



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Harsco Corporation

File: B-236777

Date: December 13, 1989

DIGEST

1. Protest requesting cancellation of an invitation for bids (IFB) after bid opening because of omission of the Certificate of Procurement Integrity clause is denied where no bidders would be prejudiced by an award under the deficient solicitation; the bidder supplied the Certificate before award; the agency's actual needs will be served by award under the IFB; and the statutory requirement for the Certificate has been suspended for 1 year as of December 1, 1989.

2. Protest challenging the use of a military specification in an invitation for bids is untimely when filed after bid opening.

DECISION

Harsco Corporation protests the award of a contract to Comdyne I, Inc., under invitation for bids (IFB) No. N00104-89-B-0037, issued by the Navy Ships Parts Control Center for inflating cylinders for lifeboats. Harsco asserts that the Navy should have canceled the IFB after bid opening and resolicited the requirement because the IFB did not include a required Certificate of Procurement Integrity clause. Harsco also challenges the military specification (MIL-SPEC) for the cylinder as seriously flawed.

We deny the protest.

The IFB was issued on June 7, 1989, for 7,211 inflating cylinders, with bid opening scheduled for July 19. The solicitation did not contain the Certificate of Procurement Integrity clause, Federal Acquisition Regulation (FAR) § 52.203-8. This clause implements section 27(d)(1) of the Office of Federal Procurement Policy Act Amendments of 1988 (OFPP Act), Pub. L. No. 100-679, 101 Stat. 4055, 4064 (1988), which essentially provides that on or after

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July 16, 1989, an agency shall not award a contract for over \$100,000 unless a bidder or offeror certifies in writing that neither it nor its employees has any information concerning violations or possible violations of the OFPP Act pertaining to the procurement. The activities prohibited by the Act involve soliciting or discussing post-government employment, offering or accepting a gratuity, and soliciting or disclosing proprietary or source selection information. The Certificate of Procurement Integrity itself requires the officer or employee responsible for the bid to sign and date the Certificate and to list all violations or possible violations of the OFPP Act, or enter the word "none" if none exists. FAR § 52.203-8(c)(1) further states that a signed certification shall be executed and submitted with bid submissions exceeding \$100,000.

Effective December 1, 1989, however, section 27 of the OFPP Act was suspended by section 507 of the Ethics Reform Act of 1989, Pub. L. No. 101-194, ___ Stat. ___ (1989), which provides that section 27 "shall have no force or effect during the period beginning on the day after the date of enactment of this Act and ending one year after such day." Accordingly, agencies are not required to include the Certificate of Procurement Integrity clause in solicitations issued on or after December 1, 1989, through November 30, 1990.

The Navy received five bids at bid opening on July 19. No bidders submitted signed and completed Procurement Integrity Certificates since the required clause was not included in the IFB, which was issued before the effective date of the clause and was not amended subsequently. Comdyne was the apparent low bidder. The Navy requested and Comdyne submitted a signed and completed Certificate of Procurement Integrity on August 3; subsequently award was made to Comdyne on August 21. Harsco, the fourth low bidder, protested the award to Comdyne to our Office on August 31, arguing that the RFP should be canceled and resolicited.^{1/} The Navy suspended performance of the contract since notice of Harsco's protest was received within 10 days of contract award, but authorized continuation of performance notwithstanding the protest on September 19.

With respect to Harsco's contention that the RFP should be canceled due to omission of the Procurement Integrity

^{1/} Corbin Superior Composites, Inc., the second low bidder, also protested the award on different grounds on September 1. We will resolve that protest in a separate decision.

Certificate, because of the potential adverse impact on the competitive bidding system of cancellation of an IFB after bid prices have been exposed, an agency must have a compelling reason to cancel an IFB after bid opening. FAR § 14.404-1(a)(1). Once bids have been opened and prices exposed, the fact that a mandatory provision of an IFB is defective, or omitted, does not, per se, require cancellation of the IFB. Bonded Maintenance Co., Inc., B-235207, July 14, 1989, 89-2 CPD ¶ 51; Linda Vista Industries, Inc., B-214447; B-214447.2, Oct. 2, 1984, 84-2 CPD ¶ 380. Indeed, we generally regard cancellation as inappropriate when other bidders would not be prejudiced by an award under the deficient solicitation and when such an award would serve the actual needs of the government. Dyneteria, Inc.; Tecom, Inc., B-210684; B-210684.2, Dec. 21, 1983, 84-1 CPD ¶ 10.

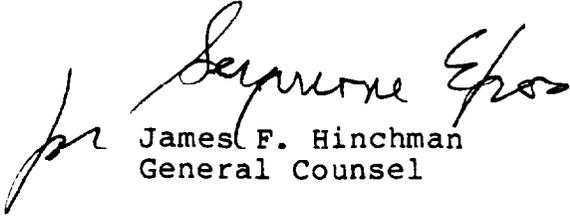
Here, while the Certificate of Procurement Integrity clause should have been included by amendment in the IFB since bid opening did not occur until July 19, 3 days after the July 16 effective date of the requirement for the Certificate, we conclude that bidders were not prejudiced by the Navy's error. Because no bidder submitted a Certificate, none had an advantage over another during the bid evaluation process. Moreover, no bidder questioned the omission of the clause, or protested the omission to the Navy or to our Office before bid opening, and there is no evidence in the record that the actual needs of the Navy were not served by award to Comdyne.

Accordingly, we find that the omission of the Procurement Integrity Certificate clause from the IFB here does not constitute a compelling reason justifying cancellation of the IFB since award under the solicitation would meet the needs of the Navy without prejudice to any bidder, Comdyne supplied the completed and signed Certificate when so requested by the Navy before award, and the statutory requirement for a Certificate has been suspended, so that if the IFB were canceled and resolicited, no Certificate of Procurement Integrity clause would be included in the new IFB.

With respect to Harsco's second allegation concerning the deficiency of the MIL-SPEC for the cylinders, a protest concerning an alleged impropriety apparent from the face of the solicitation is required to be filed before bid opening. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1989). The fact that the Navy may have advised Harsco that it could submit an alternate bid that did not conform to the MIL-SPEC as a product improvement does not negate the necessity that bids meet the MIL-SPEC requirements of the IFB; Harsco even notes that the Navy clearly stated as much when Harsco

raised the issue of submission of an alternate bid. Since Harsco filed its protest against the inclusion of the MIL-SPEC after award was made, it is untimely.

The protest is denied.

for
James F. Hinchman
General Counsel