

DECISION



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

FILE: B-209262.2

DATE: April 12, 1983

MATTER OF: Tri-County Fence Co., Inc.

DIGEST:

1. Army solicited bids on a basis that it later determined did not meet its needs, then added the proper basis to the IFB, but failed to delete the initial one. Resolicitation rather than acceptance of the lowest bid submitted on the initial basis is proper, since the IFB was defective, and an agency is not required to award a contract for an item that does not meet its needs.
2. Mere statements contradicting or disagreeing with agency's opinion concerning its actual needs do not meet the protester's burden of proving that agency's opinion was unreasonable.

Tri-County Fence Co., Inc., protests the Veterans Administration's refusal to award it a contract to supply and install a boundary fence at the VA's Medical Center in Miami, Florida, under solicitation No. 82-123.

We deny the protest.

The solicitation originally invited bids on alternate items. Item No. 1 required labor and material to remove an existing fence at the facility, and install a new fence at its south, west and north property lines. Item No. 2 described the same requirement except it deleted work on the north property line. The technical specifications required fabrication by riveting. A note following the items descriptions read:

"A single award will be made on Item No. 1, but in the event the offer exceeds the funds available, a single award will be made on Item No. 2."

Amendment No. 1 to the solicitation added Item No. 3, which described the same work as in Item No. 1, except it specified fabrication by welding. Thus, the material distinction between Item Nos. 1 and 3 is in the method of fabrication: Item No. 1, riveting, and Item No. 3, welding. The alternate bid item clause was not revised.

Three bids were received:

<u>Bidder</u>	<u>Item 1</u>	<u>Item 2</u>	<u>Item 3</u>
Tri-County	\$108,165	\$94,820	\$135,206
Frank J. Moran	-	\$138,654	\$154,038
Fencemasters, Inc.	\$133,200	\$120,500	\$125,700

Tri-County protested when the VA decided to accept Fence-masters' bid on the welded fence, on the ground that since its bid on Item No. 1 was the lowest bid received, the VA was required to award a contract to it to install a riveted fence. Pending the protest, the VA made award to Fence-masters, but later terminated the contract for the convenience of the Government essentially because it believed the inclusion of alternate riveted fence bid items, and a single welded fence item, without establishing a priority as to how the selection among the items would be made, rendered the solicitation defective. The VA has issued a new solicitation which invites bids only on a welded fence.

Tri-County protests that as the lowest bidder under the original solicitation, for a requirement (riveted fence) that it alleges satisfies the Government's needs at a savings of more than \$17,000 than Fencemasters' offer on the welded fence, it was entitled to award. The protester argues that the VA does not need a welded fence. In fact, Tri-County alleges that a VA engineer at the first pre-bid conference stated that the agency needed a riveted fence, and would not even accept a welded fence. Tri-County does not believe it should have to compete under the resolicitation for a welded fence.

Tri-County is, of course, correct that the lowest bidder in a formerly advertised procurement generally is entitled to the contract award. See Emerson Electric Company, Environmental Products Division, B-209272, November 4, 1982, 82-2 CPD 409. The problem in this case, however, is that the solicitation was defective. Our review of the record indicates that the VA decided that only welded fencing would meet its minimum needs, as reflected in Item No. 3 and the resolicitation, but failed to so indicate to prospective bidders. By adding Item No. 3 to the original solicitation without eliminating Item Nos. 1 and 2, the agency only confused the statement of its needs and the basis for award, in that bids for riveted fencing were invited even though none would be accepted.

Thus, while Tri-County's expectation of award as the low bidder normally would be justified, award to Tri-County would not have been appropriate in these circumstances; an agency is not required to accept an offer of an item that does not meet its minimum needs. See Federal Procurement Regulations § 1-2.404-1 (1964 ed.); Custodial Guidance Systems Inc., B-206988, July 6, 1982, 82-2 CPD 19. Tri-County is, instead, being afforded the opportunity to compete under a solicitation properly framed to invite bids for welded fencing as part of the VA's attempt to rectify the unfortunate situation it created in the first procurement.

As to the VA's determination that welded fencing was necessary, we will not question an agency's assessment of its minimum needs and the methods of accommodating them unless there is a clear showing that the assessment is unreasonable. The reason is that the agency is most familiar with the particular conditions involved, and therefore is in the best position to know the Government's needs, and to draft appropriate specifications. See Maremont Corporation, 55 Comp. Gen. 1362, 1376 (1976), 76-2 CPD 181. The VA explains that, as a result of the pre-bid conference, its engineering staff decided on the change from riveting to welding for strength and maintenance reasons relating to local climatic conditions. To the extent a VA engineer may have advised prospective bidders at a pre-bid conference that a welded fence would not be acceptable, that advice certainly did not preclude the VA from subsequently reevaluating its minimum needs.

B-209262.2

The protester's argument with respect to the agency's minimum needs includes no evidence to support it, and thus merely reflects disagreement with the VA's judgment. A statement of disagreement with an agency's assessment of its requirements does not meet the protester's burden to prove the unreasonableness of the agency's opinion. Integrated Forest Management, B-200127, March 2, 1982, 82-1 CPD 182; Semiconductor Equipment Corporation, B-187159, February 18, 1977, 77-1 CPD 120.

The protest against the VA's decision not to accept Tri-County's bid for riveted fencing under the initial solicitation is denied.

for Milton J. Focolan
Comptroller General
of the United States