Engineering Research Inc. (ERI)	bid \$87.58 per unit
Acme Machine & Tool Company	bid \$89.25 per unit
Hoppmann	bid \$106.80 per unit

The remaining bids ranged upward to \$310.30. Because the four lowest bids were much lower than the Navy's estimate, each was asked to verify its price and the number of fins the price covered. Each stated that its unit price covered one fin each for a total of 3200 fins. Hoppmann states that its unit price covered two fins each and was, therefore, the lowest price for the total quantity actually desired by the Navy.

ERI protested to this Office stating that the IFB, although apparently clear on its face, misled ERI and other bidders to bid on a quantity less than the Navy actually desired. ERI asked that the IFB be canceled and that a new solicitation be issued. Modern initially protested to the contracting officer after opening on the grounds that the solicitation was vague and misleading as to the quantity desired. After a determination by the contracting officer that the solicitation was ambiguous, the IFB was canceled and a new IFB clearly stating that 6400 fins were required was issued. Hoppmann then protested the cancellation to this Office.

In response to the resolicitation, 16 bids were received. Hoppmann submitted the same price as in its initial bid but five companies, including Modern and ERI, submitted lower prices than Hoppmann for the two fin sets. ERI's price of \$93.85 per set of fins is the lowest bid received upon resolicitation.

Hoppmann points out that the item called for in the original IFB was a rocket motor fin in "shipping (packing) condition" manufactured in accordance with LD 269771 which clearly indicates that each shipping container must contain two fins. Drawing No. 133037 indicates the same thing. Thus, Hoppmann argues the original IFB clearly required delivery of 6400 fins. Hoppmann further contends that even if ambiguity is found in the IFB, cancellation is not warranted unless the bidders who claim to have been misled would be prejudiced by an award to Hoppmann. Hoppmann doubts that Modern with a price of \$63.16 for one fin could have beat Hoppmann's price of \$106.80 for two fins even if Modern had initially read the IFB correctly. In this regard, Hoppmann contends that if its prices had not been exposed, the prices to be expected from a production run of 6400 fins within the same time period that the 3200 fins were to be manufactured would be higher because of the necessity for accelerating production. Hoppmann asserts that the rebidding constituted an auction and that its rights were thereby prejudiced. Further, Hoppmann contends that because of its previous experience in manufacturing the identical item for the Navy, it was the only bidder technically qualified to perform the contract. Therefore, Hoppmann requests that the original IFB be reinstated and award thereunder be made to Hoppmann.

Although originally protesting that the IFB was vague and misleading, Modern has now taken the position that the IFB clearly required 3200 fins, that its price was the lowest for this quantity and that, therefore, the cancellation should be rescinded and a contract for 3200 fins should be awarded to Modern.

ERI supports the cancellation and asserts that because at least four bidders were misled, there is prima facie evidence that the solicitation was latently ambiguous and fatally defective. ERI contends that Hoppmann's bid under the initial solicitation, on its face, does not promise to deliver 6400 fins and the Government could not be assured that its needs would be served thereby. ERI argues that Hoppmann's allegation that no company would have underbid Hoppmann but for the exposure of its initial bid price, is based on conjecture and that, therefore, no award could be made to Hoppmann without prejudice to the other bidders.

Hoppmann's contention that it was the only bidder capable of performing the contract will not be discussed in this decision. Such a contention necessarily challenges the affirmative determination of responsibility which the contracting officer must make

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prior to the award of any contract. No such determination has yet been made in this case and when made, will not be reviewed by this Office in the absence of a showing of fraud on the part of procuring officials or in other circumstances not relevant here. Central Metal Products, Inc., 34 Comp. Gen. 66 (1974), 74-1 CPD 64.

The Armed Services Procurement Regulation (ASPR) sets forth guidelines governing preaward cancellations of invitations for bids. ASPR § 2-404.1 (1976 ed.) provides in pertinent part:

"2-404.1 Cancellation of Invitation After Opening.

(a) The preservation of the integrity of the competitive bid system dictates that after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation. Every effort shall be made to anticipate changes in a requirement prior to the date of opening and to notify all prospective bidders of any resulting modification or cancellation, thereby permitting bidders to change their bids and preventing the unnecessary exposure of bid prices. As a general rule, after opening, an invitation for bids should not be canceled and readvertised solely due to increased requirements for the items being procured; award should be made on the initial invitation for bids and the additional quantity required should be treated as a new procurement.

"(b) * * * Invitations for bids may be canceled after opening but prior to award when such action is consistent with (a) above and the contracting officer determines in writing that--

"(i) inadequate or ambiguous specifications were cited in invitation;

* * * * *

"(viii) for other reasons, cancellation is clearly in the best interest of the Government."

Ordinarily, this Office will not question the broad authority of the contracting officer to reject all bids and readvertise when

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a "compelling" reason to do so exists. Spickard Enterprises, Inc., 54 Comp. Gen. 145 (1974), 74-2 CPD 121; 52 Comp. Gen. 285 (1972). However, this Office has held that even the use of an inadequate, ambiguous or otherwise deficient specification is not, in and of itself, a "compelling" reason to cancel an IFB and readvertise here an award under the solicitation as issued would serve the actual needs of the Government and would not prejudice the other bidders. GAF Corporation, 53 Comp. Gen. 586 (1974), 74-1 CPD 68.

While 14 bids were originally received, the four bids which were lower than Hoppmann did not meet the actual need of the Navy for 6400 fins. The solicitation clearly conveyed to the bidders a requirement for 3200 fins. There was no direct or indirect reference in the IFB to a requirement for 6400 fins or any indication that the 3200 figure used in the schedule was supposed to refer to sets of two fins each or containers, rather than to single fins. While the drawings are clear that each shipping container should contain two fins, it is equally clear from the language of the IFB that the primary purpose of the procurement was the acquisition of fins and that the containers were being bought only to insure the damage free shipment of the fins. The fact that the IFB required that the fins be in "Shipping (Packing) Condition" cannot reasonably be translated into a requirement for 3200 shipping containers each packed with two fins. The Navy's actual intent, its apparent previous use of the same language and the responses thereto of Hoppmann and of other bidders need not be considered in the interpretation of the IFB because on its face the solicitation clearly requires 3200 fins packed two to a shipping container.

Although we believe the initial solicitation was not patently or latently ambiguous in this regard, it was defective and inadequate as a means of conveying to all bidders a requirement for 6400 fins. An IFB is defective and inadequate if the actual quantity needed reasonably can be surmised only by those bidders who have access to information beyond the confines of the IFB. The IFB, especially as it pertains to quantity, should establish a common bidding basis for all qualified reasonable bidders including those with and those without previous experience with the identical item or with the same agency. Therefore, we believe that an award to Hoppmann under the initial IFB as issued would not have assured the Navy that its needs would be met or that it had obtained the lowest price obtainable through fair competition.

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In addition, we believe that an award to Hoppmann could not have been made without prejudice to the rights of the other bidders. The initial low bid of Modern of \$63.16 per fin was based on an anticipated production run of 3200 fins. Modern would have had to price its second 3200 fins at approximately \$43.00 each to bid a price below that of Hoppmann for the 6400 fins. Most of such non-recurring costs as production, engineering, setup, special tooling were included in its price for the first 3200 fins. These costs and the costs of facilities, support services and fixed costs generally do not increase proportionately when production is doubled even though the final delivery date remains unchanged. Moreover, material costs per unit may be lower for larger production runs. The size of the production run also will normally affect the cost of labor per unit because of the increasing efficiency of such labor. Because of these considerations and the fact that there is no reasonable way of determining the effect on the price of any particular bidder of such special and temporary factors as the need for business, shop loads and schedules and the possible parts commonality with concurrent production on other contracts, it could not be said at the time of cancellation that none of the other bidders could have bettered Hoppmann's price for the 6400 fins. Indeed, the results of the rebidding tend to support this conclusion.

An award for 3200 fins to Modern would not have served the interest of the Government and would have been as unfair to the other bidders as an award for 6400 fins to Hoppmann. The Navy was not required to continue with a defective IFB after it discovered that the IFB did not accurately state the requirement for 6400 fins. There was no increase or change of any type in the quantity needed by the Navy and thus the provision in ASPR § 2-404.1(a) that a solicitation not be canceled after opening merely to provide for increased requirements is not controlling. Rather, resolicitation is sanctioned in ASPR § 2-404.1(b) where, as here, the solicitation does not adequately state the Government's requirements and it is in the Government's best interest to resolicit.

We do not agree that the factual situation presented here constitutes an auction as that term is used in ASPR. While ASPR § 3-805.3(c), which pertains to negotiated procurements, prohibits auctions, it prescribes no penalties. There is nothing inherently illegal in the conduct of an auction in a negotiated procurement. TM Systems, Inc., 55 Comp. Gen. 1066 (1976), 76-1

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CPD 279; 53 Comp. Gen. 253 (1973). This case, however, involves a formally advertised procurement and although this Office does not mention the disclosure of competitive information with regard to any procurement, we cannot say that the cancellation of this IFB under ASPR § 2-404.1 constitutes an auction or an improper disclosure of information. We are not unmindful of the prejudice suffered by Hoppmann and Modern after the exposure of their initial prices. We recognize that known prices of competitor often tend to influence the prices in a rebidding as do the anticipated actual costs to be allocated to that project. To some extent, the integrity of the competitive bidding system may have been compromised in this instance. However, in our opinion, the compromise would have been greater if an award under the original IFB had been made to Hoppmann or to other bidders for a total of 6400 fins.

We note that Hoppmann has also protested to the contracting officer the award to anyone other than itself, of a contract pursuant to the Navy's resolicitation (IFB N00024-76-B-6072) for the same items. Copies of that protest have been furnished to this Office. While this decision deals with the issues required to be decided under the initial solicitation, the issues which are pertinent to the resolicitation are not before this Office for resolution and therefore are not decided herein.

For the reasons stated above, we believe that a compelling reason did exist for the cancellation. Accordingly, the protest is denied.


Deputy Comptroller General
of the United States