

Notepaper
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DECISION



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

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FILE: B-196183

DATE: January 30, 1980

MATTER OF: Presco International, Inc.

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DIGEST:

IFB
Conflicting provisions in invitation for bids (IFB) which cannot be resolved by IFB's Order of Precedence clause, and which affect determination of the low bidder, constitute "compelling" reason to cancel IFB pursuant to DAR § 2-404.1 (b)(i).

Presco International, Inc. (Presco) protests both the cancellation of invitation for bids (IFB) No. DAAA09-79-B-0216 and the subsequent resolicitation of the same requirement under IFB No. DAAA09-79-B-0279, alleging that it was the low eligible bidder under the provisions of the initial IFB. That IFB, issued by the U.S. Army Armament Materiel Readiness Command, Rock Island, Illinois, was canceled after bid opening when the Army realized there were two conflicting provisions in the IFB concerning the acceptability of telegraphic bid modifications.

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Bids under the initial IFB were opened at 10:00 A.M. on August 31, 1979, and the abstract of bids reveals that Presco submitted the low unit prices. The Army reports that a timely telegraphic modification received at 9:16 A.M. from the third low bidder, Kings Point Manufacturing Company, Inc., was not recorded on the abstract, notwithstanding that on the basis of its modification, Kings Point would have supplanted Presco as the low bidder, because of a provision on page A1 of the IFB stating: "Telegraphic messages will not be acceptable."

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Although initially of the opinion that this provision rendered the Kings Point modification unacceptable, the Army subsequently discovered that paragraph 5 of Standard Form (SF) 33A, "Solicitation Instructions and Conditions", incorporated by reference into the IFB, had not been deleted. In pertinent part, paragraph 5(b) provides:

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"Telegraphic offers will not be considered unless authorized by the solicitation; however, offers may be modified * * * by * * * telegraphic notice, provided such notice is received prior to the hour and date specified for receipt."

Accordingly, the Army found itself confronted with two conflicting provisions pertaining to the acceptability of telegraphic modifications, with the result that if paragraph 5(b) were given effect, Kings Point would be the low bidder on the basis of its telegraphic modification, whereas if the provision on page A1 were given effect, the telegraphic modification would be unacceptable leaving Presco as the low bidder.

The Army determined that the conflict could not be resolved by the IFB's "Order of Precedence" clause which provides that in the event of an inconsistency between solicitation provisions, the inconsistency is to be resolved by giving precedence first to the Schedule; second, to the Terms and Conditions; third, to the General Provisions; fourth, to other other provisions; and finally, to the Specifications. The Army points out, and we concur, that the provisions on page A1 and paragraph 5b of SF 33A both fall within the same category, namely "terms and conditions."

The Army therefore concluded that an award to either bidder would violate the express terms of the solicitation and that the only equitable solution was to cancel the procurement and resolicit.

Defense Acquisition Regulation (DAR) § 2-404.1 (1976 ed.) addresses the cancellation of an invitation after bids have been opened. It acknowledges the undesirability of the "unnecessary exposure of bid prices," and it stresses that the preservation of the integrity of the competitive bid system dictates that award be made to the low responsible bidder unless there is a "compelling" reason to reject all bids and cancel the invitation. However, the regulation sets forth

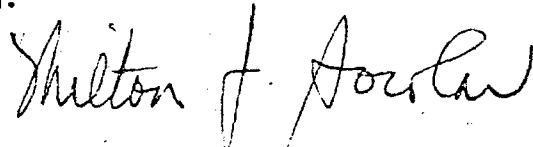
certain circumstances under which invitations may permissibly be canceled after the opening of bids; these include instances where the contracting agency determines that the invitation contained inadequate or ambiguous provisions. DAR 2-404.1(b)(i).

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In construing this section, we have stated that specification defects do not automatically mandate cancellation in each and every instance. To the contrary, we have held that an award may be made under a defective specification provided the agency would be getting what it wanted under the contract and the defect does not prejudice any of the bidders through an adverse effect on the competition for award. See Ingersoll-Rand Company, B-192279, October 6, 1978, 78-2 CPD 258, and discussion therein.

However, an ambiguity or inconsistency in an invitation which affects the bidding process constitutes a compelling reason to cancel the IFB. Uni-Con Floors, Inc., B-193016, April 19, 1979, 79-1 CPD 278; Willson Products Division, ESB Incorporated, B-191698, August 8, 1978, 78-2 CPD 102. Here, although it is apparent that the Army intended to forbid any bidding by telegraphic means, the provision of SF 33A incorporated into the IFB did permit telegraphic bid modification, and one bidder, apparently in reliance on that provision, submitted such a modification. On the other hand, the Army reports that another bidder was orally advised that it could not submit a telegraphic response in connection with its bid. Under the circumstances, we believe the Army had a reasonable basis for believing that the ambiguity in the IFB materially affected the propriety of the bidding process and that a compelling reason existed for the cancellation and readvertisement.

The protest is denied.



For The Comptroller General
of the United States