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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-186030, B-186509 DATE: December 9, 1976

MATTER OF: Hampton Metropolitan Oil Co.; Utility Petroleum, Inc.

DIGEST:

1. Rejection of bids and cancellation of solicitation is proper where due to use of undefined terms in solicitation and through no fault of bidders, agency cannot be assured that bidders will not be able to indiscriminately raise prices after award under price adjustment provisions of contract.

2. Agency may properly cancel only portion of solicitation, which contemplated multiple awards on 1,724 line items, since solicitation reserved to the Government the right to reject any or all bids and to accept any item or group of items of any offer.

Utility Petroleum, Inc. and Hampton Metropolitan Oil Company have protested the cancellation by the Defense Supply Agency (DSA) of the portions of invitation for bids (IFB) No. DSA600-76-B-0003 under which Utility and Hampton were the apparent low bidders. DSA's action followed its determination that the protesters were misled by the solicitation into submitting bids containing inadequate reference prices to be used in connection with economic price adjustment provisions.

The solicitation requested bids to supply military installations and Federal civilian agencies with 1,724 line items of various refined petroleum products, and contemplated multiple awards of fixed-price contracts with economic price adjustment clauses to low bidders on an item by item basis. Awards were made for all items except the 47 on which Utility was the apparent low bidder and the 6 on which Hampton was apparently low.

The solicitation required that the reference price to be submitted be either a "posted price" or a "published price." The solicitation did not define those terms. DSA states it intended the terms "posted price" and "published price" to be given the meanings which it believed were generally accepted in the petroleum industry. Specifically, DSA intended a "posted price" to be a price which is maintained by a company regularly engaged in petroleum marketing or distribution which represents the prices at which particular grades of products are or were last sold in substantial quantities to many customers and at which the company is currently willing to sell to potential customers. DSA states that it intended "published prices" to be those contained in generally known trade journals such as Platt's Oilgram Price Service, Oil Buyers Guide or The New York Journal of Commerce. These publications are published daily or weekly and contain prices at which petroleum products are sold or were tendered for sale. Such definitions, DSA believes, would allow contractors under the economic price adjustment clauses an upward or downward adjustment of prices on a cent for cent basis commensurate with changes in posted or published prices, but would protect the Government by limiting adjustments to price increases competitively determined in the market place. In other words, DSA believes that by tying the contract reference price to a "posted" or "published" price which reflects competitive pressures and not solely the whim of the seller, contractors would be prohibited from bidding low and posting a low price for escalation purposes and then, after award, raising the posted price indiscriminately so as to entitle them to upward adjustments under the price adjustment clauses.

Both Utility and Hampton tied their reference prices to their own "posted price." However, in Hampton's case, the contracting officer discovered that Hampton had been formed primarily to supply petroleum products to Government installations and had not made substantial commercial sales of its products, while in Utility's case the contracting officer was unable to determine, after requesting sales information from Utility, that Utility had any substantial commercial sales. As a result, while the bids of Utility and Hampton appeared to be responsive to the solicitation, the contracting officer believed that they did not afford the Government adequate protection under the price escalation clause because each firm's posted price did not appear to be subject to the commercial pressures envisioned by DSA as inherent in its concept of a reference price. However, the contracting officer recognized that the lack of a definition in the IFB of the terms "posted price" and "published price" could have misled the protesters. He therefore determined that, rather than reject the bids and award to the second low bidders for these items, it would be proper to cancel the portions of the solicitation on which Utility and Hampton were low and resolicit with an escalation provision adequately describing what the Government required as a reference price.

Both protesters object to the cancellation on the basis that there was no compelling reason to cancel as is required by Armed Services Procurement Regulation (ASPR) § 2.404(a) (1975 ed.) where bids have been opened and exposed, inasmuch as they had submitted responsive bids with reference prices that they believe would adequately protect the Government. Moreover, they contend that the cancellation of only the portions of the solicitation on which they were the low bidders would be unduly prejudicial to them.

Generally, the rejection of all bids and the cancellation of a solicitation after bids have been exposed is not looked upon with favor, in part because of the added expense and delay suffered by both the Government and the bidders, but primarily because the public opening of bids without award is viewed as discouraging competition, prejudicing bidders, and compromising the integrity of the competitive bid system. See Massman Construction Company v. United States, 102 Ct. Cl. 699, 60 F. Supp. 635, cert. denied, 325 U.S. 866 (1945). Accordingly, cancellation of an IFB after bid opening, although within the broad authority of contracting officers, is regarded as improper unless there is a cogent and compelling reason warranting the cancellation. Massman Construction Company v. United States, supra; Scott Graphics, Inc., et al., 54 Comp. Gen. 973 (1975), 75-1 CPD 302; Spickard Enterprises, Inc., et al., 54 Comp. Gen. 145 (1974), 74-2 CPD 121; 40 Comp. Gen. 671 (1961).

Utility cites our decisions in Joy Manufacturing Company, 54 Comp. Gen. 237 (1974), 74-2 CPD 183; 52 Comp. Gen. 285 (1972); and 49 Comp. Gen. 330 (1969), for the propositions that cancellation of a solicitation after bid opening is generally inappropriate when that solicitation would serve the Government's actual needs and that the use of inadequate, ambiguous, or otherwise defective specifications does not satisfy the cogent or compelling reason standard required for cancellation.

As with all cases, however, each of these decisions "must stand upon its own facts." Edward B. Friel, Inc., 55 Comp. Gen. 231, 240 (1975), 75-2 CPD 164. In Joy Manufacturing Company, supra, the agency canceled an IFB and proposed to resolicit with additional specification requirements. However, the low, responsive bidder had offered an item which might have met the additional requirement, while the other bidders were nonresponsive to the original requirements. In the circumstances, our

Office held that acceptance of the low bid--if it were found to meet all of the Government's actual needs--would work no prejudice to the other bidders and that the original IFB should be reinstated. In 52 Comp. Gen. 285 (1972), while the agency believed the IFB's purchase description to be deficient, it appeared that the equipment offered would meet the Government's actual requirements and that cancellation and readvertisement would create an "auction atmosphere" because "new bids would constitute responses to the prior exposed bid prices rather than to the changes in requirements." 52 Comp. Gen. at 289. In 49 Comp. Gen. 330, supra, an agency decision to cancel a solicitation was based in part on the contentions that the IFB did not establish a common basis for bidding and that bidders were not committed to specific prices, thereby precluding a proper evaluation to determine which bidder was low. The record did not support the agency's contentions, however, and in those circumstances we held that cancellation was not justified. What these cases indicate, of course, is that the mere utilization of inadequate or deficient specifications is not itself a reason to cancel an IFB when the Government's needs can nonetheless be satisfied. See The Intermountain Company, B-182794, July 8, 1975, 75-2 CPD 19.

In the instant case, the issue is not whether DSA would secure an acceptable product under the solicitation. Rather, it is whether the bids submitted under the solicitation adequately protect the Government against contractors being able to increase their entitlements under the economic price adjustment provisions by raising their "posted" prices indiscriminately. In effect, the issue is whether the Government could reasonably determine which bid would ultimately result in the lowest cost to the Government. In circumstances where the Government is in fact unable to determine which bid would result in the lowest ultimate cost, cancellation of the solicitation is proper. See Edward B. Friel, Inc., supra. Thus, what must be determined here is whether DSA was adequately assured that the bids of the protesters would result in the lowest ultimate price to the Government.

Both protesters argue that their reference prices do adequately protect the Government in this regard. Hampton contends that under the Federal Energy Administration (FEA) regulations in effect at the time of bid opening, selling prices had to be tied to the seller's costs. 10 C.F.R. § 212.93 (1976). Therefore, Hampton argues it could not raise its price indiscriminately. Utility points out that after bid opening, at the request of the contracting officer for written evidence that it was submitting a satisfactory reference price, its president submitted an affidavit which stated that its posted price was based on its products' acquisition price which in turn was based upon Platt's Oilgram Price Service, one of the sources which DSA indicated could be used as a reference price. Utility also contends that DSA has refused to give it further guidance as to what it meant by its requirement for substantial sales, which has prevented Utility from submitting further justification for its reference price.

In regard to Hampton's contention that its price changes under the economic price adjustment clauses are controlled by FEA regulations, DSA states that such regulations only tie Hampton's price changes to inventory cost changes but do not control the costs which Hampton could incur to replenish its inventory. DSA points out that since Hampton has no commercial customers, it would be under no threat of loss of business if its future inventory acquisition costs result in selling prices higher than what competitive pressures normally would permit. Accordingly, DSA believes that Hampton would not have sufficient competitive pressure to hold its prices in line with the market.

Although Hampton argues that since its margin is fixed by FEA regulations it would not be practical to increase its inventory costs solely to receive a higher price from the Government because its return on investment would be reduced, we think DSA's insistence on the threat of competition in the marketplace as the only reasonable assurance for its contractors to keep their reference ("posted") prices as low as possible is reasonable. Furthermore, as DSA points out, the FEA regulations concern only ceiling prices and do not preclude a seller from raising prices until that ceiling is reached. Moreover, the regulations could be modified or rescinded at any time, and as Hampton would not be contractually bound to adhere to the FEA regulations existing at the time of bid opening, the Government would not have the protection it seeks by acceptance of Hampton's bid, should those regulations actually change.

With regard to Utility's position, the affidavit it submitted states:

> "Since the company's acquired cost of each respective product is based upon Platt's Oilgram's Price Service posted price * * * the posted price falls within the high-low postings set forth in Platt's."

The contracting officer states that this "is not relevant to the establishment of posted or published price which is a valid indicator of the going market price" and concludes that "the signed affidavit does not provide the necessary assurances * * * that the posting is in fact sensitive to the marketplace." We see no basis for disagreeing with the contracting officer. The affidavit, which is not part of the bid and which could not give rise to any contractual obligation on the part of Utility should its bid be accepted, does not change the fact that Utility's reference price remains its posted price which in turn is not, insofar as DSA has been able to determine, tied to any appreciable commercial sales. Furthermore, the affidavit itself states only that Utility's current inventory cost and posted prices for each item are based on Platt's listings--it provides no assurances that the firm's future posted prices will also be based upon published listings. Also, we do not understand Utility's assertion that it has been unable to supply sales data to DSA because DSA has not adequately defined what it means by substantial sales, since we think it would be a simple matter for the firm to provide whatever data it does have which reflects its volume of commercial sales.

Accordingly, we find that the contracting officer could reasonably believe that the bids of Utility and Hampton do not provide the Government adequate assurance that the prices in those bids could not be raised indiscriminately after bid opening, and conclude that in such circumstances a compelling reason exists for cancellation of the IFB. The fact that only portions of the IFB were canceled is not objectionable since the solicitation, in accordance with applicable regulations, reserved to the Government the right to reject any or all offers and to accept any item or group of items of any offer. Furthermore, in view of the DSA determination that the other low bidders under the solicitation did submit reference prices which adequately protected the Government, there would not be a cogent or compelling reason to cancel the other portions of the solicitation. See T&G Aviation, B-186096, June 21, 1976, 76-1 CPD 397. In light of the above, we believe the provisions of ASPR § 2-404.1(b), which merely refer to cancellation of an IFB, must be read as permitting cancellation of either all or a portion of the IFB, as may be required by the circumstances, and not as requiring cancellation of the IFB in toto or not at all.

Finally, Hampton alleges that it is a minority-owned firm and is "being discriminated against" by DSA for that reason. We find nothing in the record to support that assertion.

For the foregoing reasons, the protests are denied.

R.F. Keller

Deputy Comptroller General
of the United States