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DECISION



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

FILE: B-199040

DATE: January 16, 1981

MATTER OF: Seaward International, Inc.

DIGEST:

Cancellation of invitation for bids which specified name brand component but did not provide "or equal" clause is proper where equal product would satisfy Government's minimum needs and where bidders who complied with specifications would be prejudiced by award to bidder who offered equal product.

Seaward International, Inc. (Seaward) protests the cancellation of invitation for bids (IFB) N00123-80-B-0640, a small business set-aside, issued by the Naval Regional Contracting Office (NRCO), Long Beach, California, for four Fender Systems for Elevated Pontoon Causeways. The IFB defines each Fendering System as consisting of five "Fender Cushion[s] 2F1, Samson Model CF 410" and specified ancillary bumpers, padeyes and connections.

The IFB requires that the four Fender Systems be "fabricated in accordance with Purchase Description PD 2040-1563W-80-1 dated 30 November 1979, and Civil Engineering Laboratory Drawings SK 9105 and SK 9106." Note five of Drawing SK 9106 states that the fender cushion shall be "Samson Model CF 410, Cylindrical Marine Fender." The IFB does not contain a "Brand name or Equal" clause. However, the Purchase Description includes a Standard Commercial Product clause which provides as follows:

"3.3 Standard Commercial Product.

Fenders of the same classification shall, as a minimum, be in accordance with the requirements of this purchase description and shall be the manufacturer's standard

commercial product. Additional or better features which are not specifically prohibited by this specification but which are a part of the manufacturer's standard commercial product, shall be included in the fenders being furnished. A standard commercial product is a product which, has been sold or is currently being offered for sale, on the commercial market through advertisements or manufacturer's catalogs or brochures, and represents the latest production model." (Emphasis added.)

Seaward submitted with its bid a letter indicating its intent to supply its own fender cushion instead of the specified brand name model. Seaward further stated that its fender cushion was a standard commercial product as defined in the Purchase Description and that it met all IFB requirements.

After bid opening NRCO informed Seaward, the low bidder, that its bid might be rejected as nonresponsive for failure to comply with the requirement for Samson Fender Cushions. Nevertheless, the procuring agency proceeded with a technical evaluation of Seaward's product.

At that point, Seaward protested award to any other bidder, contending that its low bid offered a product equal to that specified in the solicitation and, therefore, was responsive. That protest was subsequently withdrawn without prejudice to reinstatement pending an advance decision from our Office concerning this procurement, which was to be requested by the Navy.

The technical evaluation of the Seaward fender cushion revealed that it was a recently developed commercial product equivalent to the Samson CF 410 model. Based on that finding, the Navy, rather than requesting an advance decision, determined that the IFB was overly restrictive because it required Samson cushions and, therefore, should be canceled, and the requirement readvertised with revised specifications permitting bidders to offer equivalent fender cushions.

Seaward reinstated its protest and now argues that, even though the Purchase Description and Drawing SK 9106 specify Samson fender cushions without any provision for an "equal" substitute, the Standard Commercial Product clause permits bidders to offer standard commercial fender cushions equal to the Samson model. Therefore, the solicitation was not restrictive and it should be reinstated and award made to Seaward.

We agree with the Navy's reading of the solicitation as requiring bidders to provide Samson CF 410 fender cushions. The purchase description and drawing clearly require that brand. It is our opinion that the Standard Commercial product clause does not permit the substitution of other fender cushions, but rather adds the requirement that the offered fender system, including Samson cushions, be a standard commercial product as defined in the clause.

Seaward cites Mathewson Corporation, B-193745, July 20, 1979, 79-2 CPD 40 and Futura Company, B-193704, September 27, 1979, 79-2 CPD 227, in support of its interpretation that the standard commercial product clause here permits bidders to offer deviations from the required brand name. Neither case supports that proposition. Futura involved an entirely different clause, and Mathewson involved the same clause but a totally different issue.

The protester also supports its interpretation of the IFB by reference to the fact that because this solicitation is a small business set-aside, the product must be substantially manufactured by a small business. The protester contends that since the fender cushion is the primary component of a fendering system, the use of a cushion manufactured by Samson, a large business, would preclude an award under a small business set-aside. Therefore, the Standard Commercial Product clause must be read as allowing other cushions. However, component parts manufactured by a large business may be specified by a small business set-aside, provided that a small business makes a significant contribution to the manufacture of the end product. Jazco Corporation, B-193933, June 12, 1979, 79-1 CPD 411; Kinetic Systems, Inc., B-189146, July 1, 1977, 77-1 CPD 5. With respect

to this procurement, the IFB definition of the required fendering system indicates that the manufacturer has a significant role in the production and assembly of the end product. Therefore, the fact that this procurement is a small business set-aside does not compel Seaward's interpretation of the Standard Commercial Product clause. In any event, if Seaward is correct and a small business bidder offering Samson cushions would not be eligible for award, that would clearly render the IFB defective, since any bidder offering the specified brand name would be automatically ineligible for award--an absurd result.

Finally, Seaward cites several negotiated procurements in which, it contends, we found that award could properly be made to offerors offering equivalents to required brand names even though no "or equal" clause was included in the request for proposals. While all of those cases involve other significant circumstances that distinguish them from this case, we think that the fact that they all involve negotiated procurements is sufficient to render them inapplicable here. Generally, negotiated procurements are flexible enough to permit the consideration for award of offers which initially appear to deviate from the request for proposals, but which can ultimately be shown to meet the essential requirements. On the other hand, a bidder in an advertised procurement must in its bid offer to meet, in every way, the requirements stated in the IFB, or risk immediate rejection of its bid as nonresponsive.

The brand name specification, in the absence of a provision permitting the substitution of an equal product which would have, in fact, satisfied the Government's actual needs, rendered the IFB overly restrictive. Colonial Ford Truck Sales, Inc., B-191320, May 12, 1978, 78-1 CPD 370; 47 Comp. Gen. 175 (1967).

Contracting officers have broad discretionary powers to reject all bids and cancel a solicitation. However, cancellation of a solicitation after bid prices have been exposed could adversely affect the competitive bidding system. Therefore, a contracting officer's decision to cancel a solicitation after bids have been opened must be warranted by a compelling reason. Engineering Research, Inc., 56 Comp. Gen. 364

(1977), 77-1 CPD 106; DAR § 2-404.1(a) and (b)(i) (1976 ed.).

The use of an inadequate, ambiguous or otherwise deficient specification is not necessarily a compelling reason to cancel an IFB and readvertise where an award under the solicitation as issued would serve the actual needs of the Government and would not prejudice the other bidders. GAF Corporation; Minnesota Mining and Manufacturing Company, 54 Comp. Gen. 586 (1974), 74-1 CPD 68.

The record indicates that other bidders, in compliance with the IFB restrictions, offered standard commercial fender systems equipped with Samson cushions. Since all bidders did not bid on the same requirements, it would be prejudicial to those who submitted responsive bids to award the contract to Seaward, whose nonresponsive bid would satisfy the Government's need. Canadian Commercial Corporation, B-196325, July 28, 1980, 80-2 CPD 70. Therefore, cancellation of the IFB was proper.

The protest is denied.



For the Comptroller General
of the United States