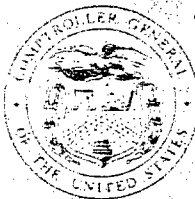


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DECISION



Washington
14351 PLMI
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-195956.3

DATE: July 21, 1980

MATTER OF: Werner-Herbison-Padgett

DIGEST:

1. Cancellation of solicitation after bid opening because of changes in technical specifications and requirements for descriptive literature and bidder experience was proper since changes were not unnecessary or inconsequential as alleged by protester.
2. Exclusive remedy under Freedom of Information Act when agency ignores or denies request for access to documents is appeal to courts.

Protest
Against →

Werner-Herbison-Padgett (WHP) protests the cancellation of ~~invitation for bids~~ (IFB) No. DACA51-79-B-0055 by the Army Corps of Engineers. The cancellation followed our decision sustaining WHP's protest of a proposed award to Charles H. Reed Export, Inc. (Reed), the low bidder under the solicitation, which is for racquetball courts for delivery to Germany. See Werner-Herbison-Padgett, B-195956, January 23, 1980, 80-1 CPD 66.

Our decision found that Reed's bid was non-responsive and the solicitation was deficient for failure to comply with the descriptive literature requirements of Defense Acquisition Regulation (DAR) § 2-202.5 (1976 ed.). Reed then protested that WHP's bid was also nonresponsive, but the case was closed when the Army canceled the solicitation. WHP now protests that no compelling reason exists for the cancellation. For the reasons discussed below, this protest is denied.

~~Protest~~

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The Army states that after its review of the original specifications in the light of Reed's protest and our decision, it canceled the invitation because the specifications were inadequate or inappropriate in the following respects:

- a) the requirement for submission of construction drawings with the bids was, as indicated in our decision, inconsistent with DAR § 2-202.5 and was, in fact not essential to the Army's needs.
- b) the invitation did not impose minimum experience requirements which the Army determined was "necessary for an acquisition of this type and quantity."
- c) the overall requirement for single outdoor courts had increased from 28 to 36.
- d) a completion date of 180 days after award instead of the 120 days required by the invitation was now viewed as appropriate.
- e) the technical provisions were deficient in two areas and required revision.

DAR § 2-404(1)(a) provides that award must be made to the low, responsive, responsible bidder unless there is a compelling reason to reject all bids and cancel the solicitation. Section 2-404(1)(b) lists a number of reasons sufficiently compelling to justify cancellation of a solicitation. Included among those reasons are "inadequate or ambiguous specifications were cited in the invitation," "specifications have been revised" and "for other reasons, cancellation is in the best interest of the Government." Contracting officers have broad discretion in deciding whether to cancel a solicitation, and we will not overturn such a decision unless there is an abuse of that discretion. Aul Instruments, Inc., B-195887, February 6, 1980, 80-1 CPD 98.

WHP asserts that there was no compelling reason to cancel because the changes indicated by the Army are either unnecessary or inconsequential. For example, WHP argues that the elimination of the requirement for construction drawings is not a justification for cancellation because if the drawings were not necessary they could just be ignored. Similarly, WHP argues that the new experience requirement is similar to one that was in the canceled invitation, and that the revisions to the technical provisions are minor. WHP also maintains that the increase in number of courts is more appropriately handled by a separate procurement.

It is true that an increase in requirements generally cannot justify cancellation of an invitation after bid opening. See DAR § 2-401(a). We believe, however, that the various, other reasons proffered by the Army justify the cancellation. First, we cannot agree that the Army, having decided that the construction drawings were no longer needed, was free to ignore the drawings that were submitted in response to the invitation requirement. As we pointed out in our prior decision, the requirement for drawings which showed courts in strict compliance with the specifications clearly was one relating to bid responsiveness, and under the rules applicable to Federal procurement, a bidder's failure to comply with the requirement, either by not submitting the drawings or by submitting drawings which indicated a material deviation for the specifications, would necessarily render the bid nonresponsive. 40 Comp. Gen. 132 (1960); 48 id. 420 (1968). Thus, the requirement could not be ignored; rather, since it overstated the agency's needs, the proper course of action is cancellation of the invitation and readvertisement. 52 Comp. Gen. 815 (1973); 46 id. 1 (1966).

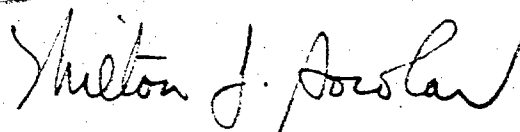
Second, we do not find that the new experience requirement, that bidders have at least three years experience as manufacturers or dealers in racquetball courts, is similar to the requirement in the original solicitation that certain of the materials for the courts be furnished by a firm which has produced the materials for five years. Rather, it imposes a broader overall requirement and is not, as WHP implies, merely a different incarnation of the original five-year experience requirement.

Third, we believe the changes to the technical specifications for the courts are not "nothing more than clarifications", as WHP suggests, but material changes in the requirements the contractor must meet. For example, a new provision states that structural calculations must be reviewed by a German structural "proofing" engineer to insure they meet German standards. The provision also requires that the calculations be provided by a licensed U.S. engineer. The original solicitation only required that structural calculations be submitted; there was no mention of who must perform or approve them. Also, among other changes, the new solicitation provides vertical support spacing requirements for court wall panels and states that the panels shall be attached to structural frame members in accordance with the manufacturer's recommendation. The original solicitation was silent on these matters.

In short, we find that these changes form an adequate basis for the contracting officer's decision to cancel the invitation.

Finally, WHP complains that the agency has ignored a Freedom of Information Act, 5 U.S.C. § 552 (1976), request it has filed. Our Office has no authority to determine what records must be released by other Government agencies and if the request is ignored or denied the sole remedy is by suit in the United States District Court. See Security Assistance Forces & Equipment International, Inc., B-196008, March 14, 1980, 80-1 CPD 198.

The protest is denied.



For the Comptroller General
of the United States