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DECISION

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

FILE: B-193720 DATE: August 27, 1979

MATTER OF: East Wind Industries, Inc.-- Reconsideration DLG00142

DIGEST:

1. Upon reconsideration, agency has not shown that impropriety in solicitation was apparent prior to bid opening so that bid protest filed after bid opening was untimely and therefore not for consideration by GAO.

2. Although agency did not improperly include option provision in IFB, its decision to exercise option at time of award and evaluate bids on basis of prices offered for both basic and option quantities was improper, since it had known firm requirements, with funds available, and should have therefore amended IFB to accurately reflect its actual needs.

3. Contracting agency should reconsider conclusion that it is not in best interest of Government to terminate contract for convenience, since contractor has furnished no backup to support estimated termination cost and information that contractor is in default on one delivery and may be an another because of difficulty in getting equipment from supplier casts doubt that termination for convenience costs for equipment would be $500,000.

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The Defense Logistics Agency (DLA) and the St. Clair Rubber Company (St. Clair) separately request reconsideration of our decision in B-193720, June 7, 1979, 79-1 CPD 404. In that decision, we sustained the protest of East Wind Industries, Inc. (East Wind), holding that DLA had improperly included an option provision in the solicitation. We found that the agency's action raised doubt whether the Government was receiving the items solicited at the lowest possible cost and whether the integrity of the

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[Protest Involving Option Provision in Solicitation]

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competitive bidding system was being maintained. Consequently, we recommended that the contract with St. Clair be terminated for the convenience of the Government and the requirement be resolicited.

DLA and St. Clair now request that we reconsider our prior decision and deny the protest. In the alternative, they request that if we affirm our prior decision that we reconsider our recommendation to terminate the contract. However, for the reasons indicated below, we affirm our prior decision and recommendation.

To summarize the facts, invitation for bids (IFB) No. DLA100-78-B-0835 was issued on July 24, 1978, requesting bids for 1,268,688 pairs of chemical protective footwear covers. The solicitation was issued as a 50-percent small business set-aside (unrestricted and set-aside portions each 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). Bid opening was delayed until October 12, 1978. When bids were opened on that date, East Wind was low bidder on the unrestricted portion at $6.59 per pair with a bid of $8.21 per pair for the option quantity. St. Clair, on the other hand, bid $6.71 per pair for both the unrestricted and option quantities.

Before the IFB was issued, the Government's identified requirement for protective covers was for a total quantity of 2,653,488 pairs. Initially, DLA had intended to satisfy this requirement by invoking options on two East Wind contracts for 985,704 and 399,096 pairs respectively and by issuing a new solicitation--the instant procurement--for 1,268,688 pairs. However, although it did invoke the option for the 985,704 pairs, DLA did not immediately invoke the second option because it was concerned with the reasonableness of the price ($7.33 per pair). It decided to wait and see what prices

were offered under the new solicitation before deciding whether or not to exercise this option. After evaluating the bids, DLA determined that the most economical way of procuring the remaining quantity it needed (1,268,688 pairs plus 399,096 pairs) was to obtain the full amount under the IFB. To accomplish this, it decided to exercise the IFB's option at the time of award for 399,096 additional pairs. Upon making this decision, DLA was authorized by the IFB to evaluate bids on the basis of the total price offered--that is, the price for the basic quantity plus the price for the option quantity. In doing so, DLA found that St. Clair's bid of $6.71 per pair for both quantities was lower than East Wind's price of $6.59 per pair for the basic quantity and $8.21 per pair for the option quantity. Accordingly, DLA decided to award a contract to St. Clair for 1,033,440 pairs (634,344 plus 399,096). Upon learning this, East Wind filed a protest with our Office.

The basis for East Wind's protest was that the inclusion of the option provision in the IFB was in violation of Armed Services Procurement Regulation/Defense Acquisition Regulation (ASPR/DAR) § 1-1502(b)(v) (1976 ed.) which provides that option clauses should not be included in solicitations if "the option quantities represent known firm requirements for which funds are available." East Wind argued that DLA had a known firm requirement for protective covers and had funds available. Thus, East Wind believed that by including an option in the IFB, DLA had both violated ASPR/DAR § 1-1502(b)(v) and failed to obtain the fullest competition possible.

After reviewing the record, we held that the facts indicated that DLA had always intended to purchase 399,096 more pairs of protective covers than the number actually solicited under the IFB, 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 second contract, and that it had funds available. We concluded, therefore, that DLA had a known firm requirement for 1,033,440 pairs of protective covers with funds

available. In light of this, we held that the inclusion of the option provision in the IFB was inconsistent with ASPR/DAR § 1-1502(b)(v). Accordingly, we recommended that the contract with St. Clair be terminated for the convenience of the Government and the requirement be resolicited. In our opinion, the quantity solicited under the IFB did not accurately represent DLA's actual anticipated needs thereby raising doubt 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, we based this recommendation on the fact that the improper use of the option provision brought into question the integrity of the competitive bidding system.

In its request for reconsideration, DLA argues for a second time that East Wind's protest should be deemed untimely because the alleged impropriety--the improper inclusion of the option provision--was apparent prior to bid opening and our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1979), clearly require that a protest concerning any alleged impropriety apparent prior to bid opening must be filed in our Office before bids are opened. In our prior decision, we held that East Wind's protest was timely, even though filed after bid opening, because the protester had not been alerted to the question of whether the agency had acted properly by including an option provision in the IFB until after it had learned that the agency planned to exercise that option at the time of award for the exact number of protective covers (399,096 pairs) which could be obtained under the option provision in East Wind's second contract. DLA now claims that since prior to bid opening East Wind knew that (1) the agency was requesting bids for 1,268,688 pairs of protective covers, and (2) there existed an option in East Wind's second contract for 399,096 pairs, it was clearly alerted to the question whether DLA had a known firm requirement in excess of 1,268,688 pairs. In addition, DLA points out that in a letter to our Office dated March 2, 1979, the President of East Wind stated:

> "Several days prior to the bid opening the contracting officer informed me that they were ready to make the award to us at $7.33 a pair on the option but wanted to wait until the bid opening to see what the market tested as to price. We therefore concluded that if the bid prices were less than the $7.33 that the option would be dropped."

In DLA's opinion, this further indicates that prior to bid opening East Wind knew that the Government's requirements were for both the 1,268,688 pairs and the 399,096 pairs. Based on this, therefore, DLA contends that the alleged impropriety was apparent prior to bid opening and East Wind's failure to file its protest prior to bid opening renders the protest untimely under our Bid Protest Procedures.

However, we do not believe that DLA's present arguments in any way contradict our prior determination that East Wind's protest was timely. While it is true that prior to bid opening East Wind was aware both that the IFB solicited a total of 1,268,688 pairs of protective covers and that its second contract contained an option for an additional 399,096 pairs, this is not a basis to conclude that East Wind knew prior to bid opening that DLA was including an option provision in the IFB despite having known firm requirements for protective covers and funds available. The statement quoted above from the East Wind letter of March 2, 1979, indicates that it was East Wind's understanding that DLA was testing the market through the IFB. In other words, East Wind believed that if the prices received for the 1,268,688 pairs solicited under the IFB were less than $7.33 per pair then DLA would not exercise the option under East Wind's contract, but obtain its entire requirement under the IFB. If, on the other hand, DLA received unit prices greater than $7.33 per pair, it appears that East Wind expected DLA to exercise the option on its contract and then make awards under the IFB for less than 1,268,688 pairs (a right reserved by standard form 33A which was incorporated by reference into the IFB). This belief on East Wind's part is indicated by another statement found in its March 2, 1979, letter wherein it is stated:

"We had no way of knowing that DPSC-DLA would violate their own ASPR § 1-1502(b)(v) regulations and consider awarding the 399,096 pair as part of this bid."

Therefore, we believe that up until the time it learned that DLA was going to award St. Clair a contract for 634,344 pairs of protective covers plus an additional 399,096 pairs, East Wind was unaware that DLA had a known firm requirement, and funds available, for more than the 1,268,688 pairs solicited under the IFB and could not be held responsible for failing to question the propriety of including an option provision in the solicitation. Accordingly, the protest was timely and therefore properly considered by our Office.

DLA also argues, however, that we were mistaken in our holding that the inclusion of the option provision in the IFB was improper. The agency has submitted a copy of the minutes of a Team Management Meeting held on May 17, 1978 (more than 2 months before the IFB was issued), in which it is shown that the procurement officials decided that they could satisfy all the Government's requirements for protective covers by exercising the options on East Wind's two contracts and by issuing a new solicitation. In addition, they decided that they would include a 100-percent option in the new solicitation in order to "satisfy any additional unprogrammed requirements." In light of this information, plus the fact that the bidders were not required to submit bids on the option quantity, DLA believes that there is sufficient evidence to prove that the option provision was not included in the solicitation merely to obtain a lower price for the 399,096 pairs in question, but rather was included to satisfy possible future needs as authorized by ASPR/DAR § 1-1502(a) (1976 ed.). DLA concludes, therefore, that our prior decision was incorrect in finding that the inclusion of the option provision was improper.

In view of the information now provided, we stand corrected insofar as our prior decision implied that the sole purpose for DLA's inclusion

of an option provision was to determine whether a lower unit price might be obtained under the IFB for the 399,096 pairs available under East Wind's second contract option. But we affirm our general finding that there has been an improper use of an option provision in this solicitation. We reach this conclusion because the record clearly indicates that at the time the IFB was issued the Government's known firm requirement was for 2,653,488 pairs of protective covers. At some point before bid opening, DLA decided that, even though it continued to have a requirement for 2,653,488 pairs of protective covers, it was not certain whether the price it would have to pay to exercise the option for the 399,096 pairs was reasonable. Consequently, DLA wished to check the reasonableness of East Wind's option price. To do this, it decided to compare the prices offered on the IFB's option quantity, and if lower than $7.33 per pair, it would then exercise that option for 399,096 pairs at the time of award. This was in fact done. However, while we now agree that there was nothing improper with DLA's initial decision to include an option provision in the IFB, we do not agree that an option provision can be used to test the market in the manner done here. DLA had a firm requirement and funds available. Under these circumstances, we believe that upon doubting the reasonableness of East Wind's option price, DLA should have amended the IFB to increase the number of protective covers solicited by an additional 399,096 pairs. See ASPR/DAR § 2-208(a). As a result, bids would have been offered on DLA's remaining requirement for protective covers thus giving the agency the most competitive bids then possible. If upon later evaluation, DLA determined that it was more economical to exercise the option on East Wind's contract, it could then make awards under the IFB for less than the full quantity solicited.

East Wind has also argued that the IFB should have been amended to reflect DLA's actual requirements and has presented specific methods to achieve this goal--for example, the use of Defense Personnel Support Center clause CB9, "Notice of Option Availability (DPSC 1977 May)." Yet, while acknowledging that this or some similar approach might have been used by the contracting officer, DLA maintains that there is no substantive

difference between the contracting officer's use of IFB clause D52 (which informed bidders that offers could be evaluated on the basis of the prices offered for both the basic and option quantities if the agency elected to exercise the option at the time of award) and the other approaches suggested. We do not agree. As indicated above, DLA's need for 399,096 more pairs of protective covers was not an "unprogrammed" requirement which would have justified the use of the IFB's option clause. From the time it first determined its requirements for protective covers, DLA intended to purchase the 399,096 pairs in question. It was only uncertain over what was the most economical way of making this purchase. As indicated in our prior decision, DLA's actions resulted in the IFB soliciting bids for a quantity which did not accurately represent the Government's actual anticipated needs so that it is questionable whether the bids received were as competitive as they might have been.

Based on the foregoing, we affirm our prior decision.

In the event that we would affirm our prior decision, both DLA and St. Clair have requested in the alternative that we reconsider our recommendation that the contract with St. Clair be terminated for the convenience of the Government. In support of this request, DLA informs us that St. Clair has estimated its termination costs to be approximately $1,444,262. In DLA's opinion, the lower prices which the Government might receive from resoliciting the basic quantity plus the 399,096 pairs will not even begin to approach these costs. It concludes, therefore, that it is not in the Government's best interest to terminate the contract.

While we agree that termination costs of $1,444,262 are substantial, we are unable to conclude on the information presently available that these costs accurately reflect what it will actually cost the Government to terminate this contract. In that connection, we note that the contractor has furnished no backup to support its estimated termination costs. Further, we have been advised informally by DLA that it has been necessary

to terminate St. Clair for default for the first increment scheduled for delivery on July 14, 1979, and that it may be necessary to terminate St. Clair for default for the next increment since the company is having difficulty getting necessary equipment from its supplier. This information casts considerable doubt on its representation that termination costs for equipment would be $500,000. In the circumstances we believe that DLA should reconsider its conclusion that it is not in the best interest of the Government to terminate the contract with St. Clair. To the extent that St. Clair should be terminated for default under the contract, it would not be appropriate to terminate it for convenience.

Our decision of today does not relieve DLA of its obligation to report to the appropriate committees of Congress as required by section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976).

R.F. Keller

Deputy Comptroller General
of the United States