

Support
R-II

DECISION



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

FILE: B-219926.2

DATE: November 13, 1985

MATTER OF: Midwest Holding Corporation--
Reconsideration

DIGEST:

1. Agency has a compelling reason to terminate a protested contract and to cancel the underlying invitation for bids for refrigerated produce cases when specifications are inadequate in not stating that the shelves must be adjustable and removable and when it does not appear that an award to the protester under the original solicitation would meet its needs.
2. Protest against rejection of a bid as nonresponsive is academic where agency terminates a contract for the convenience of the government because the underlying invitation for bids contains inadequate specifications.

Midwest Holding Corporation requests reconsideration of our decision in Midwest Holding Corp., B-219926, Sept. 26, 1985, 85-2 CPD ¶ 344, in which we dismissed a protest against the rejection of Midwest's bid for produce cases to be used in a Navy commissary and against the award of a contract to Tyler Refrigeration Corporation. We found the protest academic because Tyler's contract was being terminated for the convenience of the government and the requirement recompeted.

Midwest alleges (1) that its bid was improperly found nonresponsive; (2) that after termination of the protested contract, the Navy should have made an award to it, rather than cancel the original solicitation; (3) that the specifications in the new solicitation are unduly restrictive, since Midwest cannot meet them except with a custom item; and (4) that our dismissal of its protest was premature.

We deny Midwest's new protest against the cancellation of the original invitation for bids (IFB) and affirm our dismissal.

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The Navy Resale and Services Support Office made the protested award under IFB No. N00250-85-B-0059. Line item No. 4 called for a 24-foot (end-to-end) lineup of refrigerated produce cases, to consist of three 8-foot cases with one pair of finished ends, for delivery to the commissary in El Centro, California.

By notice dated August 6, 1985, the Navy informed Midwest that its bid in response to this IFB had been rejected for failure to conform to solicitation requirements for a removable shelf with light and a full-length mirror. In its protest to our Office, as well as in its request for reconsideration, Midwest contends that descriptive literature, submitted with its bid, showed that the product it offered met both these requirements. Before we had considered whether the Navy had properly rejected the Midwest bid, however, the agency informed us that it was terminating the contract with Tyler because the specifications did not accurately describe its needs, in that they did not require slotted standards that would allow adjustments in shelf height. Therefore, the agency stated, it would resolicit with revised specifications. It did so by issuing IFB No. N00250-85-B-0109, with an opening date of October 31, 1985.

In its request for reconsideration, Midwest contends that not only the product that it offered but all commercial refrigeration units allow for adjustments in shelf height. It also argues that the Navy in effect excluded it from competition by modifying the second IFB, No. -0109, which originally called for a mirror of 23-30 inches in length, to specify a mirror of 26-30 inches. Midwest, which did not bid on the resolicitation, states that it can supply a 23-inch mirror, as originally required, but that it can supply the longer mirror only as a custom item at a higher price.

The Navy responds that an award to Midwest under the first IFB would not have met its needs, because only the upper shelf of the produce case offered by the firm tilts, and only the lower shelf can be adjusted to different heights. In addition, the Navy states, the descriptive literature covering the produce case offered by Midwest does not show that the upper shelf is removable. All of these features, the Navy states, are necessary to ensure that the needs of the government will be met.

The primary question for consideration here is whether the changes in specifications for the produce case are sufficient to justify cancellation after bid opening, as the Navy contends. Because of the potential adverse impact on the competitive bidding system of canceling an IFB after prices have been exposed, contracting officials must have a compelling reason to do so. Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.404-1 (1984). Contracting officials have broad discretion to decide whether or not compelling 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. It is incumbent upon the protester to establish that the contracting officer abused this discretion. A&C Building and Industrial Maintenance Corp., B-205259, Dec. 15, 1981, 81-2 CPD ¶ 478. Generally, the use of inadequate specifications provides a cogent and compelling reason for invitation cancellation. Pacific Scientific Co., Gardner-Neotec Division, B-208193, Jan. 18, 1983, 83-1 CPD ¶ 61. Specifications are inadequate when they do not state the government's actual needs. Custodial Guidance Systems, Inc., B-206988, July 6, 1982, 82-2 CPD ¶ 19.

The Navy states that in this case, its actual needs include removable, adjustable 13-15-inch shelves that tilt to two positions. In addition, slotted shelf standards must be installed vertically between the mirrors for adjustable shelf mounting. The original IFB did not contain this requirement. Based upon our review of the specific defects in the IFB pointed out by the agency, we find that the contracting officer reasonably concluded that the specifications failed to reflect the government's actual needs. Midwest argues that its produce cases are acceptable by commercial supermarkets and other military commissaries and therefore questions the Navy's determination that they will not satisfy the actual needs of the commissary in El Centro, California. The fact that Midwest's produce cases are used in other commissaries is not sufficient to show that the Navy requirement is unreasonable. We have recognized that agency technical judgments with respect to similar needs can reasonably differ. Sparklet Devices, Inc., 60 Comp. Gen. 504 (1981), 81-1 CPD ¶ 446; Security Assistance Foods & Equipment International, B-199757, November 19, 1980, 80-2 CPD ¶ 383. Therefore, contrary to Midwest's contention, it does not appear that an award to it under the original IFB would satisfy the government's actual needs.

As for mirror length, the Navy states that it did not issue any modifications to IFB No. -0109. Our review of that document indicates that a mirror length of 23-32 inches is specified, so that there is no basis for Midwest's protest of this requirement. In any event, the Navy advises us that it has just discovered that the second IFB is also inadequate because in it the agency inadvertently omitted the requirement for slotted shelf standards. As a result, the Navy states that it intends to cancel this IFB and again resolicit, furnishing Midwest with a copy of the new IFB. Although it is regrettable that the revised IFB is also inadequate, the fact remains that no award could have been made to Midwest under the original one.

Finally, we disagree with Midwest's contention that our dismissal of its protest as academic was improper. It is our policy not to consider academic protests. Since the Navy was in the process of terminating Tyler's contract for the convenience of the government because of inadequate specifications, the fact that we dismissed the protest based upon the Navy's statement that it intended to do so, rather than waiting until the termination had been accomplished, is irrelevant. In fact, the Navy has advised our Office that Tyler's contract was terminated effective September 11, 1985; as noted above, our dismissal is dated September 26, 1985. Midwest cites Patterson Pump Co., B-216133, et al., Mar. 22, 1985, 85-1 CPD ¶ 333, in which we held that a protest against the rejection of a bid was not academic even though the agency canceled the IFB and resolicited after deleting a descriptive data requirement. There, however, the deletion of the requirement did not result from any change in the government's substantive requirements. We indicated that the agency had no compelling reason for cancellation unless the rejection of the protester's bid was proper. While the situation here is not so much that the Navy's substantive needs have changed as that the Navy, at least once and apparently twice, failed to express those needs clearly, unambiguously, and in sufficient detail to ensure that they are met, we remain of the view that Midwest's protest against the rejection of its bid is academic. Our prior dismissal is affirmed.

We find no basis to object to the cancellation or recommend an award to Midwest under the original solicitation; therefore, Midwest's claim for attorney's fees is also denied.

for *Seymour S. Green*
Harry R. Van Cleve
General Counsel