

DECISION

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

*J. Cohen
Proc I*

7962

FILE: B-192279

DATE: October 6, 1978

MATTER OF: Ingersoll-Rand Company

DIGEST:

1. Where IFB contained ambiguous, unnecessary, and inapplicable specifications so that award thereunder would prejudice other bidders, cancellation of IFB under ASPP § 2-404.1(b) (1976 ed.) was proper.
2. Issuing agency may cancel solicitation no matter when information justifying cancellation first surfaces.
3. IFB does not import obligation on Government to accept any of bids received, including low responsive bid.

Invitation for bids (IFB) No. N62472-78-B-1622 was issued on April 7, 1978, by the Naval Facilities Engineering Command for a pumping system and related items and services. The six bids received were opened on June 12. By telegram dated June 13, Ingersoll-Rand Company, the fifth low bidder, protested to the contracting activity that for various reasons the lower bids were not responsive to the solicitation. In addition, the second and third low bidders each protested the responsiveness of the bids below them.

On June 28, Ingersoll-Rand filed a protest in our Office against award to any other bidder on the same bases involved in its protest to the Navy. Specifically, Ingersoll-Rand argued that the two lowest bidders were not responsive because each listed in its bid certain exceptions to the solicitation's technical requirements, and the third and fourth low bidders were nonresponsive because they offered to supply commercial pump motors which Ingersoll-Rand alleged did not meet the IFB specifications. Ingersoll-Rand's bid was based

on a motor custom built to the Navy's needs. Ingersoll-Rand also submitted an alternate bid based on a commercially produced motor.

On July 12, before the resolution of Ingersoll-Rand's protest to our Office, the IFB was canceled under Armed Services Procurement Regulation (ASPR) § 2-404.1 (1976 ed.), which provides in pertinent part:

"Cancellation of Invitation After Opening

- "(a) The preservation of the integrity of the competitive bid system dictates that after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation. Every effort shall be made to anticipate changes in a requirement prior to the date of opening and to notify all prospective bidders of any resulting modification or cancellation, thereby permitting bidders to change their bids and preventing the unnecessary exposure of bid prices. * * *
- "(b) * * * Invitations for bids may be canceled after opening but prior to award when such action is consistent with (a) above and the contracting officer determines in writing that
- "(i) inadequate or ambiguous specifications were cited in the invitation;
- "(ii) specifications have been revised * * *"

Ingersoll-Rand has now protested the cancellation of the IFB.

In a report on the protest, the Navy sets out the following four reasons for canceling the solicitation:

- (1) paragraph 3.2.2 of the IFB required that the motor be in accordance with "specification CC-M-641 ANSI C2." The Navy states that specification CC-M-641 was canceled in 1974, and MIL. SPEC. MIL-P-17552C is the specification presently applicable.
- (2) IFB "Table I-Factory Test Requirements" lists a series of pump, turbine, and motor tests. Paragraph 4.4 requires the contractor to test each pump and driver at the factory prior to final preparation for shipment. Failure to pass any of the tests listed in Table I would be cause for rejection of a bid. However, the Navy contends that the listed test procedures far exceed normal test procedures and are unnecessary to procure satisfactory motors; are different from "NEMA-MG-1" tests specified elsewhere in the IFB as applicable, and, therefore, create an ambiguity as to which tests are to be applied; and largely pertain to DC motors although AC motors are being procured.
- (3) Paragraph 3.2.1 of the IFB requires that the "[pump] casing shall be horizontally split with 20 inch suction and 18 inch discharge piping connections in the lower half."

The Navy states:

" * * * This important portion of the specification is ambiguous in failing to specify how the disparate suction and discharge connections are to be harmonized. Probably the unwritten intent of the specifications was to provide adapters with the pump to make the proper connections. It is estimated that such adapter would cost approximately \$5,000 and this ambiguity in the specification leaving a gap in the specifications must be clarified in order to provide for all costs to be included in bids."

- (4) There is "no sound engineering reason" for the requirement in IFB paragraph 3.2.1 that "each pump shall be fitted with double row angular contact thrust bearings," with the resultant cost to the Government, because the thrust forces encountered in this type of design are minimal.

In comments on the Navy's report, Ingersoll-Rand states that it agrees with the Navy that the cited specifications are inadequate and ambiguous. Ingersoll-Rand contends, however, that such deficiencies were brought to the issuing activity's attention prior to bid opening, but apparently were not considered serious enough to warrant correction at that time. Ingersoll-Rand further argues:

"* * * none of the stated inadequacies or ambiguities are sufficiently significant to alter the form, fit, or function of the equipment. The specification and contractual requirements are not as refined as we would expect from a government agency, but they are

viable as verified by the totally responsive bid Ingersoll-Rand has submitted.

"It would be quite simple for any reputable manufacturer who submitted a responsive bid to incorporate * * * [the Navy's] presently requested specification items on a post-award basis or to produce totally reliable, efficient, functional equipment in accordance with the specifications as they previously existed.

" * * * it is not the intent of government procurement regulations to allow a unilateral cancellation of an active solicitation against which totally responsive bids have been submitted unless the equipment requirements have changed in form, fit, or function. * * * [the Navy's] response confirms that no such changes have taken place."

It is recognized that the rejection of bids after opening tends to discourage competition because it publicly exposes bids without award and causes bidders to expend manpower and money in bid preparation without the possibility of acceptance. 52 Comp. Gen. 285 (1972). It is primarily for these reasons that the procurement regulations require that a "compelling reason" must exist for such cancellation. Therefore, the issue here involves only the propriety of the contracting officer's determination under ASPR § 2-404.1(b)(i) and (ii) (1976 ed.).

We first note that although Ingersoll-Rand contends that the Navy was aware of the allegedly defective nature of the cited specifications prior to bid opening, the record indicates that the first time the matter was raised with the Navy was in Ingersoll-Rand's and the two other protests to

the contracting officer, all of which were received after bid opening. In any case, an agency may cancel a solicitation no matter when the information precipitating cancellation first surfaces. See Edward B. Friel, Inc. et al., 55 Comp. Gen. 488 (1975), 75-2 CPD 333.

Regarding ASPR § 2-404.1(b)(i) (1976 ed.), when it is learned after bid opening that specifications were defective because they were subject to more than one reasonable interpretation, the proper course of action is to reject all bids and resolicit on the basis of revised specifications. The reasoning therefor is that the bidders did not have an opportunity to compete on an equal basis. Pacific West Constructors, B-190387, January 24, 1978, 78-1 CPD 63. However, we have permitted award under a defective specification when it appears that the following conditions are met: (1) the agency would be getting what it wanted under the contract, and (2) competition was not adversely affected to prejudice any other bidder. 43 Comp. Gen. 23 (1963); see, also, Johnson Controls, Inc., B-188488, August 3, 1977, 77-2 CPD 75.

Similar considerations apply with regard to ASPR § 2-404.1(b)(ii) (1976 ed.). Thus, it is proper to consider both the materiality of a specification revision in relation to fulfilling the Government's needs and the possible prejudice to bidders by award on the basis of a specification that was subsequently, or should have been, revised, when determining whether to cancel an IFB under that regulation. See Charles J. Dispenza & Associates, B-186133, April 27, 1977, 77-1 CPD 284; Stahl Soap Corporation - Request for Reconsideration, B-186663, December 15, 1976, 76-2 CPD 491; Columbia Van Lines, Inc. et al., B-182855, May 14, 1975, 75-1 CPD 295; 49 Comp. Gen. 211 (1969).

By its position that award on the basis of the admittedly defective specifications is appropriate because the "form, fit, or function"


of the Government's requirements would not be compromised thereby, Ingersoll-Rand is in effect proposing that the first condition cited above for consideration in this type of situation is applicable. However, notwithstanding whether award under the IFB might in fact fulfill the Government's needs, for the reasons stated below the second condition clearly is not met. We point out in this connection that, as the regulations in ASPR § 2-404.1 (1976 ed.) indicate, an IFB does not import an obligation on the Government to accept any of the bids received, including the low responsive bid. See, also, 41 Comp. Gen. 709, 711 (1962); paragraph 10(b) of Solicitation Instructions and Conditions, Standard Form 33-A.

The three protests filed with the Navy and Ingersoll-Rand's protest to our Office indicate that the low bidder did not provide in its bid adapters necessary to connect the suction and discharge piping referenced in IFB paragraph 3.2.1 and bid a pump that lacked the required (but unnecessary) double row contact thrust bearings. The second low bidder apparently took exception to the tests required by the IFB, which have been determined unnecessary or inapplicable, and instead specified tests that were evidently sufficient but not in compliance with the solicitation's requirements. In addition, it appears that the allegedly nonresponsive commercial motors offered by two other bidders may have been nonresponsive because of the IFB's unclear, unnecessary and/or inapplicable specifications.

In view thereof, we cannot say that the defective specifications in the IFB as issued did not adversely affect competition to prejudice other bidders. While it is unfortunate that these problems were considered by the Navy only after bids were exposed, that does not alter the fact that a "compelling reason" existed to cancel the IFB under ASPR § 2-404.1 (1976 ed.).

In regard to Ingersoll-Rand's suggestion that the contract should be awarded in accordance with the IFB and then modified as necessary, we recognize that subsequent to the award of a Government contract, changes or modifications in the terms of the agreement may be required. However, the contracting parties may not employ a change in the terms of the contract so as to defeat or interfere with the purpose of competitive procurement. Praxis Assurance Venture, B-190200, March 15, 1978, 78-1 CPD 203; E.R. Hitchcock & Associates, B-182650, March 5, 1975, 75-1 CPD 133. Under that principle, and based on the above discussion, Ingersoll-Rand's suggested procedure is clearly not appropriate.

The protest against the cancellation is denied. We therefore consider Ingersoll-Rand's earlier protest against the responsiveness of the other bids under the IFB to be moot.


Deputy Comptroller General
of the United States