

DECISION

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

25407

FILE: B-208876**DATE:** June 7, 1983**MATTER OF:** Winandy Greenhouse Company Incorporated**DIGEST:**

1. Changing the requirements of a procurement after the opening of bids to properly express the minimum needs of the Government constitutes a compelling reason to cancel the solicitation where the protest against cancellation fails to show both that the protesting low bidder appears on the face of the bid to satisfy the minimum needs of the Government and that no prejudice would arise from an award without resolicitation.
2. Award under IFB must be made to lowest priced bidder absent listing of "other factors" in IFB which will be used for evaluation.
3. A protest against the cancellation of a solicitation does not restrict or prevent an agency from resoliciting the procurement or taking other steps preliminary to an award.

Winandy Greenhouse Company Incorporated (Winandy) protests the award of a contract to Albert J. Lauer, Inc. (Lauer), under invitation for bids No. 4010-N-82, issued by the United States Department of Agriculture (Agriculture) for the replacement of glass in two greenhouses at Agriculture's Northern Grain Insects Laboratory, Brookings, South Dakota. Winandy also protests the cancellation of the original solicitation and the steps subsequently taken to resolicit after the contracting officer terminated the contract with Lauer for the convenience of the Government. We deny the protest.

In July 1982, Agriculture solicited bids for either or both item No. 1, the replacement of the glass with acrylic, or alternate item No. 2, the

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replacement of the glass with tempered safety glass. Bidders were informed that award would be made for whichever item was most advantageous to the Government, price and other factors considered.

Winandy bid \$84,829 on item No. 2, the tempered safety glass system, while Lauer bid \$86,200 and Midwest Glass bid \$91,640.29 on item No. 1, the acrylic system. The contracting officer chose the acrylic system over the tempered safety glass system primarily because she believed that the glass system bid by Winandy lacked sufficient load-bearing capacity. Based upon knowledge of the weather conditions in South Dakota and of the City of Brookings' requirement that roofs be able to withstand 30 pounds per square foot of snow load and 25 pounds per square foot of wind load, the contracting officer determined that the apparent load-bearing capacity of the system bid by Winandy, 15 pounds per square foot on horizontal surfaces and 20 pounds per square foot on vertical surfaces, was insufficient to meet the minimum needs of the Government. The contracting officer awarded the contract to Lauer on August 23, and Winandy thereupon protested to our Office.

After the award, the contracting officer discovered that the specifications in the invitation for bids did not include any requirement as to minimum load-bearing capacity. Upon discovery of this deficiency, the contracting officer terminated the contract and canceled the solicitation. Agriculture then resolicited for the procurement, requiring a "live" load-bearing capacity of 30 pounds per square foot and a wind load-bearing capacity of 25 pounds per square foot. Bids were due by April 14, 1983. Winandy filed protests with our Office both against the cancellation of the original solicitation and against a resolicitation during the pendency of its protest.

Winandy denies that the requirements set forth in the original specifications were insufficient to satisfy the Government's need for load-bearing capacity and alleges that the contracting officer, therefore, improperly canceled the solicitation.

As a general rule, changing the requirements of a procurement after the opening of bids to properly express the minimum needs of the Government constitutes a compelling

reason for the cancellation of a solicitation. Rivera General Contracting, B-199514, February 11, 1981, 81-1 CPD 146; Therm-Air Mfg. Co., Inc., B-194185, November 20, 1979, 79-2 CPD 365. Further, it is primarily for an agency to determine what its minimum needs are. We will not question an agency's determination of its minimum needs in the absence of a clear showing that the determination was arbitrary or capricious. A&M School Bus Service, B-208833, December 22, 1982, 82-2 CPD 566; Therm-Air Mfg. Co., Inc., supra.

Winandy has not shown that the contracting officer acted arbitrarily or capriciously in setting the level of the overall minimum load-bearing capacity necessary to satisfy the minimum needs of the Government. Admittedly, the Uniform Building Code, which specifies a minimum load-bearing capacity for roofs, indicates that greenhouses need only be designed for a lesser capacity for a vertical live load (i.e., a load on horizontal surfaces) of not less than 10 pounds per square foot. However, the code also requires that where snow loads occur, as in South Dakota, the snow load, as determined by building officials, shall be relied on in setting the minimum load-bearing capacity of roofs if the snow load is greater than the normal minimum load-bearing capacity set forth in the code. Uniform Building Code § 2305 (1967). The City of Brookings, acting through its building officials, requires that roofs be able to support a snow load of 30 pounds per square foot. Brookings also apparently requires buildings to withstand wind loads of 25 pounds per square foot.

The Uniform Building Code also provides that, in setting minimum load-bearing capacity, snow loads in excess of 20 pounds per square foot may be reduced for each degree of pitch in the roof over 20 degrees by $S/40$ minus $1/2$, where "S" is the total snow load in pounds per square foot. Uniform Building Code § 2306(d). Thus, while Winandy is correct in arguing that for steeply pitched roofs the required minimum snow load-bearing capacity can be reduced because snow tends to slide off the roof rather than build up, the reduction for the greenhouse roofs, which Winandy indicates are at a 26.5 degree pitch, would only be 1.625 pounds per square foot: $6.5 (30/40 - 1/2) = 1.625$.

As for Winandy's contention that the existing frames of the greenhouses are the predominant factor in determining the overall load-bearing capacity of the greenhouses, Winandy has failed to prove its allegation that given these frames, any glass or acrylic reskinning system which met the specifications in the original solicitation would also provide the minimum load-bearing capacity required. Nor has Winandy shown that the contracting officer acted arbitrarily or capriciously in determining that one of the component parts of the refurbished greenhouses, the glass or plastic panes as installed, must be able to withstand at least 30 pounds per square foot of snow load and 25 pounds per square foot of wind load. No matter how strong the frames may be, if the individual glass or plastic panes as installed will not bear such loads, the overall integrity of the skin cannot be guaranteed under such loads.

However, Winandy also alleges that, whatever the reasonableness of the contracting officer's determination of the minimum needs of the Government for load-bearing capacity, the Sun-Mate tempered safety glass system bid by Winandy exceeded the minimum set by the contracting officer and provides at least 40 pounds per square foot of load-bearing capacity. We recognize that, in the absence of prejudice, there is no compelling reason for cancellation of a solicitation because of inadequate specifications where the design offered by the low bidder satisfies the minimum needs of the Government and is otherwise acceptable. See Twehous Excavating Company, Inc., B-208189, January 17, 1983, 83-1 CPD 42; Oregon Typewriter and Recorder Company, B-200890, May 22, 1981, 81-1 CPD 405; Dominion Engineering Works, Ltd., et al., B-186543, October 8, 1976, 76-2 CPD 324. However, whether the low bid in fact satisfies the minimum needs of the Government must be determined from the face of the bid at the time of bid opening. See Norris Paint & Varnish Co., Inc., B-206079, May 5, 1982, 82-1 CPD 425.

The only indication in the bid of the load-bearing capacity of the Sun-Mate system bid by Winandy was in the descriptive literature included by Winandy with the bid. The literature indicated that its design members would be able to bear a live load of 15 pounds per square foot on horizontal surfaces and a wind load of 20 pounds per square foot on vertical surfaces. Winandy contends that these

figures were only for new greenhouses, and not for the reskinning of the existing greenhouses, and that the figures were not intended to indicate the maximum load which Sun-Mate could safely carry. Whatever the reason for these figures, Winandy's literature failed to show that the Sun-Mate system could withstand a live load of 30 pounds per square foot and a wind load of 25 pounds per square foot, the minimum requirements of the Government.

Winandy also alleges that the award to Lauer was improper because Lauer was nonresponsive, the award was made at a higher price to a supplier of a lesser quality system than that bid by Winandy, the specifications did not establish any requirement for minimum load-bearing capacity, and, in any case, the system bid by Winandy satisfied the needs of the Government. However, since Winandy has failed to show that the contracting officer acted arbitrarily or capriciously in canceling the original solicitation in order to change the requirements of the procurement to properly express the minimum needs of the Government, and since we therefore will not question the cancellation, we need not address these allegations. Proper cancellation of a solicitation renders academic a protest concerning award procedures involved under that solicitation. Oregon Typewriter and Recorder Company, supra; Murphy Machinery Company, B-192760, February 9, 1979, 79-1 CPD 90.

However, we note that the award to Lauer was improper notwithstanding the specification deficiency discovered by the Government. Lauer, the second low bidder, was awarded the contract because Agriculture found its bid most advantageous, price and other factors considered. It appears that the contracting officer considered the load-bearing capacity of the system and the availability of replacement glass in the event of breakage, neither of which was listed in the IFB, in making the award.

We have consistently interpreted the language "price and other factors," which appears in Federal Procurement Regulations (FPR) § 1-2.407-1(a) (1964 ed.) and 41 U.S.C. § 253(b) (1976), to require award on the basis of the most favorable cost to the Government. Thus, in the context of a

formally advertised procurement, "other factors" are objectively determinable elements of cost identified in the solicitation as factors to be evaluated in the selection of a contractor. Emerson Electric Company, Environmental Product Division, B-209272, November 4, 1982, 82-2 CPD 409.

The IFB listed both the acrylic and glass systems as suitable options and award should have been made, based on the format of the IFB, solely on price.

Winandy also protests Agriculture's issuance of a new solicitation during the pendency of its protest. However, while the FPR provide for restrictions on the award of a contract before a written protest against the procurement has been resolved, FPR § 1-2.407-8(b)(4) (1964 ed., amend. 68), the FPR does not prevent Agriculture from merely taking steps preliminary to an award, such as resolicitation.

The protest is denied.

for *Milton J. Aroskar*
Comptroller General
of the United States