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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Pavel Enterprises, Inc.

File: B-249332

Date: November 9, 1992

Douglas L. Patin, Esq., Kilcullen, Wilson and Kilcullen, for the protester.
Michael Colvin, Department of Health and Human Services, for the agency.
John Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Compelling reason exists for canceling invitation for bids (IFB) for office space renovation after bid opening in order to delete requirement in specifications for foreign-made floor covering which the Buy American Act prohibits the use of in the construction contract to be awarded under the IFB and in order to delete unnecessary environmental control and monitoring equipment and modular furniture.

DECISION

Pavel Enterprises, Inc. protests the cancellation of invitation for bids (IFB) No. 263-92-B(CC)-0439, issued by the Department of Health and Human Services (HHS) for renovation of office space at the agency's Twinbrook II Building in Rockville, Maryland.

We deny the protest.

The IFB stated that the contractor was to provide labor, materials, supervision and equipment required to renovate the space. To bid on the project, offerors were not required to separately specify the materials to be provided, but were simply to insert a total price in the appropriate space in the solicitation, thereby agreeing to perform the contract in accordance with the drawings and specifications included in the IFB.

The specifications included the following provision:

"VINYL SHEET FLOORING

A. Provide vinyl sheet flooring complying with FS L-F-475A(2), Type II, Grade A, and as follows:

1. Forbo Flooring, 'Mormoleum.'
2. Armstrong 'Possibilities.'"

The agency received 21 bids in response to the solicitation. The bids ranged from Pavel's bid of $1,035,000 to $1,212,000. After bids were opened, one of the bidders, S.B. Construction Company, complained that the solicitation specified a brand name, foreign-made vinyl floor covering.

As a result of that protest, HHS reviewed the solicitation and found that one of the two specified brand name floor coverings--Forbo Flooring "Mormoleum"--is foreign made. In the agency's view, acquisition of that product under this solicitation for a construction contract is prohibited by the Buy American Act. Also, the agency determined that the two brand name floor coverings were specified for aesthetic reasons only and that it therefore had no authority to limit bidders' selection of floor coverings to the brand names. The contracting officer states that she assumed that all bidders prepared their bids based on the specified brand name floor coverings and, since there was no reason to limit bidders to those products, the solicitation was unduly restrictive.

In addition, according to the agency, although it had amended the solicitation before bid opening in an attempt to remove defects in the specifications, upon further review agency officials discovered numerous other mistakes and ambiguities which the agency states resulted in overstated requirements. The agency explains that requirements for fire treated millwork materials and several items of modular furniture should have been deleted. The agency further states that the computerized environmental control and monitoring equipment specified was more sophisticated than necessary and that the configuration of the doors at the building entrance was more elaborate and expensive than necessary. In addition, the agency states that the specifications lacked measurements for vertical blinds, a requirement for field painted steel doors and frames needed to be replaced by factory painted doors and that there were 39 other minor defects in the solicitation that needed to be corrected. According to the agency, as a result of these solicitation defects and ambiguities, the bids were overstated by approximately $93,000.

Pavel argues that there was no reason to cancel the solicitation and that it was prejudiced by the cancellation since its low price was exposed. According to the protester, HHS' original reasons for the cancellation--that the solicitation required a foreign-made floor covering and that it improperly restricted offerors to providing brand name products--are mistaken.

First, Pavel argues that offerors were not restricted to the foreign-made Forbo flooring covering since the solicitation also listed the Armstrong product, which is an American-made alternative. Second, the protester maintains that offerors were not restricted to providing either of the brand name floor coverings listed in the solicitation. According to Pavel, under the Material and Workmanship clause set forth at Federal Acquisition Regulation (FAR) § 52.236-5(a), which was referenced in the solicitation, where the solicitation listed the brand name of a required product, bidders had the right to prepare their bids based on "equal" products. Pavel maintains that this is the case even where, as here, the solicitation did not state that contractors could provide either the "brand name" or an "equal."

Finally, Pavel argues that the other alleged mistakes and ambiguities in the specifications do not justify canceling the solicitation. According to the protester, most of these additional flaws in the specifications were corrected by the amendment issued before bid opening. For instance, Pavel states that the requirements for fire treated millwork and field painted steel doors had already been deleted by the amendment. Also, Pavel argues that most of the other clarifications were minor and the other specification changes could have been made without canceling the solicitation. For example, Pavel maintains that the unnecessary environmental control and monitoring equipment and modular furniture could have been deleted by a change order under the contract and this would not have prejudiced any bidder since those deletions would affect them all equally.

Because of the potential adverse impact on the competitive bidding system of canceling an IFB after prices have been exposed, any cancellation after bid opening must be based on a compelling reason. FAR § 14.404-1(a)(1); Deere & Co., B-241413.2, Mar. 1, 1991, 91-1 CPD ¶ 231. A compelling reason for cancellation exists when it is determined that an IFB overstates the agency's minimum needs or fails to express them properly. Id. Here, we find the agency had a compelling reason to cancel the solicitation since it required the use of a prohibited foreign-made floor covering and since the solicitation otherwise overstated the agency's needs.

The use of the foreign-made floor covering is prohibited by the Buy American Act, 41 U.S.C. § 10b (1988). The Act and its implementing regulations require that only domestic construction materials be used on construction contracts, except under circumstances not present here. See FAR § 25.202. Under the implementing regulations, construction materials are articles and supplies brought to the work site for incorporation into the building. FAR § 25.201. Pavel does not dispute that the floor coverings in question are construction materials and that use of those materials here is prohibited.

Pavel argues, however, that firms were not restricted to the foreign-made floor covering since the solicitation also listed the Armstrong floor covering, which is an American-made alternative. While the solicitation did list a domestic floor covering in addition to the prohibited foreign product, the two were not interchangeable; as the agency explains, each of the floor coverings was required for installation in different areas. Under the circumstances, we agree with the agency that the solicitation required the use of a foreign-made floor covering which is prohibited by the Buy American Act.

We do not agree with Pavel that because of the presence of the Material and Workmanship clause bidders knew that they could provide other products equal to the foreign-made floor covering or the other brand name floor covering called for in the solicitation. In relevant part, that clause reads as follows:

> "References in the specifications to equipment, material, articles, or patented processes by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition. The contractor may, at its option, use any equipment, material, article, or process that, in the judgment of the contracting officer, is equal to that named in the specifications, unless otherwise specifically provided in this contract."

Under the clause, during contract performance, a contractor is permitted to propose to use equipment or materials equivalent to those specified by brand name referenced in the solicitation. See M.C. & D. Capital Corp., B-225830, July 10, 1987, 87-2 CPD ¶ 32. If the contracting officer approves, the awardee can perform the contract using products other than the brand name products specified in the solicitation. Pavel maintains that the Material and Workmanship clause should be interpreted as the equivalent of a Brand Name or Equal clause that specifically informs

all prospective bidders that they can base their bids on products equal to the listed brand name products.

As we stated above, for at least those locations where the Forbo flooring material was required, the specifications called for an item which would be unacceptable under the terms of the Buy American Act for this construction contract. Therefore, even if bidders understood the Material and Workmanship clause as permitting them to base their bids upon the use of an equal product, the solicitation still stated incorrectly that the Forbo flooring product was acceptable when, in fact, it could not be accepted.

Moreover, at least one bidder, S.B. Construction, understood the solicitation to require that bids be based only on the listed brand name floor covering. Under the circumstances, we do not think that was an unreasonable interpretation of the solicitation since the Material and Workmanship clause pertains to contract performance. While it is true that the Material and Workmanship clause does permit the substitution of equal materials during performance, that clause does not, like the standard Brand Name or Equal clause, concern the bid submission. Under the terms of the Material and Workmanship clause if the agency properly concludes that the contractor's substitution does not meet its concept of an equivalent product then the contractor is obligated to supply the brand name product.

We therefore believe that since the solicitation specified a particular brand name product which could not be used in the performance of this construction contract and considering the fact that the Material and Workmanship clause does not pertain to bid submission and entails a performance risk if the substituted material is not acceptable to the agency, there was a reasonable basis for concern that the mistaken use of the brand name item in the solicitation adversely impacted the competition. See Display Sciences, Inc.--Recon., B-222425.2, Aug. 26, 1986, 86-2 CPD ¶ 223 (IFB based on brand name or equal specification properly canceled where brand name product exceeded the government's needs).

Although the protester challenges most of the additional reasons offered by the agency for the cancellation, we think that the agency had a compelling reason to cancel because the solicitation specified the prohibited foreign-made floor covering and because of two of the additional problems the agency discovered in its review of the solicitation: the unnecessary environmental control and monitoring equipment and unnecessary modular furniture.

As far as the monitoring equipment is concerned, the agency explains that the specifications were ambiguous and led bidders to propose equipment more elaborate than necessary. Also, the environmental control and monitoring system is required to be expandable and, according to the agency, although the specified system is inherently expandable, ambiguous language in the specifications led bidders to propose additional unnecessary equipment to assure expandability. The agency reports that this more elaborate and additional hardware was worth approximately $60,000.

With respect to modular furniture, the agency reports that when it issued the amendment before bid opening, it intended to delete all required furniture. Nonetheless, according to the agency, modular furniture worth approximately $27,000 was not deleted. The agency states that as a result of these two defects in the specifications, the bids were approximately $87,000 higher than they would have been without the defects.

Although Pavel argues that many of the other defects alleged by the agency were minor, the protester does not dispute the agency's assertions that the ambiguous specifications for the environmental control and monitoring equipment caused bids to be inflated by approximately $60,000 or that the furniture requirements which the agency intended to delete inflated bids by approximately $27,000. Rather, Pavel argues that these specification defects do not justify the cancellation since the unnecessary equipment and furniture could simply be deleted from the contract by means of a deductive change order. According to Pavel, the environmental control and monitoring equipment would be supplied to any bidder by the same vendor so deletion of the extra equipment would result in the same credit under the contract for any bidder. Pavel maintains that the extra furniture also could be deleted after the contract is awarded. According to Pavel, since deletion of the unnecessary equipment and furniture from the contract would affect all bidders equally, no bidder would be prejudiced by awarding the contract so the cancellation is not justified by the deletion of those items.

The range of bids submitted under the solicitation was extremely close with all 21 bids within a range of $177,000 and the 10 lowest bids within $15,000 of each other. Under the circumstances, although Pavel maintains that deletion of the unnecessary furniture and equipment would be accounted for in the same by all of the competitors and thus have the same effect on all bidders, given the close range of the bids, we cannot assume that the deletion of these items would be accounted for in the same manner by all of the competitors and thus have no effect on a recompetition. An agency may not award a contract competed under given

specifications with the intention of significantly modifying its terms after award since such a procedure would be prejudicial to other bidders under the invitation and thereby have the effect of circumventing the competitive procurement statutes. Adrian Supply Co., B-246207.2; B-246207.3, Mar. 13, 1992, 92-1 CPD ¶ 282.[1]

It is our view that the cumulative effect of the overly restrictive requirements for brand name floor covering, including the prohibited foreign-made product, along with the overstatement of the agency's needs for the environmental control and monitoring equipment and furniture constituted the requisite compelling reason for cancellation of this solicitation.

The protest is denied.

James F. Hinchman
General Counsel

[1]Pavel notes that the original written justification for the cancellation referred only to the requirement of foreign-made floor covering and the specification of brand name products to support the cancellation. That written justification did not refer to the additional reasons later offered by the agency to support the cancellation and Pavel argues that we should not consider those later offered reasons. We do not agree. Information justifying the cancellation of a solicitation can be considered no matter when the information surfaces or should have been known. Zwick Energy Research Organization, Inc., B-237520.3, Jan. 25, 1991, 91-1 CPD ¶ 72.