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**DECISION**



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

28010

**FILE:** B-213892

**DATE:** April 17, 1984

**MATTER OF:** Essex Electro Engineers, Inc.

**DIGEST:**

Although a step-one technical proposal deviated from a solicitation requirement materially related to the agency needs, the deviation had only a de minimis effect upon the procurement where the offeror was able to bring its product into conformity by the simple substitution of a slightly more expensive component, and the substitution itself had only a trivial price impact upon the relative standing of the step-two bids.

Essex Electro Engineers, Inc. protests the award of a contract to Over-Lowe Company under invitation for bids (IFB) No. M00027-82-B-0043, the second step of a two-step formally advertised procurement issued by the Marine Corps for the acquisition of skid-mounted floodlight sets with telescoping towers. Bids under this IFB were to be based on the bidders' own technical proposals submitted in response to a request for technical proposals (RFTP) issued as step one of the two-step procurement. Essex challenges the award to Over-Lowe, the low bidder, on the grounds that the Marine Corps allegedly found Over-Lowe's proposal to be technically acceptable under step one where the agency had improperly relaxed a material requirement of the solicitation without informing the other offerors that its minimum needs had changed. In addition, Essex complains that Over-Lowe did not acknowledge receipt of certain amendments to the IFB; that the Marine Corps improperly conducted significant ex parte communications with Over-Lowe; and that the period for acceptance of Over-Lowe's best and final offer had expired prior to award. We deny the protest.

Step one was issued on September 7, 1982. The requirements for the floodlight sets at issue here were provided in the RFTP, in pertinent part, as follows:

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"3.3.3 Floodlights. The floodlight set shall have three 1000-W [watt] outdoor floodlights, each not to exceed 40 pounds. . . The floodlight, with lamp, shall have a lateral beam spread of not less than 146 degrees and a vertical beam spread of not less than 123 degrees.

3.3.3.1 Lamps. The three lamps shall be high-intensity discharge (HID) metal-halide, 1000-W lamps, Sylvania metal arc, Westinghouse metal halide, General Electric multi-vapor, or equal. The lamps shall have an initial minimum lumen output of 100,000 lumens, shall have a lamp life (rated average life) of 10,000 hours, shall operate down to -25°F, and shall be compatible with the floodlights."

Three of the five technical proposals received in response to the RFTP--those of Essex, Over-Lowe and BDS--were rated as either acceptable or reasonably susceptible of being made acceptable. Over-Lowe's technical proposal at paragraph 2.8.2.d stated, in pertinent part:

"Each fixture will have a horizontal and vertical beam spread of 125 degrees by 94 degrees with an initial beam efficiency of 70.1 percent, and accommodate 1000 watt metal halide lamps."

There is nothing in the record before us to indicate that the agency found Over-Lowe's proposal to be other than technically acceptable, despite the fact that its offered floodlights did not conform to the horizontal and vertical beam spread requirements.

On June 29, 1983, the IFB was issued to the three firms qualifying under step one and the following unit price bids were received:

Over-Lowe	\$3,382
Essex	\$4,764
BDS	\$13,411

Following bid opening on August 15, the Marine Corps awarded the contract to Over-Lowe as the low, responsive, responsible bidder on October 24.

Essex now principally protests that it was improper for the Marine Corps to make the award to Over-Lowe because the firm's failure to conform to the beam spread requirements was a material exception to the solicitation which could not be waived. Essex asserts that the agency could not relax those requirements for only Over-Lowe without also being obliged to notify the other offerors, and therefore asks this Office to recommend termination of the Over-Lowe contract and a new award to itself as the remaining low, responsive bidder.

Two-step formal advertising is a hybrid method of procurement, combining the benefits of competitive advertising with the flexibility of negotiation. The step-one procedure is similar to a negotiated procurement in that technical proposals are evaluated, discussions may be held, and revised proposals may be submitted. Step two is conducted in accordance with formal advertising procedures, each firm bidding on its own technical proposal. See Defense Acquisition Regulation (DAR) § 2-502 (1976 ed.). The step-one negotiation procedures do not require that technical proposals comply with every detail of the specifications, but proposals must satisfy the government's basic or essential requirements. 53 Comp. Gen. 47 (1973). If a technical proposal represents a basic change in the government's essential requirements, it can be accepted only if the agency informs the other offerors of the change and affords them an opportunity to submit revised proposals based upon the changed requirements. Baird Corporation, B-193261, June 19, 1979, 79-1 CPD 435. This reflects the fundamental federal procurement principle that all offerors must be treated fairly and equally so as to promote full and free competition. RCA Corporation; Norman R. Selinger & Associates, Inc., 57 Comp. Gen. 809 (1978), 78-2 CPD 213.

Here, Over-Lowe's technical proposal deviated from a stated requirement of the solicitation by offering horizontal and vertical beam spreads less than provided by the

specifications, and Essex has offered in evidence certain mathematical computations, unchallenged by either the agency or Over-Lowe, which we feel adequately demonstrate that a reduction in the angles by which light originates from a particular source, that is, the horizontal and vertical beam spreads, substantially reduces the total area illuminated by that source. According to Essex's calculations, a reduction in the beam spread from 146 degrees by 123 degrees as called for in the RFTP to 125 degrees by 94 degrees as offered by Over-Lowe reduces the illuminated area to 10 feet from the light source from 473 to 162 square feet, and at 40 feet from the light source from 7,570 square feet to 2,589 square feet, or more than a 66 percent reduction at both distances.

Nonetheless, Over-Lowe's deviation from the beam spread specifications had no real effect upon the procurement because the firm will bring its floodlights into conformity with the requirement by the simple substitution of phosphor-coated bulbs for the clear bulbs originally offered in its technical proposal. In this regard, Over-Lowe has furnished certain documentation from its supplier which shows that the coated bulbs have a beam spread of 157 degrees by 138 degrees and are rated at 110,000 lumens, thus meeting the combined floodlight/lamp specifications, although their use will apparently reduce the total efficiency of the floodlights by approximately 10 percent. The RFP neither specified a minimum acceptable efficiency level, nor required the use of either a clear or coated bulb. Essex is mistaken in urging that the specifications in paragraph 3.3.3.1 required clear lamps only. The word "clear" is not used, and we are informed by the National Electrical Manufacturers Association that the high-intensity discharge (HID) lamps required by the specifications may be coated or clear. Therefore, because a HID lamp does not necessarily have to be clear, we do not agree with Essex's contention that it is "conclusive" that the phosphor-coated lamp proposed by Over-Lowe is not equal in its performance characteristics or capabilities to the lamps described in the RFTP. In our view, offerors were free to choose the means by which they would meet the beam spread requirements of the specifications.

Over-Lowe also represents that the cost of each bulb will be \$3.58 (or \$10.74 for each floodlight set). However, even if we were to accept Essex's contrary assertion that substitution of coated bulbs will cost \$51.00

for each bulb as opposed to the \$3.58 per bulb cost represented by Over-Lowe (our own informal investigation suggests that Over-Lowe's assertion is the more accurate one), the unit price increase to Over-Lowe's bid is still only \$153.00, well below the \$1,382 unit price difference between the bids. Therefore, it is clear that the increase in Over-Lowe's cost occasioned by allowing the firm after bid opening to substitute coated bulbs has only a de minimis effect upon the bidding process. See Brutoco Engineering & Construction, Inc., 62 Comp. Gen. 111 (1983), 83-1 CPD 9; Roarda, Inc., B-192443, November 22, 1978, 78-2 CPD 359. Although Essex has contended that the agency's apparent relaxation of the beam spread requirements for only Over-Lowe without notice thereof to all other offerors enabled Over-Lowe to use off-the-shelf components instead of specially-manufactured ones, an assertion disputed by both the agency and Over-Lowe, Essex has not demonstrated that its own adherence to those requirements so over-qualified its technical proposal that Over-Lowe was therefore given a price advantage exceeding the difference between the bids. See Lusardi Construction Company, B-210276, September 2, 1983, 83-2 CPD 297.

Essex also alleges that Over-Lowe failed to acknowledge certain amendments to the IFB. We see no basis for the allegation where the agency's administrative report on the protest includes copies of Amendments 0001 and 0002 to the IFB, both of which are signed by Over-Lowe representatives, thereby acknowledging their receipt.

In addition, Essex asserts that the Marine Corps improperly conducted significant ex parte communications with Over-Lowe on August 1, 1983. As the agency states, however, no oral discussions concerning the step-one technical proposals were held. According to the agency, the only oral communications consisted of telephone calls on August 1 to each of the offerors informing them that Amendment 0002 would be issued shortly, and that the bid opening would be extended. We see nothing improper in this, and where Essex furnishes no other evidence besides its unsupported allegation, the firm has clearly failed to meet its burden of proving that there were additional ex parte communications between the Marine Corps and Over-Lowe, or that the August 1 telephone call to Over-Lowe was itself otherwise improper. See Willis Baldwin Music Center, B-211707, August 23, 1983, 83-2 CPD 240.

Finally, Essex has urged that Over-Lowe's best and final technical proposal expired prior to award. We see no merit to the argument. As the agency correctly responds, no award is made at the conclusion of step one; award is made based upon the bidder's step-two price which is bid on its own previously evaluated step-one technical proposal. DAR § 2-502, supra. As the agency states, Over-Lowe's step-two bid remained valid for 90 days after the August 15 bid opening; therefore, we agree that the October 24 award to Over-Lowe, made within the 90-day period, was a valid award. In any event, we point out that in certain circumstances the regulations do not require that an award be made within the bid acceptance period; an agency is permitted to request a bid extension from a bidder where administrative difficulties may delay an award beyond the acceptance period. DAR § 2-404.1(c) (DAC No. 76-17, September 1, 1978). See Barton Contracting Company, B-211355, April 15, 1983, 83-1 CPD 420.

The protest is denied.

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