

McHoliffe



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Chu Associates, Inc.

File: B-234837

Date: July 14, 1989

DIGEST

Contracting agency has responsibility for determining whether technical data item is required by the solicitation and may waive requirement where identical data has been previously furnished by offeror and accepted by the agency. Contracting agency determination to grant a waiver of technical data requirement for awardee under the terms of the solicitation did not prejudice the protester where awardee's offer was low with or without the waiver of the requirement.

DECISION

Chu Associates, Inc., protests the award of a contract by the Navy to Canadian Commercial Corporation on behalf of Valcom, Ltd., under request for proposals (RFP) No. N00104-88-R-WK41, for whip antennas. Chu alleges that the contracting officer improperly waived a solicitation requirement for Valcom for certain engineering drawings which had been previously furnished to the Navy by Valcom under a prior contract.

We deny the protest.

The solicitation requested proposals to supply 354 whip antennas and related data items on a fixed-price basis, and generally provided for award to the responsible offeror whose conforming proposal would be most advantageous to the government, considering cost or price and other factors specified in the solicitation. Section M-6 of the RFP, concerning the pricing of data, provided that the government could waive requirements for submission of data items for offerors who had previously furnished such data. Certain "Level 3 (Production)" engineering drawings were included in the data items listed in section M-6 of the RFP and thus were subject to the discretionary waiver authority

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of the contracting officer, if an offeror previously furnished such drawings.

Four offerors submitted proposals by the August 23, 1988, closing date. Valcom's offer of \$803,672, based on a waiver of first article testing and previously furnished production drawings, was low. Since the agency decided not to give the apparent second low offeror further consideration, after it failed to meet the solicitation's first article test requirement, Chu became the next low offeror at \$1,164,040.01. Award was made to Canadian Commercial Corporation on behalf of Valcom on December 15, 1988.

By letter of December 30, Chu filed a protest with the Navy against the proposed award to Valcom. In its agency-level protest, Chu challenged the award because the proposed award price to Valcom did not include a price for the required production drawings and thus indicated that the agency had improperly waived the requirement for production drawings. The Navy denied Chu's protest on March 3, 1989, stating that the terms of the RFP clearly permitted a waiver for Valcom of these previously furnished drawings. In denying Chu's protest, the contracting officer also stated that, even without the waiver, Chu's offer was not low. Chu subsequently filed its protest with our Office on March 17.

Chu essentially challenges the propriety of the agency's waiver of the production drawings requirement for Valcom.^{1/} Chu specifically argues that the waiver was improper because the production drawings previously furnished contained restrictive legends and thus did not qualify for waiver.

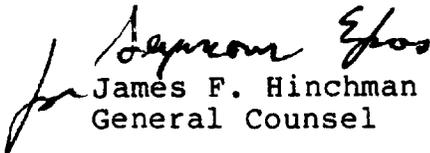
To the extent that Chu is protesting the actual determination by the contracting officer to waive the requirements for Valcom in this procurement, we consider the waiver decision to be a matter of administrative discretion, which we will not disturb unless it is shown to lack a

^{1/} The protester also argues that the RFP failed to adequately notify offerors that award essentially would be based on price. We note, however, that our Office has consistently held that where, as here, a solicitation provides that "price and other factors" will be the basis for award and "other factors" are not set forth in the solicitation, such a provision clearly provides for award to the low, technically acceptable offeror. See Essex Electro Engineers, B-229491, Feb. 29, 1988, 88-1 CPD ¶ 212.

reasonable basis. See Wilson & Hayes, Inc., B-196089, Mar. 17, 1980, 80-1 CPD ¶ 204.

The Navy states that, under the terms of the present solicitation, Valcom qualified for a waiver of the production drawings requirement since Valcom established in its offer that it had previously furnished the equipment and drawings to the Navy.^{2/} Further, the RFP permitted waiver by the agency where production drawings had been previously furnished, whether or not the drawings were submitted on a proprietary basis. The Navy explains that the intent of this waiver provision is to prevent the government from paying for the same drawings twice. Moreover, the record shows that the protester has not been prejudiced in any way by the contracting officer's determination to grant a waiver of the production drawings requirement for the awardee here since Valcom's offer was low with or without the waiver. See, e.g., Power-Trol, Inc.--Reconsideration, B-227954.2, Oct. 30, 1987, 87-2 CPD ¶ 419. We find no reason to question the reasonableness of the contracting officer's exercise of discretion here.

The protest is denied.


James F. Hinchman
General Counsel

^{2/} Chu also asserts that the procurement was flawed because all offerors should have had access to the Valcom drawings which were listed in the RFP. Chu in its agency-level protest alleged that under a prior contract with Valcom in 1986, the Navy purchased these drawings for use in future competitive procurements. The record shows, however, that these drawings were furnished with restrictive legends to a different buying activity. The item has not been solicited since that time and the contracting officer here was unaware of the existence of the prior drawings or that the restrictive legends were not valid. Based on Chu's protest, the contracting officer has initiated a formal challenge to the restrictive legends on the drawings, and, if successful, will make them available for future competitive acquisitions.