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**DECISION**



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

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**FILE:** B-216709 **DATE:** May 13, 1985

**MATTER OF:** Flight Refueling, Inc.

**DIGEST:**

The use of specifications which do not adequately describe the government's actual needs provides a compelling reason to cancel an invitation after bid opening. GAO will not substitute its judgment about the adequacy of the specifications, and has no basis to object where the protester has not shown the agency's determination to be clearly unreasonable.

Flight Refueling, Inc. (FRI) protests the Naval Ocean Systems Center's cancellation of invitation for bids (IFB) No. N66001-84-B-0115, a total small business set-aside, for torpedo fueling/defueling stands and spare parts. We deny the protest.

FRI was the apparent low, responsive bidder under the solicitation when bids were opened in April of 1984. At the Navy's request, the Defense Contract Administration Services Management Area, Baltimore (DCASMA) conducted a preaward survey of FRI. DCASMA recommended that award be withheld, and the contracting officer found FRI to be nonresponsible, because of a lack of quality assurance capability and a lack of financial resources. The Navy referred the question of the protester's responsibility to the Small Business Administration (SBA), which declined to issue a Certificate of Competency (COC). SBA reconsidered this decision in August, when it received additional financial information from the agency. After reviewing the new information, SBA informed the agency that it was favorably considering the issuance of a COC, and asked that it be advised if the agency objected. DCASMA then conducted another preaward quality assurance survey and again recommended that no award be made to FRI.

At this point, the Navy reviewed the solicitation and decided that the IFB specifications needed to be revised.

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The contracting officer issued determinations and findings to support a decision to cancel the solicitation, and notified FRI of the cancellation.

The Navy enumerates three bases for its decision: the use of inadequate quality control requirements, the lack of a first article testing requirement, and various deficiencies in the specifications (including design revisions and parts changes).<sup>1/</sup> The protester contends that none of these reasons provides a sufficient basis for canceling the solicitation after bids had been opened.

The Federal Acquisition Regulation, § 14.404-1(a)(1), provides that after bids have been opened, award must be made to that responsible bidder who submitted the lowest, responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation. 48 C.F.R. § 14.404-1(a) (1984). Our Office has held that the use of specifications which do not adequately describe the government's actual needs generally provides a compelling reason for cancellation. See, e.g., Kings Point Mfg. Co., Inc., B-210757, Sept. 19, 1983, 83-2 CPD ¶ 342. We have also held that contracting officials have broad discretion to decide whether or not appropriate circumstances for cancellation exist, and our review is limited to considering the reasonableness of the exercise of that discretion. Professional Carpet Service, B-212442, et al., Oct. 24, 1983, 83-2 CPD ¶ 483. In order to prevail, the protester must demonstrate that the contracting officer abused this discretion. Id. We therefore will not question a cancellation where the record provides a rational basis that a compelling reason justifies cancellation. See Surgical Instrument Co. of America, B-211368, Nov. 18, 1983, 83-2 CPD ¶ 583.

The Navy's first reason for canceling the solicitation, that the quality control requirements must be upgraded to "MIL-Q-9858A", is based on the agency's determination that improperly manufactured stands (or stands constructed from improperly manufactured components)

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<sup>1/</sup> Although the contracting officer also cited an ambiguity in the option provisions of the solicitation as a basis for cancellation, the agency report to our Office does not rely on that factor.

represent a potential hazard to Navy personnel. The Navy points out that the solicitation is for an initial purchase of a newly designed test stand, and that the purpose of the stand is to transfer Otto Fuel II to the MK-46 torpedo safely and efficiently. This fuel is reported by the Navy Bureau of Medicine and Surgery to cause a range of adverse symptoms when inhaled or absorbed through the skin. The Navy therefore stresses the importance of preventing exposure of its personnel to the fuel or its vapors. Indeed, one stated purpose of the procurement is to minimize the possibility of spills, leaks or other inadvertent exposure to the fuel. The Navy contends that the known hazards associated with the use of this fuel warrant the most stringent quality control program.

In explaining the difference between the quality control program originally required in the IFB and the one required by MIL-Q-9858A, the Navy gives as an example the fact that the latter requires verification of the quality of each component used in building the torpedo fueling stands, whereas the former requires only that the quality of the completed unit be tested. The Navy contends that testing at the component level is essential because some defects in individual components would no longer be visible in the fully assembled stand. The Navy asserts that only the more stringent quality guidelines provide the level of quality assurance required to meet the agency's needs. The Navy notes in this regard that MIL-Q-9858A requires the contractor to have a complete quality control program, including a quality assurance staff, an initial planning document addressing quality control methodology, and quality cost data.

The Navy's assertions that Otto Fuel II presents serious health risks to personnel, and the importance of preventing any leaks or exposure to the fuel, are uncontested. However, FRI argues that no inspection system can guarantee the safety of Navy personnel, and that the original guidelines would be as effective as MIL-Q-9858A. The protester further contends that the only real effect of MIL-Q-9858A would be to increase documentation and record-keeping requirements. We do not find these arguments persuasive.

Although the protester objects to the Navy's determination to impose more stringent quality controls, it has not demonstrated that the Navy's judgment was clearly unreasonable or arbitrary in this regard. Rather, the protester has simply asserted that the original quality assurance program is adequate for the Navy's needs. Mere disagreement with the agency's determination of its actual needs is not sufficient to establish that the agency abused its discretion here. Moreover, we find no basis to question the agency's judgment that a more stringent quality control standard is necessary, since the equipment being procured represents a serious safety hazard if improperly manufactured.

FRI also argues that the cancellation was improper because all of the proposed changes could have been negotiated after award. However, the general rule in this regard is that the integrity of the competitive bidding system precludes an agency from awarding a contract competed under given specifications with the intention of changing to materially different specifications after award. See Kings Point Mfg. Co., Inc., B-210757, supra, 83-2 CPD ¶ 342 at 3. Both parties agree that the imposition of the more stringent quality controls would result in higher costs of production. The protester has even alleged that the use of MIL-Q-9858A will "drive up the cost to the Government" and will preclude small business concerns from bidding competitively.<sup>2/</sup> In this circumstance, we are persuaded that the proposed changes are substantial and will materially affect the manufacture and cost of the torpedo stands. Award to the protester under the original specifications, without material changes, therefore would have been improper.

Because the change in quality control requirements provides sufficient justification for canceling the solicitation, we need not consider whether the other bases advanced by the agency also justify the cancellation. However, we feel compelled to point out that the need for stringent quality control requirements should have been apparent prior to bid opening: the use of Otto Fuel II was envisioned from the start, and the dangers inherent in that use were well known. Therefore, we must agree with

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<sup>2/</sup> We note, however, that the revised solicitation is a total small business set-aside.

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the protester's complaint that the agency, by requiring the protester to undergo two preaward surveys and the COC process, has unnecessarily caused significant expense both to the government and to the bidder. We do not believe that the agency followed sound judgment in this respect, and its actions clearly did not enhance the integrity of the competitive bidding process.

In this connection, we note the similarity between this case and Intercomp Co., B-213059, May 22, 1984, 84-1 CPD ¶ 540, which also involved a Navy procurement. There, the agency canceled an IFB long after bid opening, also following a decision by the SBA to issue a COC to the protester in that case. After expressing our belief that the cognizant procurement officials had not followed sound judgment in failing to cancel the solicitation as early as possible upon discovering a specification deficiency, we advised the Secretary of the Navy of our view. Here, although the Navy acted to cancel promptly upon discovering the deficiency in the specifications, we find the long delay in recognizing the deficiency equally disturbing. These errors in judgment cause unnecessary expense to all parties involved, and engender unnecessary suspicions of unfair treatment. In view of this similar error some few months after the Intercomp decision was issued, we are again, by separate letter, advising the Secretary of the Navy of this situation.

*Harry R. Van Cleve*

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General Counsel