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DECISION



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

FILE: B-203377.5

DATE: January 8, 1982

MATTER OF: Marmac Industries, Inc.

DIGEST:

1. Protest against cancellation of a solicitation will be considered timely where there is a reasonable doubt whether the protester knew of the reason for the cancellation more than 10 days before its protest was filed with GAO.
2. A compelling reason to cancel a solicitation for flyers helmets exists where a chin strap retention requirement is considered necessary for safety reasons and a technical review shows that the requirement cannot consistently be met unless the existing specification is revised.
3. An issuing agency may cancel a solicitation no matter when the information justifying cancellation first surfaces.

Marmac Industries, Inc. protests the cancellation of invitation for bids (IFB) No. DLA 100-81-B-0772, issued by the Defense Personnel Support Center, Defense Logistics Agency (DLA) for a quantity of SPH-4 flyers helmets. Marmac contends that DLA "lacked a compelling and cogent reason to cancel the solicitation" and that the cancellation was therefore improper. The agency maintains that cancellation was necessary due to specification deficiencies which might have resulted in the delivery of unacceptable helmets. We deny the protest.

Bids were opened June 2, 1981, and although Marmac was the apparent low bidder at \$122.45 per unit, the award was delayed pending resolution of a protest filed in our Office by another bidder, Gentex Corporation. By

letter dated September 24, before our Office had rendered a decision on the Gentex protest, the contracting officer advised Marmac that the solicitation had been canceled in accordance with Defense Acquisition Regulation (DAR) § 2-404.1(b)(1) based on a determination that the specifications were inadequate.

The solicitation contained a requirement for chin strap retention of 300 pounds, a standard DLA considered necessary to afford the wearer adequate protection in the event of a crash. The incumbent contractor, the first to perform under this revised specification (the prior standard was 150 pounds), failed to consistently meet the 300 pound requirement in its testing of the helmets and attributed this failure to the materials and design specified in the solicitation. This claim prompted further research by DLA's Division of Technical Research, which concluded that the specification preparing activity adopted the revised specification without performing sufficient testing to assure that it could be met. The specification preparing activity reportedly is now in the process of revising the materials and design specified for the helmets. The contracting officer also advises that additional specification revisions are being considered to correct possible deficiencies related to the fit of the helmet and the operation of the visor. In view of these findings by the technical research staff, the contracting officer determined that cancellation of the solicitation and a resolicitation of this requirement incorporating a revised specification was necessary to assure that the 300 pound chin strap retention requirement would be met.

Marmac contends DLA lacked a sufficient justification to cancel the solicitation considering that bids had been opened and prices exposed. Marmac notes in this regard that our Office has found the use of an inadequate specification to justify cancellation only where the defect is material or other bidders would be prejudiced by an award based on the inadequate specification. It maintains that DLA has failed to establish either of these factors and, further, questions how the deficiency could have been

deemed material if the contracting officer learned of it through unsatisfactory performance by the incumbent contractor but waited until after bid opening to cancel the solicitation. This sequence of events suggests to Marmac that DLA actually may have been motivated to cancel by a desire to prevent Marmac from receiving the award.

As a threshold issue, we must consider whether Marmac timely filed its protest. Our Bid Protest Procedures require that protests be filed in our Office no later than 10 working days after the basis of protest was or should have been known. 4 C.F.R. § 21.2(b)(2) (1981). Marmac's protest was received on October 14, and is therefore timely only if Marmac learned that the solicitation would be canceled due to inadequate specifications on or after September 29 (10 working days before October 14 exclusive of October 12, Columbus Day). Marmac claims it received DLA's written notification of the cancellation on September 30. Counsel for Gentex maintains, however, that she informed Marmac's counsel of the cancellation by telephone on September 28, and has submitted a copy of a telephone bill to establish this fact. Although Marmac does not specifically rebut Gentex's contention, we find the protest to be timely.

While the telephone bill submitted by Gentex shows that a call to Marmac's counsel was placed on September 28, it indicates neither the parties to nor, of course, the content of the conversation. It appears from an October 21 letter to our Office from Gentex's counsel, moreover, that she believed the solicitation had been canceled "as a result of a lack of immediate requirements for the item." Thus, even if Gentex's counsel did notify Marmac's counsel of the cancellation on September 28, it is at least unclear whether the information given included the correct reason for the cancellation, namely, inadequate specifications. Since it is this very justification that Marmac is challenging, we believe the uncertainty as to the date Marmac first received notice should be resolved in Marmac's favor.

Applied Devices Corporation, B-199371, February 4, 1981, 81-1 CPD 65; Memorex Corporation, 57 Comp. Gen. 865 (1978), 78-2 CPD 236. Accordingly, we will consider Marmac's protest on the merits.

Turning to the substance of Marmac's protest, we have held that contracting officers have broad discretionary authority to reject all bids and cancel an invitation for bids. Because of the potential adverse impact on the competitive bidding system, however, a contracting officer's decision to cancel an invitation after all bid prices have been exposed must be supported by a cogent and compelling reason. Keco Industries, Inc., B-191856, April 5, 1981, 81-1 CPD 234; Spikard Enterprises, Inc., et al., 54 Comp. Gen. 145 (1974), 74-2 CPD 121. We have recognized that, in most instances, the use of inadequate or deficient specifications will constitute a sufficient basis for cancellation. Keco Industries, Inc., supra. On the other hand, as Marmac observes, we have also stated that a deficient specification alone will not justify cancellation where an award under the specification would satisfy the Government's requirement and no other bidder or potential bidder would be prejudiced by such an award. Ingersoll-Rand Company, B-192279, October 6, 1978, 78-2 CPD 258; Communications Design, Incorporated, B-182843, May 15, 1975, 75-1 CPD 298.

The record does not support Marmac's position that DLA has failed to show it could not meet its requirement by making an award under the original specification. The contracting officer reports that the 300 pound chin strap retention requirement was necessary for safety reasons and Marmac has offered no evidence to the contrary. The contracting officer states that the testing prompted by the incumbent contractor's inability to meet the 300 pound requirement revealed that the requirement could not consistently be met under the existing specification, and that a revision of the specification was therefore necessary. Again, Marmac has presented no evidence that it or any other bidder could meet the requirement under the existing specification. Since we find DLA has made a prima facie showing that the specification was materially deficient

and that delivery of acceptable helmets could be assured only by resoliciting using a revised specification, we conclude that the specification deficiencies amply justified the cancellation. While Marmac may disagree with DLA's decision to cancel the IFB, it has introduced no evidence to establish that the contracting agency abused its discretion.

We add that there is no indication in the record that DLA canceled the solicitation for the purpose of preventing Marmac from receiving the award. In fact, prior to the cancellation, the contracting officer reportedly had recommended Marmac for award. There also is no evidence that the contracting officer was or should have been aware of the specification deficiency prior to bid opening. Although the inability of the incumbent contractor to meet the 300 pound requirement did give rise to the doubt concerning the adequacy of the specification, the finding that the specification was in fact inadequate was not made until the technical staff had concluded its review. We have no reason to believe that the findings of the technical staff were known by the contracting officer prior to bid opening. In any event, we have held that an agency may cancel a solicitation no matter when the information precipitating cancellation first surfaces. Ingersoll-Rand Company, supra; Edward B. Friel, Inc. et al., 55 Comp. Gen. 488 (1975), 75-2 CPD 333.

The protest is denied.

Harry R. Van Closen
For Comptroller General
of the United States