



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

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Decision

Matter of: Xactex Corporation

File: B-247139

Date: May 5, 1992

Richard L. Hames, Esq., Davis, Wright, Tremaine, for the protester.

Laurie Stiteler, Esq., Department of the Air Force, for the agency.

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DIGEST

Cancellation of solicitation after extensive discussions was proper, and not indicative of bad faith, where discussions led agency to believe it could not obtain a reasonable price; only one firm had been able to submit a technically acceptable proposal; and the agency determined after reexamining specifications that testing requirements had restricted competition and added significant additional cost to the government and that resolicitation without testing would enhance competition and reduce cost.

DECISION

Xactex Corporation protests the cancellation of request for proposals (REP) No. FA1608-90-R0043, issued by the Department of the Air Force for portable ultrasonic inspection units for the San Antonio Air Logistics Center (SAALC) at Kelly Air Force Base, Texas.

We deny the protest.

The solicitation, issued on October 31, 1989, as a total small business set-aside, contemplated award of a firm, fixed-price requirements contract for portable ultrasonic inspection units, NSN 6635-00-242-1501, P/N PD SANE 242E, plus data.¹ A purchase description was included, which contained the technical and performance requirements for the

¹The units are used to detect flaws nondestructively in aircraft structures and components by means of ultrasonic pulse-echo and thru-transmission examinations.

units. Although 33 small business sources were solicited, no responsive proposals were received by the original closing date. Therefore, contracting officials withdrew the set-aside and solicited 25 potential sources on an unrestricted basis. Four proposals, including Xactex's, were received by the September 24, 1990, revised closing date. Only Xactex's proposal was found to conform to the technical requirements; the other three offerors requested specification deviations, but they were denied in October 1990.

Xactex submitted a revised proposal on February 22, 1991. From that date through November 13, contracting officials evaluated Xactex's proposal, primarily focusing on the offered price. The agency had Xactex's cost proposal audited by the Defense Contract Audit Agency (DCAA), Western Region, Seattle, Washington, and evaluated by Defense Contract Management Area Operations (DCMAO), Seattle. Both agencies reported in August that they were unable to determine how Xactex had estimated certain costs (primarily materials cost), and thus could not determine the reasonableness of significant costs that appeared to be excessive. The Air Force continued the price evaluation and negotiation process into November, but still could not find the price acceptable.

At this juncture, due to the lack of competition for the requirement as written, the requests for deviations by the other offerors, and Xactex's inability to produce data deemed sufficient to establish price reasonableness, contracting officials reviewed the specifications. On December 11, the agency essentially redetermined its minimum needs. Although it previously had determined otherwise, the agency concluded that an acceptable item² could be procured without the reliability and maintainability testing requirements, which had precluded acceptable offers of commercial items on the market and were relatively costly. The Air Force therefore canceled the RFP on December 16 with the intent of resoliciting after eliminating these testing requirements, and with the hope of enhancing competition and reducing the cost to the government.

Xactex maintains that the agency abused its discretion in canceling the RFP, since there is no evidence of any proposed substantive changes to the requirement. Xactex does not consider the testing changes to be significant since, it asserts, the agency has not established that their deletion

²The item still would have to be modified to meet the purchase description, but the agency determined that the revisions necessary without the testing would be less extensive than under the current purchase description.

will increase competition and, in any case, the agency carefully considered the question of testing and reliability when it decided to impose those requirements at the outset of the procurement. Xactex also disputes the Air Force's findings as to its proposal's price reasonableness, noting that it has submitted all requested pricing information and responded to all of the concerns raised by the audits. The protester concludes that the agency has not fulfilled its obligation to consider the Xactex proposal in good faith, and requests either that the solicitation cancellation be rescinded and the evaluation be reopened, or that it be reimbursed its proposal preparation costs.

Under FAR § 15.608(b)(4), a procuring agency may reject all proposals (even if technically acceptable) received in response to a solicitation if cancellation is clearly in the government's interest. Custom Training Aids, Inc., IB-241446.2, Feb. 12, 1991, 91-1 CPD ¶ 151; Independent Business Servs. Inc.--Recon., IB-235569.4, Feb. 23, 1990, 90-1 CPD ¶ 207. In a negotiated procurement, the contracting officer has broad discretion in deciding whether to cancel a solicitation and to do so the contracting officer need only have a reasonable basis as opposed to the cogent and compelling reason required for cancellation of a solicitation where sealed bids have been opened. Lucas Place Ltd., IB-235423, Aug. 30, 1989, 89-2 CPD ¶ 193. A reasonable basis to cancel exists when a new solicitation presents the potential for increased competition or cost savings. Id.; Bell Indus., Inc., IB-233029, Jan. 25, 1989, 89-1 CPD ¶ 81. Therefore, an agency may cancel a solicitation if it materially overstates the agency's requirements and the agency desires to obtain enhanced competition by relaxing the requirements. HBD Indus., Inc., IB-242010.2, Apr. 23, 1991, 91-1 CPD ¶ 400.

We find that the agency's decision to cancel the RFP and resolicit based upon relaxed specifications was reasonable. It is clear that the competition received was very limited; no technically acceptable offers were received from the 33 firms solicited under the initial small business set-aside, and Xactex's was the only acceptable proposal of the four received under the subsequent unrestricted procurement. While Xactex correctly points out that the Air Force has not explained in detail how the testing requirements operated to exclude potential offers, the agency has furnished an August 1, 1990, memorandum from the Chief of the Instrument Branch, Directorate of Contracting and Manufacturing, SAALC, stating that, under the prior award for inspection units (contract No. FA1608-87-C-1570), the reliability and maintainability testing requirements were deleted after award. The memorandum goes on to state that the prior procurement originally was conducted on a small business set-aside basis, but that "35 small businesses could not

respond with a bid because the testing was too difficult." The Air Force's determination that available, potentially acceptable (with some modification) commercial items had been excluded by the testing requirements logically was based on this experience. Although this does not establish with certainty that competition will be increased, such certainty is not required; based on prior experience, eliminating portions of the testing presents the potential that competition will be increased, and therefore supports the cancellation. Research Analysis and Maintenance, Inc., B-236575, Dec. 12, 1989, 89-2 CPD ¶ 543; Lucas Place, Ltd., supra.

Moreover, Xactex's assertion to the contrary notwithstanding, the record does establish that reliability and maintainability testing would involve considerable time and expense to the government. Based on the audit and technical analysis of Xactex's own proposal, the Air Force estimated that, even without considering the possible savings from increased competition, it could save as much as 14 percent of the total cost by deleting the testing. This also constitutes a proper basis for canceling the RFP. Id.; Bell Indus., Inc., supra.³

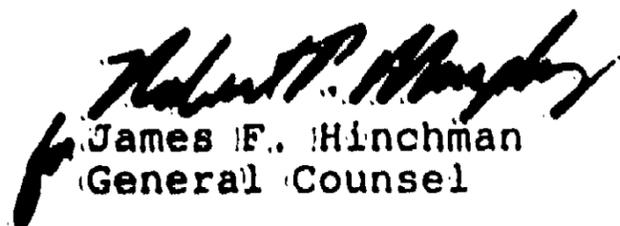
There also is no basis for objecting to the agency's finding that Xactex had not adequately demonstrated that its price was reasonable. The DCMAO report assessed each cost element, indicated the "should" cost, and explained that it was unable to justify certain of Xactex's higher estimated costs based on the information furnished. Xactex maintains that it has submitted adequate supporting data, but has furnished no specific evidence that would warrant questioning the DCMAO conclusions. In any case, given our conclusions above, whether or not the price evaluation was done properly, the cancellation was justified based on potential enhanced competition and reduced cost to the government.

³The protester cites our decision Pro-Fab, Inc., B-243607, Aug. 5, 1991, 91-2 CPD ¶ 128, in support of its position. We sustained that protest on the ground that, while the agency cited relaxed material requirements as the basis for canceling, the record showed that no material requirements had been relaxed, and there was no reason to believe that competition had been restricted. Here, we conclude that the testing requirements are costly and, based on prior agency experience, there is reason to believe that the requirements reduced competition.

The record contains no evidence of bad faith by the Air Force in its continuing negotiations with Xactex. The Air Force concedes that the procurement has been delayed due to technical data problems, evaluation of offers requesting deviations from the requirements, funding availability problems, and the lengthy communications concerning Xactex's pricing. The agency maintains that at all times it intended to award a contract based on the negotiations with Xactex, and there is no evidence in the record to the contrary; the decision to resolicit was made only after a minimum needs review prompted by the agency's determination that price reasonableness had not been, and possibly could not be, established to the agency's satisfaction. The fact that the agency changed its views of its actual minimum needs late in the procurement does not by itself evidence bad faith. An agency properly may decide to cancel a procurement even after extensive discussions have been held, where those discussions indicate to the agency that an acceptable proposal cannot be obtained. See Health Servs. Mktg. and Dev. Corp., B-241830, Mar. 5, 1991, 91-1 CPD ¶ 247; see also CV Assocs.--Recon., B-243460.2, Aug. 20, 1991, 91-2 CPD ¶ 171 (irrespective of when needed changes could or should have been known, the facts that justify canceling a solicitation can be considered no matter when they surface).

Xactex contends that eliminating the testing requirements will result in critical safety risks. The Air Force responds that first article testing will serve to ensure a quality item and that most of the commercial units available have been tested for years by various parties. This is not for our Office to decide. The determination of the government's needs and the best way of accommodating them are matters primarily within the contracting agency's discretion. Research Analysis and Maintenance, Inc., *supra*.

The protest is denied.


James F. Hinchman
General Counsel