



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Nebraska Aluminum Castings, Inc.

File: B-234144.2

Date: June 8, 1989

DIGEST

1. Agency properly used to negotiated procedures rather than sealed bidding procedures where the contracting officer determined that delivery considerations were more important than price and price related factors and the use of negotiated procedures would increase the probability of competition.

2. Agency is not obligated to provide precise dollar amount or percentage formula guidance in solicitation to permit an offeror to maximize its price for first article production and testing in order to obtain highest possible early progress payments without incurring the risk of having its offer rejected as unbalanced.

DECISION

Nebraska Aluminum Castings, Inc. (NAC), protests the specifications under request for proposals (RFP) No. DAAK01-89-R-0024, issued by the United States Army Troop Support Command (Army), for magnetic compasses. NAC complains that the RFP is restrictive, vague and written to favor the incumbent supplier.

We find the protest without merit.

The requirement is for a total production quantity of 192,000 compasses at a rate of 12,800 units per month, with multiple awards permitted. The RFP called for offerors to propose lot sizes in multiples of at least 3,200 per month over a period of 15 months, plus 10 units for first article testing. Commencement of delivery at monthly intervals within 180 days after the date of award was desired; however, the RFP indicated that delivery commencement dates which varied by 90 days or less would be considered equal, thereby permitting deliveries to commence within 270 days of

the date of award. The evaluation criteria provided that award would be made to the offeror (of at least one lot of 3,200 or more) whose delivery conforms or most nearly conforms to the 180 day commencement date. Between proposals approximately equal in terms of the commencement date, award would be made to the offeror with the lowest evaluated price. In addition, the RFP contained a warning that prices for first article production and testing should reflect only those reasonable costs essential to producing and testing the units, otherwise the offeror would run the risk of having its proposal being found unacceptable on the basis of unbalancing.

The requirement initially had been issued as a sealed-bid procurement, but the Army determined that meeting its delivery needs was more important than price. The Army was also attempting to establish a more flexible delivery format which would encourage alternate sources of supply besides the incumbent, Stocker & Yale, Inc., which has been essentially the only offeror capable of producing this item for the Army over the past 20 years. NAC asserts that the Army changed the procurement format from sealed bids to negotiated in order to favor the incumbent.

The enactment of the Competition in Contracting Act of 1984 (CICA) eliminated the statutory preference for sealed bids. CICA mandates the use of full and open competition, and to achieve it agencies are required to use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement. 10 U.S.C. § 2304(a)(1)(B) (Supp. IV 1986). Under CICA an agency is required to solicit sealed bids only if: (1) time permits (2) award will be based on price (3) discussions are not necessary, and (4) more than one bid is expected to be submitted. 10 U.S.C. § 2304(a)(2)(A). The determination that any or all of these conditions is or is not present in any given procurement essentially involves the exercise of a business judgment by the contracting officer. KIME Plus, Inc., B-230190.3, Nov. 1, 1988, 88-2 CPD ¶ 420. If the contracting officer determines that any one of these factors is not present, the agency may solicit competitive proposals pursuant to negotiation procedures. Milbar Corp., B-232158, Nov. 23, 1988, 88-2 CPD ¶ 509.

Here, the contracting officer determined that the delivery schedule was more important than price considerations because of a critical need for the compasses. The current contract's last delivery is January 1990. Because of the average monthly demand and the backorder for the compasses, the Army would have few compasses in stock by that time.

The contracting officer determined that the use of negotiation procedures would enable the Army to place greater emphasis on its delivery requirements, while also taking price into consideration to the extent feasible. In addition, the contracting officer believed that the flexibility provided by the negotiated procedures would permit increased competition and might enable the Army to establish a new source of supply. In our view, these considerations reasonably supported the business judgment to use negotiation rather than sealed bid procedures.

The crux of NAC's protest concerns the RFP warning, mentioned above, concerning first article pricing and unbalancing. NAC objects that this restriction, in conjunction with the RFP limitation that progress payments for the first article may not exceed the price prior to first article test approval, is vague and does not provide offerors with sufficient guidance as to how to price their first articles. NAC contends that a more precise limit--either a specific dollar amount or a percentage--should be provided.

Our Office has previously considered NAC's identical objections to the same clause in our decision, in Nebraska Aluminum Castings, Inc., B-223928, Oct. 17, 1986, 86-2 CPD ¶ 463. As we pointed out in that decision, the clause was in response to our Office's decisions in Riverport Industries, Inc., 64 Comp. Gen. 441 (1985), 85-1 CPD ¶ 364, aff'd upon reconsideration, B-218656.2, July 31, 1985, 85-2 CPD ¶ 108, and Edgewater Machine & Fabricators, Inc., B-219828, Dec. 5, 1985, 85-2 CPD ¶ 630, which held that a bid containing grossly inflated first article prices is materially unbalanced per se and must be rejected as nonresponsive. We had encouraged the Army, whose solicitations were involved in those decisions, to take steps to discourage this type of bidding. We held that the clause in question appropriately cautions bidders that their first article prices must be based upon legitimate first article production and testing costs, and cannot be inflated beyond the reasonable value of the first articles so that the bid thereby becomes unbalanced. Nebraska Aluminum Castings, Inc., B-223928, supra.

NAC is again arguing that the clause is inappropriate because it does not provide offerors with a precise mathematical formula to guide them in preparing a balanced offer. However, as we previously pointed out in the NAC decision, it is neither the percentage differential between the total first article price and the total bid price, nor the degree by which the first article unit price exceeds the production item unit price that controls in such matters.

Rather, a bid is unbalanced where, given the nature of the items being acquired, the prices charged for the first articles bear no reasonable relation to the production and testing costs actually associated with those units.

Nebraska Aluminum Castings, Inc., B-222476, June 24, 1986, 86-1 CPD ¶ 582, aff'd upon reconsideration, B-222476.2, Sept. 23, 1986, 86-2 CPD ¶ 335. Accordingly, we find that it was proper for the agency to caution offerors to base their first article price on actual first article costs, rather than impose the arbitrary dollar limit or mathematical formula which NAC would prefer. Nebraska Aluminum Castings, Inc., B-223928, supra.

NAC argues that subsequent to the above-referenced decisions there has been a proposed Federal Acquisition Regulation (FAR) change to revise FAR § 32.501-5 to permit a contracting officer to limit progress payments on first articles by a stated dollar amount or percentage. FAR Case 88-15, 53 Fed. Reg. 8,734 (1988). However, this change has not been adopted and, in any event, it would merely permit a contracting officer to include such a clause in a solicitation, not require the inclusion of such a formula in any solicitation. Accordingly, we do not find that the proposed change affects our rationale.

In fact, NAC appears to be objecting primarily that the lack of a precise dollar amount or percentage as a safe harbor for first article pricing places an offeror at risk in attempting to maximize its possible progress payments during the first article test period, for production line capitalization purposes, without running the risk of having its offer rejected as unbalanced. However, the purpose of the first article price is not to permit an offeror to capitalize its production costs through excessive early progress payments, as NAC continues to assume; rather the first article price must be reasonably related to the legitimate costs of producing and testing the first article only. While the costs of any special process involved in producing the first articles, and the costs of testing them, properly may be included in first article pricing, the costs of acquiring tooling and equipment should be amortized over the entire contract quantity where those costs are related to the offeror's performance of the entire contract--that is, to the furnishing of the production items as well as the first articles. Claim of Nebraska Aluminum Castings, Inc.--Second Request for Reconsideration, B-222476.9, Mar. 16, 1988, 88-1 CPD ¶ 269.

NAC also asserts that the incumbent's current contracts should be terminated and that it should not be considered

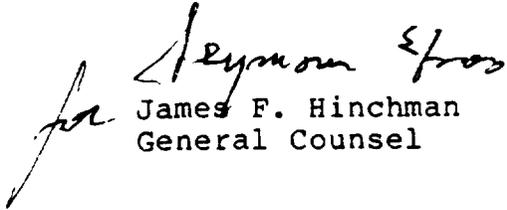
for this award because of its poor performance and substitution of noncompliant materials. The determination of whether the incumbent is complying with its contract obligations is a matter of contract administration which is the responsibility of the procuring activity, which is in the best position to assess this performance. Here, the Army has determined that the incumbent's performance is satisfactory and our Office has no basis to take exception to this determination. To the extent that NAC is asserting that the incumbent does not intend to perform in compliance with the current specifications, we note that the incumbent does not appear to be in line for award under this solicitation. Further, this allegation concerns a matter of contract administration which is not for consideration under our Bid Protest Regulations. 4 C.F.R. § 21.3(m)(1) (1988); Fryer Engineering, B-233835, Mar. 17, 1989, 89-1 CPD ¶ 284.

NAC also objects that the relatively short, 180 day, delivery commencement schedule is the result of poor planning on the part of the agency. This allegation is not supported by the record which shows that the Army commenced efforts to satisfy the requirement early in 1988, and that the requirement was originally synopsized in the Commerce Business Daily in June 1988, with deliveries estimated to commence approximately 585 days after contract award. The procurement was delayed as the result of a protest filed with the agency by the incumbent, and because of the Army's effort to proceed in a manner which would both insure a continued supply of compasses and encourage the development of additional sources. The current delivery commencement requirement is a result of this delay. Thus, the Army did engage in advance planning as required by CICA, and the shortened delivery commencement schedule was neither deliberately imposed, nor did it result from the Army's inaction. See Honeycomb Co. of America, B-225685, June 8, 1987, 87-1 CPD ¶ 579. Here, the Army reasonably required the 180-day delivery commencement period under the present RFP in order to meet its actual requirements after unsuccessfully attempting to acquire the compasses under a solicitation which would have permitted a substantially longer time period.

As for the alleged advantage provided to the incumbent, this is simply due to the fact that the incumbent will probably be granted first article test waiver because of its past performance, which is no more than a natural and legally unobjectionable advantage of incumbency. Nebraska Aluminum Castings, Inc., B-223928, supra. In this regard, it is well settled that an incumbent's competitive advantage provides no legal basis for protest unless it can be shown that the

advantage arose because of a preference or other unfair action by the contracting agency. Id.

The protest is denied.

for
James F. Hinchman
General Counsel