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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Joannell Laboratories, Inc.--
Reconsideration

File: B-242415.4

Date: July 2, 1991

Paul Shnitzer, Esq., Crowell & Moring, for the protester.
Linda C. Glass, Esq., Andrew T. Pogany, Esq., and Michael R.
Golden, Esq., Office of the General Counsel, GAO, participated
in the preparation of the decision.

DIGEST

On reconsideration, General Accounting Office has no basis to change corrective action recommendation that the agency reopen the competition, amend the solicitation to state its requirement clearly, and request new best and final offers, where protester was not entitled to the award because the agency did not find protester's product acceptable in all material respects.

DECISION

Joannell Laboratories, Inc. requests reconsideration of the recommendation for corrective action contained in our decision, Joannell Laboratories, Inc.; Nu-Way Mfg. Co., Inc., B-242415; B-242415.3, May 1, 1991, 91-1 CPD ¶ _____, sustaining Joannell's protest of the award of a contract to EC Corporation under Request for proposals (RFP) No. N61339-90-R-0011, issued by the Department of Navy for Main Tank Gun/Weapons Effect Signature Simulator (MTG/WESS) Systems, which encompassed both a firing device and pyrotechnic requirements.

We affirm our decision.

The RFP required offerors to provide test data to demonstrate that their proposed devices met the functional and physical requirements of the specifications. The RFP provided for award on the basis of technical acceptability/lowest evaluated price. Our Office sustained Joannell's protest because we found that the Navy improperly awarded the contract to EC whose proposed product was noncompliant with certain material RFP pyrotechnic requirements. Joannell in its initial protest argued that EC's proposal did not conform with the RFP pyrotechnic requirements concerning electro-static discharge

and electromagnetic interference, hermetic seal and other specifications, and presented detailed engineering analysis to support its position.

The agency's sole response to Joanell's arguments was that amendment No. 12, which added ammunition lot testing requirements during the pre-production phase of the contract, delayed until contract performance the testing and determination of pyrotechnic acceptability. However, our review of the record showed that amendment No. 12 delayed test data requirements in only six areas: (1) flash; (2) thermal imaging optics detection; (3) smoke characteristics; (4) sound characteristics; (5) fragmentation; and (6) vibration. These were only a small portion of the numerous test results initially required by the RFP to be submitted with each offeror's proposal. The tests in amendment No. 12 did not address the areas in EC's product that were alleged to be noncompliant by the protester, and the record showed that EC did not furnish test data in these areas. Since the record further showed that test data requirements were waived for EC in certain areas and not for the other offerors, we recommended that the Navy reopen the competition, amend the RFP to state its requirement clearly, and request new best and final offers (BAFOs).

In its request for reconsideration, Joanell argues that the solicitation was not deficient in any way and, therefore, that the recommendation in the protest decision calling for the amendment of the RFP to state the government's requirement clearly and to request new BAFOs was inappropriate. Joanell maintains that its proposal was "fully compliant" with the specifications and it should receive the award as the low-cost, technically acceptable offeror.

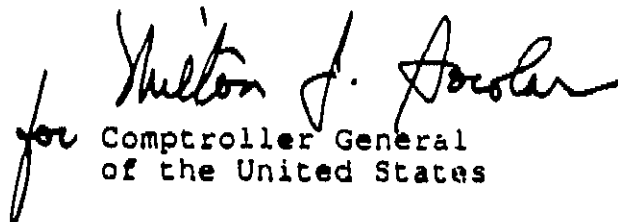
Joanell's argument provides no basis for modification of our recommendation. The Competition in Contracting Act of 1984 (CICA) provides that where our Office determines that a contract award does not comply with statute or regulation, we may recommend that the agency implement certain specified remedies, or "implement such other recommendations as the Comptroller General determines to be necessary in order to promote compliance with procurement statutes and regulations." 31 U.S.C. § 3554(b)(1)(G) (1988). This mandate is reflected in our Bid Protest Regulations, which provide that if we determine that an award is improper, we may recommend that the contracting agency implement remedies we deem appropriate under the circumstances. See 4 C.F.R. § 21.6(a) (1991).

We did not recommend award to Joanell because the record showed, contrary to Joanell's contentions, that Joanell did not furnish required test data in certain areas not covered by amendment No. 12 tests and which were required for technical

acceptability. For example, Joannell failed to provide sufficient test data for its powder composition, vacuum-thermal stability testing, storage-life testing, and several others. None of these testing requirements appeared to be covered by amendment No. 12. Contrary to the protester's arguments, several evaluation documents and narratives in the record showed that none of the offerors, including Joannell, complied with material testing requirements. The record also showed that the level of submission of test data varied with each offeror for every requirement, and we had no basis to determine the cost impact for offerors which provided some, although not sufficient, test data as opposed to an offeror who provided none. The entire competition was therefore flawed because firms were not evaluated on a common basis.

In view of the agency's determination to consider proposals that did not provide test results as required by the original RFP, coupled with the fact that the record showed that certain test requirements were waived differently for each offeror, we again conclude that the only way to ensure that all offerors are competing on a common basis is for the agency to reopen the competition, amend the RFP to state its requirement clearly and request new BAFOs.^{1/}

The decision is affirmed.


for Comptroller General
of the United States

^{1/} In response to our recommendation, the Navy has apparently amended the RFP and eliminated the test data requirements. Contrary to the protester's assertion, this shows that requirements of the initial RFP overstated the Navy's minimum needs.