



Comptroller General  
of the United States

Washington, D.C. 20548

*Ms. Miller*

25776

## Decision

**Matter of:** Budney Industries  
**File:** B-252361  
**Date:** June 10, 1993

Larry Harper for the protester.  
Timothy A. Beyland, Esq., Department of the Air Force, for the agency.  
Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Contracting agency's decision to resolicit its requirement for critical flight engine part items after termination of an improper contract award--rather than make award to the otherwise successful offeror for that procurement--is unobjectionable where agency's inventory demand significantly increased and the record shows that a consolidated procurement for the increased quantity offers potential cost savings as well as a reduced risk of technical delays.
2. Protest that awardee is not a responsible firm is dismissed where there is no evidence of possible fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria were not met.
3. Protest filed after solicitation closing date challenging alternate delivery schedule provision is dismissed as untimely since alleged improprieties apparent from the face of a solicitation must be filed prior to the time set for receipt of proposals.

### DECISION

Budney Industries protests the cancellation of request for proposals (RFP) No. F34601-92-R-3175, issued by the Department of the Air Force for 229 support turbine stators, a critical flight part required for the TF30 aircraft engines. The Air Force canceled the procurement after it concluded that the award it had made thereunder violated Federal Acquisition Regulation (FAR) § 9.306(f)(2) and that its quantity requirement for the stator item had increased. In its protest, Budney contends that instead of canceling and resoliciting for the requirement, the agency should have made award to Budney. Budney also challenges the award of a

*059416/149411*

contract to Dover Tool Company under the resolicitation for these items, RFP No. F34601-93-R-57392.

We deny the protest in part and dismiss it in part.

#### BACKGROUND

The RFP was issued on June 1, 1992, as a total small business set-aside and called for the production of 19 turbine stators--to restock the agency's basic inventory supply--and an urgent quantity of 210 turbine stators--to be used as stock for a TF30 aircraft engine preventive maintenance "Pacer Repair Program" scheduled to begin in July of 1993. The solicitation required offerors to propose both with and without first article testing (FAT), and provided that the FAT requirement could be waived where the offeror had successfully provided production quantities of the identical turbine stator item to a government agency or a prime contractor within the previous 36 months.

With respect to contract delivery, the RFP provided:

"URGENT REQUIREMENT. YOUR OFFER TO BE BASED ON MEETING REQUIRED DELIVERY AS NEARLY AS POSSIBLE, INCLUDING USE OF PREMIUM EFFORT, IF NECESSARY."

In this regard, while the solicitation set forth a required delivery timetable for both an FAT and FAT-waiver award, the solicitation also contained a provision permitting offerors to propose an alternate delivery schedule. With respect to contract award, the RFP provided that award would be made to the offeror whose proposal presented the most advantageous combination of price and delivery to the government.

By the August 3 closing date, eight offers were received. Budney took no exception to the RFP's required delivery schedule and was the apparent low offeror--with a proposed "First Article Required" unit price of \$1,580 and a proposed "First Article Not Required" unit price of \$1,540. Notwithstanding Budney's lower price, the contracting officer selected the second low offeror--Electro Methods--for award since Electro had proposed an alternate FAT-waiver delivery schedule which offered to provide the "urgent quantity" portion of the contract to the agency 5 months earlier than Budney; in this regard, Electro was deemed eligible for the FAT waiver since the firm had successfully manufactured and delivered 76 turbine stators to the Air Force under a contract which was completed on December 29, 1989.

On August 21, the Air Force awarded the contract to Electro; on August 28, Budney filed a protest with our Office, challenging the award as improper.

Where a solicitation permits waiver of FAT--thereby expediting delivery of a product to the government--FAR § 9.306(f)(2) prohibits an agency from using the delivery time differences between an FAT-required offeror's schedule and an FAT-waiver offeror's schedule as an evaluation factor for award.<sup>1</sup> In responding to Budney's August 28 protest, the Air Force concluded that it had violated this regulation since the agency had determined Electro's proposal to be the most advantageous offer based on that firm's use of an accelerated FAT-waiver delivery schedule. Accordingly, by letter dated September 14, the Air Force advised this Office that it was terminating the award to Electro and would resolicit after reevaluation of its turbo stator requirements. When an agency terminates an awardee's contract and resolicits for its needs, such agency action renders a protest academic, see East West Research, Inc.--Recon., B-233623.2, Apr. 14, 1989, 89-1 CPD ¶ 379; consequently, by decision dated September 16, we dismissed Budney's protest.

On September 18, Budney filed an agency-level protest with the contracting officer, challenging the cancellation; instead of resoliciting the requirement, Budney argued, the Air Force should reinstate the canceled solicitation and make award to Budney as the lowest-priced offeror. By letter dated October 13 the Air Force denied Budney's agency-level protest;<sup>2</sup> on October 30, Budney filed this protest with our Office, which reiterates its agency-level challenge to the cancellation.

#### DISCUSSION

Cancellation of an RFP after the awardee's price has been revealed is proper where the record contains plausible evidence or a reasonable possibility that a decision not to cancel would be prejudicial to the government or the

---

<sup>1</sup>FAR § 9.306(f)(2) provides that although a solicitation's delivery schedule may "[p]rovide for earlier delivery when testing and approval is waived and the [g]overnment desires earlier delivery . . . any resulting difference in delivery schedules shall not be a factor in evaluation for award."

<sup>2</sup>Budney received this letter on October 16.

integrity of the procurement system. See General Projection Sys., 70 Comp. Gen. 345 (1991), 91-1 CPD ¶ 308; Norfolk Shipbuilding & Drydock Corp., B-247053.5, June 11, 1992, 92-1 CPD ¶ 509. For example, cancellation is appropriate where the needs of the agency have changed in some material respect. See Allied Repair Serv., Inc., 62 Comp. Gen. 100 (1982), 82-2 CPD ¶ 541 (cancellation is proper where the agency's minimum needs required 46 percent increase in scope of ship repair services); Crow-Gottesman-Hill #8, B-227809, Oct. 2, 1987, 87-2 CPD ¶ 323, aff'd, B-227809.2, Nov. 10, 1987, 87-2 CPD ¶ 471 (cancellation is proper where agency's actual floor space requirement increased from 90,000 to 125,000 square feet); The Big Picture Co., B-224112.2, Mar. 2, 1987, 87-1 CPD ¶ 232 (cancellation is proper where agency's minimum needs required adding television services to solicitation for audiovisual services).

In this case, the contracting officer reports that the decision to cancel and resolicit for this requirement-- rather than awarding a contract to Budney--resulted from the requesting activity's determination that the urgent quantity of turbo stators specified in the original RFP no longer reflected the agency's actual minimum needs. Whereas the requesting activity originally anticipated that 210 of these items were necessary for the July 1993 Pacer Repair Program, by September 14, 1992, when the decision was made to terminate the award to Electro, the requesting activity recognized that the known number of defective stator parts actually requiring replacement already exceeded this 210 estimate; in fact, as reflected in the current resolicitation for this requirement, the actual number of stators requiring replacement is 292--an increase of 39 percent.<sup>3</sup>

While the Air Force could have made an award to Budney for the specified 210 stators and resolicited for the remaining quantity, such a procurement approach would prejudice the government in two respects. First, by conducting two negotiated procurements for the different quantities, the Air Force potentially would have to repeat the FAT process, thereby incurring twice the technical risks and time delays inherent in that process; similarly, the agency's administrative and cost burdens could be doubled. Second, because manufacturing/production costs generally decrease as the production quantity increases, procuring the increased quantity under one solicitation would result in a lower unit

---

<sup>3</sup>In this regard, under the terms of the RFP, the routine 19-stator item quantity was not scheduled for delivery to the Air Force until more than a year after delivery of the urgent 210-stator item quantity portion of the contract.

price than proceeding with two separate procurements.<sup>4</sup> See 10 U.S.C. § 2384a(a)(1) (1988), which requires agencies to procure supplies in the quantity that will result in the most advantageous cost.

Since the record shows that the Air Force has a bona fide need for 292 stators by July of 1993, and since consolidation of the two quantities into one procurement represents the least risky, most efficient approach with the potential for significant cost savings to the agency, we find the cancellation determination to be unobjectionable.<sup>5</sup> See CFM Equip. Co., B-251344, Mar. 31, 1993, 93-1 CPD ¶ 280 (agency properly canceled negotiated procurement where record showed that consolidation of canceled requirement with upcoming procurement represented less expensive approach for fulfilling the government's needs).

#### The Resolicitation

The replacement solicitation for this requirement, RFP No. F34601-92-R-57392, was issued on December 15 as a total small business set-aside for a revised quantity of 292 stators; on January 29, 1993, a contract was awarded to Dover Tool Company as the lowest-priced offeror with an acceptable delivery schedule.

---

<sup>4</sup>The contracting officer also reports that at the time of the cancellation determination, the agency hoped to promptly resolicit with a more compressed delivery schedule which would better serve the government's interests; however, because of delays involved in reevaluating its stator requirement as well as the time involved in setting up the resolicitation effort, a replacement solicitation was not issued until December 15, 1992. The resolicitation effort set forth a more compressed delivery schedule which--with respect to the FAT--required first articles to be delivered 60 days after contract award and reduced the government's testing period from 90 to 30 days.

<sup>5</sup>Budney's suggestion that the agency could have awarded Budney a contract under the RFP and subsequently modified the contract to increase the quantity to 292 and incorporate an accelerated delivery schedule is without merit. It is improper to award a contract with the intent to materially alter the contract terms after award. See PAI Corp. et al., B-244287.5 et al., Nov. 29, 1991, 91-2 CPD ¶ 508; Source AV, Inc., B-241155, Jan. 25, 1991, 91-1 CPD ¶ 75.

On February 12, Budney filed a protest with this Office challenging the award to Dover as improper on the following grounds: (1) Dover submitted a below-cost offer and lacks the facilities and manpower to perform the contract at its offered price; and (2) the RFP's "Proposed Delivery Schedule" provision--which allowed offerors to propose alternate delivery schedules--was improper.<sup>6</sup>

While Budney argues that Dover submitted an unreasonably low price, and further alleges that Dover is incapable of performing the contract, these are matters concerning the awardee's responsibility which our Office will not review absent a showing of possible fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation may have been misapplied.

MEDLIN Transcriptions--Recon., B-246896.2, Feb. 14, 1992, 92-1 CPD ¶ 192. Since Budney has made no such showing--and since the Air Force's act of awarding a contract to Dover constitutes an affirmative determination by the agency that Dover is a responsible contractor, see General Elec. Ocean and Radar Sys., B-250418; B-250419, Jan. 11, 1993, 93-1 CPD ¶ 30--we dismiss this portion of Budney's protest.<sup>7</sup> Esilux Corp., B-234689, June 8, 1989, 89-1 CPD ¶ 538.

Nor will we consider Budney's protest against the solicitation's alternate delivery schedule provision. Our Bid Protest Regulations require protests based on apparent solicitation defects--such as the alternate delivery schedule provision at issue here--to be filed prior to the time set for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1993). Since Budney failed to protest this

---

<sup>6</sup>Budney also argues that proceeding with the resolicitation was improper while its protest challenging the cancellation of the prior RFP was pending. This issue is academic in light of our finding that the agency's cancellation was unobjectionable. ASR Mgmt. & Tech. Servs., B-244862.3; B-247422, Apr. 23, 1992, 92-1 CPD ¶ 383.

<sup>7</sup>To the extent that Budney is simply protesting that certain of Dover's prices are unreasonably low or unrealistic, the allegation is not for consideration as there is no legal basis to object to the submission or acceptance of a below-cost offer. See M.B. Shaw Co.--Recon., B-247247.2, Feb. 12, 1992, 92-1 CPD ¶ 182; Star Brite Constr. Co., Inc., B-244122, Aug. 20, 1991, 91-2 CPD ¶ 173.

solicitation term prior to the January 8, 1993 resolicitation closing date, we dismiss this ground of protest as untimely. Cleveland Telecoms. Corp., B-247964.3, July 23, 1992, 92-2 CPD ¶ 47.

The protest is denied in part and dismissed in part.



*ft* James F. Hinchman  
General Counsel