

Proc I

DECISION



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

10,392

FILE: B-193720

DLG-00142

DATE: June 7, 1979

MATTER OF: East Wind Industries, Inc.

[Protest of Inclusion in IFB of Solicitation Quantity Under Option Provision]

DIGEST:

1. Bid protest, filed after bid opening, alleging that inclusion of option provision in IFB violated Armed Services Procurement Regulation/ Defense Acquisition Regulation (ASPR/DAR) § 1-1502(b)(v); is timely since protester was unaware of facts allegedly indicating violation until after bids were opened.
2. Agency inclusion of solicitation quantity under option provision is unjustified where quantity in provision represents firm requirements for which funds are available.
3. Agency's failure to follow ASPR/DAR § 1-502(b)(v) raises doubt as to whether Government is receiving items at lowest possible cost and whether integrity of competitive bidding system is being maintained. These considerations form basis for recommendation that contract be terminated for convenience of Government and requirement be resolicited.

East Wind Industries, Inc. (East Wind), protests the award of a contract to St. Clair Rubber Company (St. Clair) under invitation for bids (IFB) No. DLA100-78-B-0835, issued by the Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania. *DLG-00102 - AGC-0200*

The IFB solicited bids for 1,268,688 pairs of chemical protective footwear covers. The solicitation was issued on July 24, 1978, as a 50-percent small business set-aside (unrestricted and set-aside portions each

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consisting of 634,344 pairs) with bid opening scheduled for August 14, 1978. The IFB also requested bidders to submit an offer for an option quantity which would not exceed 100 percent of the unrestricted quantity awarded (634,344 pairs).

By letter dated August 7, 1978, East Wind appealed the small business size standard assigned to the procurement. In order to allow time to resolve this appeal, on August 9, 1978, DPSC issued IFB amendment 0001 which extended the date for bid opening indefinitely. The Small Business Administration Size Appeals Board later denied East Wind's appeal, and on October 2, 1978, DPSC issued IFB amendment 0002 which established October 12, 1978, as the new bid opening date.

When bids were opened on that date, six bids were received for the unrestricted portion as follows:

<u>Bidder</u>	<u>Unit Prices</u>	<u>Option</u>
East Wind	\$6.59	\$8.21 per pair
St. Clair Rubber Co.	\$6.71	\$6.71 per pair
P.F. Inds., Inc.	\$7.30-\$7.92	\$7.75 per pair
Kings Point Mfg. Co., Inc.	\$8.37/\$8.47/\$8.77	Price same if option exercised at time of award of basic, otherwise 20 percent higher.
Guida Clothing Co., Inc.	\$10.00	\$11 per pair
Alamo Mfg. Co., Inc.	\$15.00	Price 15 percent higher than basic

Bids were evaluated during November 1978, and a few days before December 13, 1978, East Wind learned that DPSC was planning to make an award to St. Clair for the unrestricted portion (634,344 pairs) plus 399,096 pairs under the IFB's option provision. Thus, on December 14, 1978, East Wind filed a protest with

our Office arguing that St. Clair should not be given the award since East Wind was actually the low responsive and responsible bidder on the subject solicitation.

The record indicates that before the IFB in question was issued, the Government's identified requirement for chemical protective footwear covers was for a total quantity of 2,653,488 pairs. Initially, DPSC intended to satisfy this requirement by (1) invoking the 100-percent option on East Wind contract DSA100-77-C-1316 for the total available quantity of 985,704 pairs at a unit price of \$6.79; (2) invoking the 100-percent option on East Wind contract DLA100-78-C-0737 for the total available quantity of 399,096 pairs at a unit price of \$7.33; and (3) issuing a new solicitation--the instant procurement--for 1,268,688 pairs.

DPSC exercised the option for 985,704 pairs under contract DSA100-77-C-1316 on July 28, 1978, but did not exercise the option under contract DLA100-78-C-0737 since this option was not scheduled to expire until November 17, 1978. The Government also concedes that it did not exercise this second option because it was concerned with the reasonableness of the price and thus deemed it appropriate to wait until the results of the bid opening for the additional 1,268,688 pairs were known before deciding whether to exercise this option.

After bid opening, DPSC concluded that the most economical way of procuring the remaining quantity needed (1,268,688 pairs plus 399,096 pairs) was to obtain the full amount under the subject solicitation rather than by exercising the option on East Wind's contract DLA100-78-C-0737. In order to accomplish this, the Government decided that it would exercise the IFB's option at the time the unrestricted portion was awarded and by this means obtain the additional 399,096 pairs that it needed.

Under these circumstances, the agency relied on paragraph 6 of IFB clause D52, "Option for Increased Quantity," which provides:

"Offers will be evaluated on the basis of the quantities to be awarded, exclusive of the option quantity, unless the Government elects to exercise the option at the time of award, in which case offers will be evaluated for purposes of award on the basis of the total price for the basic quantity and the option quantity exercised with award."

Thus, even though East Wind offered a lower price than St. Clair on the basic quantity (\$6.59 per pair v. \$6.71 per pair), when the Government evaluated the bids on the basis of the total price--the price for the basic quantity plus the price for the option quantity--St. Clair was found to be low overall because the price it offered on the option quantity was substantially lower than East Wind's (\$6.71 per pair v. \$8.21 per pair) and as a result offset East Wind's lower price on the basic quantity.

Based on this determination, DPSC made an award to St. Clair on February 16, 1979, for 1,033,440 pairs of chemical protective footwear covers pursuant to Armed Services Procurement Regulation/Defense Acquisition Regulation (ASPR/DAR) § 2-407.8(b) (1976 ed.) which, under certain circumstances, allows an award to be made while a protest is pending.

East Wind argues that the inclusion of the option provision in the IFB was in violation of ASPR/DAR § 1-1502(b)(v) (1976 ed.) which provides:

"(b) Option clauses shall not be included in contracts, and option provisions shall not be included in solicitations, if:

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"(v) the option quantities represent known firm requirements for which funds are available unless (A) the basic quantity

is a learning or testing quantity and there is some uncertainty as to contractor or equipment performance, and (B) realistic competition for the option quantity is impracticable once the initial contract is awarded."

Under our Bid Protest Procedures, 4 C.F.R. §20.2(b)(1) (1978), protests based upon alleged improprieties in a solicitation apparent prior to bid opening must be filed in our Office prior to bid opening in order to be considered timely. The agency argues here that if East Wind wished to protest the inclusion of an option provision in the IFB, it should have filed its protest prior to bid opening and its failure to do so makes its protest untimely.

We do not agree. East Wind's concern with the IFB's option provision only arose after bid opening when it learned that the agency planned to exercise the IFB's option clause at the time of award for the exact number of protective covers (399,096 pairs) which it could obtain under the option provision of East Wind's contract DLA100-78-C-0737. This alerted East Wind to the questions of whether DPSC had a known firm requirement for protective covers, had funds available, and finally whether it was proper to include an option provision in the IFB. Under these circumstances, we do not believe that East Wind was required to file its protest with our Office prior to bid opening. Therefore, we will consider the matter.

The issue then is whether there has been a violation of ASPR/DAR § 1-1502(b)(v).

As noted above, ASPR/DAR § 1-1502(b)(v) provides that an option clause will not be used in an IFB if "the option quantities represent known firm requirements for which funds are available." The agency argues that its requirements for protective covers remained uncertain until bids were opened and the prices offered under the IFB could be compared with the price available under the option on East Wind's contract so as to determine which would be the most advantageous to the Government.

From the record presented, however, it appears that DPSC knew the total number of protective covers it wished to procure, but was uncertain over whether part of this quantity should be obtained by invoking the option clause under East Wind's contract DLA100-78-C-0737. Thus, DPSC indicates that it included an option provision in the subject solicitation because it believed that in this way it might be able to obtain a lower unit price for these 399,096 pairs than available under the option on East Wind's contract and as a result achieve a monetary savings for the Government. Clearly, then, the inclusion of an option provision in the IFB was not because DPSC's requirements were uncertain, but because of uncertainty over the best method of fulfilling those requirements. Thus, DPSC did in fact have a firm known requirement at the time the IFB was issued. ✓

DPSC also argues that because of the conflicting directions it received regarding the funds to be used for this procurement, funds were in fact unavailable until after bid opening and that this then was also a basis for including an option provision in the IFB.

DPSC states that at the time the IFB was issued the general practice was to use DPSC's revolving stock funds to procure the items in question. However, at a budget hearing on October 4, 1978, the Office of the Assistant Secretary of Defense (OASD) directed DPSC to obtain funded requisitions from the military services (each of which received separate appropriations for the chemical protective clothing program) prior to taking purchase actions. This, DPSC states, meant that funds from the revolving stock funds were no longer available to purchase the protective covers. However, the services were slow in responding to DPSC's request for funded requisitions. As a result, OSAD decided in December 1978 to allow an award to be made by once again authorizing the use of revolving stock funds.

Thus, in DPSC's opinion, funds were no longer available at the time bids were opened (October 12, 1978) and remained unavailable until the use of

revolving stock funds was once again authorized (December 11, 1978).

We have recognized that executive officials have a certain amount of discretion in the reprogramming of funds within an appropriation account and that a decision to shift funds from one program to another may not be questioned unless shown to be wholly arbitrary. A.R.F. Products, Inc., 56 Comp. Gen. 201 (1976), 76-2 CPD 541. However, we do not believe that this is the situation presented here. The record indicates that there was no reprogramming of funds, but rather that the responsible officials had more than one source of funds for this procurement and after encountering some difficulty with getting funded requisitions from the military services decided to use the revolving stock funds which had initially been projected as the source of funds for the procurement and had in fact been used before to make similar purchases. Therefore, not only did DPSC have a known firm requirement, but it also had funds available throughout the entire procurement process. Consequently, the inclusion of an option provision in the IFB was inconsistent with ASPR/DAR § 1-1502(b)(v). ✓✓

We must determine then whether this improper use of an option provision requires the termination of St. Clair's contract for the convenience of the Government and the resolicitation of the requirement. ✓

A situation analogous to the one presented here is when an agency solicits bids on the basis of estimate quantities. In that situation, the estimated quantities must be compiled from the best information available so that the estimates are a reasonably accurate representation of actual anticipated needs. If the estimates are not reasonably accurate, the evaluation of bids based on those estimates is suspect and may not result in the lowest cost to the Government. Therefore, if during the procurement process it becomes apparent that the estimated quantities do not accurately reflect the agency's actual anticipated needs, the proper procedure is to cancel the solicitation and

readvertise. Union Carbide Corporation, B-188426, September 20, 1977, 77-2 CPD 204, and decisions cited.

From the facts now known, we are aware that DPSC always intended to purchase 399,096 more pairs of protective covers than the number actually solicited under the IFB. DPSC has admitted that its main reason for including an option provision in the IFB was to determine whether it might get a lower unit price for those 399,096 pairs under the new solicitation than if it invoked the option on East Wind's contract DLA100-78-C-0737. While it is apparent that DPSC was trying to obtain the lowest price possible for the Government, its decision to include an option provision in the IFB resulted in the IFB soliciting bids for a quantity which did not accurately represent DPSC's actual anticipated needs. This raises doubt, therefore, whether the prices received were as competitive as they might have been had the bids received offered prices for 1,033,440 pairs of protective covers rather than for 634,344 pairs plus an unspecified option quantity. In addition, DPSC's improper use of the option provision also brings into question the integrity of the competitive bidding system.

We recommend, therefore, that the contract with St. Clair be terminated for the convenience of the Government and the agency's known firm requirement for protective covers be resolicited. By letter of today, we are informing the Director, Defense Logistics Agency, of our recommendation.

Since this decision contains a recommendation for corrective action, we are furnishing copies of our decision to the Senate Committees on Governmental Affairs and Appropriations and to the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the submission of written statements by the Defense Logistics Agency to those committees concerning the action taken with respect to our recommendation.

Protest sustained.

A handwritten signature in dark ink, appearing to read "R. Z. Keller". The signature is written in a cursive style with a large, looping initial "R".

Deputy Comptroller General
of the United States