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DECISION

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

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FILE: B-203781.2 DATE: May 10, 1982

MATTER OF: Davey Compressor Company

DIGEST:

1. When solicitation requires a commercial product, before the procuring agency can make award it generally must determine that the potential awardee will furnish such a product, and any waiver of the requirement is improper. However, when the agency discovers that a modified commercial product will meet its needs, it has overstated them and should either amend the solicitation or cancel and resolicit.

2. GAO will not question an agency's decision to relax specifications if it is based on minimum needs, since specifications must be drawn to maximize competition. Even if changes are made to accommodate one offeror, unless there is evidence of favoritism, fraud, or intentional misconduct by the Government, GAO has no legal basis to object to the agency's use of less restrictive specifications.

3. Regulation that mandates amendment of a solicitation when the Government's requirements are changed or relaxed applies either before or after receipt of proposals, and is not limited to changes occurring before best and final offers. It only requires that all offerors in the competitive range be sent the amendment and given an opportunity to revise their proposals.

Davey Compressor Company protests the award of a contract for floodlight sets under request for proposals No. F41608-81-R-2810, issued by the San Antonio Air Logistics Center, Kelly Air Force Base, Texas. Davey charges that after best and final offers, the Air Force improperly amended a purchase description that required a manufacturer's standard commercial product, in order to accept an offer by the Over-Lowe Company for a modified commercial product. We deny the protest.

Chronology:

Under the solicitation in question, issued January 28, 1981, the Air Force sought unit prices for a pneumatically operated, telescoping tower containing four 1,000 watt floodlights; each tower was to be mounted on a two-wheel trailer. The solicitation required that the sets be the manufacturer's standard commercial product, defined in section 3.3 of the purchase description as:

> "* * * a product which has been sold or currently [is] being offered for sale on the commercial market through advertisements or manufacturer's catalogs or brochures, and [which] represents the latest production model. Standard commercial product also is defined as the floodlight set without the pneumatically operated telescoping tower and its air source * * *. This will allow a contractor who presently produces the required floodlight set without a pneumatically operated tower to change his design in this area * * *."

The remainder of the purchase description consisted of detailed performance and design specifications for the floodlight sets, including power distribution equipment, a diesel-fueled generator, the trailer, and other miscellaneous equipment and training materials that the contractor was to provide.

Evaluation was to be based on total unit prices for (1) an initial quantity of 64 floodlight sets; (2) follow-on quantities in increments of up to 500 floodlight sets; and (3) packing and shipping costs if applicable. The offeror with the lowest evaluated price was to be awarded a three-year, fixed price with economic adjustment, requirements contract.

Five firms responded to the solicitation; one of these withdrew and another was eliminated from competition because it could not meet the Air Force's delivery schedule. Following submission of best and final offers in April 1981, the lowest remaining offeror was found nonresponsible. Since this was a 100 percent small business set-aside, the matter was referred to the Small Business Administration, which in July 1981 refused to issue a certificate of competency. This left only two firms in the competitive range, with Over-Lowe's evaluated price $2.2 million lower than Davey's.

A pre-award survey, completed during August 1981, resulted in a finding that Over-Lowe was qualified for award except for the fact that its standard commercial product required "extensive modification/reconfiguration" to meet specifications. For example, the purchase description stated that the floodlight set with the tower in transport position could not exceed 72 inches in width; Over-Lowe's product, according to the survey report, was 83 inches wide. Although the firm planned to reduce the width by 11 inches, the survey report indicated that this would require a compensating extension of its 9-foot trailer outriggers, with an undefined effect on stability and "roadability." The survey report pointed out that Over-Lowe planned to make numerous other changes in its standard commercial product, as well as to build its own pneumatic tower, since its standard one was hand-operated.

The record includes an Air Force memorandum, dated September 1, 1981, stating that although paragraph 3.3 of the purchase description did not expressly prohibit reconfiguration of a manufacturer's standard commercial product, it did not appear to permit it except with regard to the tower and its air source. Air Force procurement officials therefore recommended that the solicitation be amended to clarify their intent to permit other modifications, where necessary, to meet specifications. While the Air Force was considering this change, it asked offerors to extend their acceptance periods to October 5, 1981.

Davey, upon learning that Over-Lowe had received such a request, protested to the Air Force that the firm's standard commercial product did not meet specifications. On September 22, 1981, the Air Force denied Davey's protest and issued an amendment stating that the floodlight sets should be in accord with the purchase description, but might be "derivative" of a manufacturer's standard commercial product. Due date for a second round of best and final offers was September 28, 1981; Over-Lowe's new evaluated price was $1,038,007 lower than Davey's, and the Air Force awarded it the contract on September 30, 1981. Since that time, the Air Force has informally advised us, a total of 708 floodlight sets have been ordered, and 92 have been delivered, inspected, and accepted.

Davey's Protest:

Davey alleges that the Air Force revised its purchase description solely for the purpose of making award to Over-Lowe, and that such action constituted improper negotiation

after best and final offers. Davey further argues that while stating that the amendment would increase competition, the Air Force actually restricted competition by permitting only Davey and Over-Lowe to submit new best and final offers. Davey concludes that as the only responsible offeror that was responsive to the solicitation as issued, it should have received the award.

Analysis:

Although the record fully supports Davey's allegations as to the Air Force's purpose in amending the purchase description--to insure that Over-Lowe's offer could be considered for award--we find the protest without legal merit.

As a general rule, when a solicitation requires a commercial product, before the procuring agency can make an award it must determine that the potential awardee will furnish such a product, and any waiver of the requirement is improper. Coast Iron & Machine Works, Inc., 57 Comp. Gen. 478 (1978), 78-1 CPD 394. But when, as here, the agency discovers that a standard commercial product can be modified or reconfigured and still meet its needs, a requirement for the unmodified commercial product overstates those needs.

The proper course of action, in such a case, is either to amend the solicitation and give offerors an opportunity to revise their proposals or, if the change in requirements is great enough, to cancel and resolicit. Defense Acquisition Regulation (DAR) § 3-805.4 (1976 ed.). Even when requirements are relaxed to accommodate one offeror, if the action is based on the Government's minimum needs, we will not object to it, since specifications must be drawn to maximize competition. See, for example, Data General, B-197776, July 21, 1980, 80-2 CPD 53, in which the Department of Health and Human Services deleted a solicitation requirement for a COBOL compiler, a component of an automatic data processing system when it discovered that the one included in the system that it planned to buy did not meet Government standards as required by General Services Administration regulations. We upheld the agency's action because its needs could be met without the compiler. See also Iotron Corporation, B-192311, April 18, 1979, 79-1 CPD 273, in which we indicated support for a Coast Guard decision to relax specifications for a computer-operated collision avoidance system in order to increase competition.

Further, our Office will not question the use of less restrictive specifications unless there is evidence of favoritism, Harris Data Communications, Inc., B-192384, January 8, 1979, 79-1 CPD 7, or a showing of fraud or intentional misconduct by the Government, Lion Recording Services, Inc., B-194724, May 14, 1979, 79-1 CPD 352. To do so would be contrary to the objective of our bid protest function, which is to insure full and free competition, Id. We are not persuaded that the facts of this case reflect favoritism toward Over-Lowe or fraud or misconduct on the part of procuring officials. Rather, it appears that the Air Force changed the purchase description in order to state its minimum needs more accurately and, in doing so, obtained not only competition but a lower price than would have been available from the only firm that met the more restrictive specification.

Finally, the regulation that mandates amendment of a solicitation when the Government's requirements are changed or relaxed, DAR § 3-805.4, applies either before or after receipt of proposals and is not limited to changes occurring before best and final offers. It merely requires, in paragraph (b), that all offerors in the competitive range be sent the amendment and given an opportunity to revise their proposals. In our opinion, the change in this case was not so great as to warrant cancellation and resolicitation, particularly when the Air Force already was aware that among the potential offerors other than Davey and Over-Lowe, one could not meet the delivery schedule and another had not qualified for a certificate of competency.

In view of the above, we reject Davey's arguments that the Air Force improperly conducted negotiations after best and final offers or unduly restricted competition at this stage of the procurement. The protest is denied.

Milton J. Socolar

for Comptroller General
of the United States