



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Eastern Technical Enterprises, Inc.

File: B-281319; B-281320

Date: January 22, 1999

Michael J. Gardner, Esq., Clark & Stant, for the protester.

Kenneth A. Lechter, Esq., Department of Commerce, for the agency.

Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Cancellation of an invitation for bids after bid opening is proper where solicitation does not reflect changed requirements in work and award under the solicitation would not serve the government's actual needs.

DECISION

Eastern Technical Enterprises, Inc. protests the cancellation of invitation for bids (IFB) No. 51-EANA-8-00076, issued by the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), for the drydocking and repair of NOAA Ship ALBATROSS IV. The protester's challenge is based upon the terms of the agency's resolicitation of the procurement through the issuance of request for proposals (RFP) No. 52-EANA-9-00002. Eastern contends that the RFP did not contain sufficient changes in requirements to support the agency's cancellation of the IFB.

We deny the protest.

The IFB was issued on July 22, 1998 to 16 firms. Three bids were received by the September 8 bid opening. Eastern's bid of \$599,469 was the apparent low bid received; bids of \$848,682 and \$1,097,402 were received from two other firms. On September 22, the agency canceled the IFB due to changes in its requirements. The protester received notice of the cancellation on October 6. On the same day, Eastern received the RFP, the agency's resolicitation of the canceled requirement. After comparing the two solicitations' requirements, Eastern filed its current protest, contending that the changes in requirements were minor and do not support the agency's cancellation of the IFB.¹

¹The agency reports that the RFP also has been canceled, since insufficient time remains to conduct the procurement in light of the agency's need to include further
(continued...)

Preservation of the integrity of the competitive bidding system dictates that after bids have been opened, award must be made to that responsible bidder which submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the IFB. Federal Acquisition Regulation (FAR) § 14.404-1(a)(1); Zwick Energy Research Org., Inc., B-237520.3, Jan. 25, 1991, 91-1 CPD ¶ 72 at 2-3. However, an IFB may be canceled after bid opening, and all bids rejected, where award under the IFB would not serve the government's actual needs, and the specifications therefore need to be revised. FAR § 14.404-1(c)(1), (2); I.T.S. Corp., B-243223, July 15, 1991, 91-2 CPD ¶ 55 at 3-4.

We conclude that the cancellation here was proper. As discussed below, the record shows that the agency's needs have materially changed since the issuance of the IFB, as evidenced by the significantly relaxed requirements contained in the RFP.²

The agency cites several examples of changes it believes are sufficiently significant to justify the cancellation. For example, in basic item No. 1 of the IFB's performance requirements, regarding drydocking and routine drydock work, the agency has deleted two requirements: (1) the requirement that the single section floating drydock be capable of leveling the ship within +/-2 minutes of arc with reference to the horizontal gravity plane (IFB Detail Specifications (DS) § 3.1.3(c)); and (2) the requirement that the ship be drydocked on 60-inch minimum height keel blocks (Id. § 3.1.3(b)). The Lead Port Engineer explains that these two requirements--which pertain to certain ship transducer and underwater body work not required under the IFB--were mistakenly included in the IFB, and that they exceed the agency's actual drydocking needs. Specifically, he explains the restrictive nature of the unnecessary requirements, and the materiality of their deletion as follows:

Eliminating the tight-tolerance ship leveling requirement provides contractors with the option of performing the work in a graving dock or marine railway instead of only in a single section floating drydock. Eliminating the 60-inch minimum keel block height requirement allows the ship to be drydocked on more common 48-inch block heights, and

¹(...continued)

necessary changes in the performance requirements (for example, regarding hull modifications), and the agency's need for immediate use of the ship for a series of survey requirements that cannot be delayed. The agency intends to resolicit its actual drydocking and repair requirements for the ship within the year.

²To the extent Eastern challenges the reissuance of the agency's requirements as a negotiated procurement, we dismiss the challenge as academic in light of the agency's cancellation of the RFP. Morey Mach., Inc.--Recon., B-233793.2, Aug. 3, 1989, 89-2 CPD ¶ 102 at 1-2.

in facilities with limited draft capabilities, further increasing competition. These requirements were needed when the ship had transducer work scheduled in conjunction with underwater body work in drydock. Transducer work was not scheduled for this drydock and repair period and the requirements should not have been included in the specification.

Declaration of James B. Stricker, Lead Port Engineer, at 2.

Other examples cited by the agency of material changes include: (1) the deletion of basic item No. 23 (IFB DS § 3.23), central hydraulics upgrade, which mistakenly remained in the IFB after the work had been performed on an unscheduled emergency repair basis (at a cost of approximately \$70,000); (2) the deletion of basic item No. 24 (Id. § 3.24), bridge running lights relocation, since it had been performed earlier by ship personnel; and (3) the reduction of work required under basic item No. 21 (Id. § 3.21), in that the agency changed the quantity of work stated by limiting the amount of bulkhead that was to be removed and replaced by the contractor. Declaration of James B. Stricker, Lead Port Engineer, at 2; Memorandum from Contracting Officer and Head of Contracting Office to Contract File (Sept. 22, 1998).

Our review of the record demonstrates that the IFB did not represent the agency's actual needs; much of the solicited work, as apparent in the above-referenced examples, is no longer needed to meet the agency's actual needs in terms of cost and complexity.

The agency states that the needed changes relate to approximately 25 percent of the work initially solicited. Memorandum from Contracting Officer and Head of Contracting Office to Contract File (Sept. 22, 1998). The materiality of the cited changes is demonstrated here, we believe, by both the degree of change (which involves stringent requirements changed to substantially more relaxed terms, or which were totally deleted) and the significance of certain of the changed terms in terms of performance and price of the contract. As discussed above, several of the changes relate to a substantial reduction in terms of complexity of the performance requirements, resulting from the agency's determination that the initial terms were in excess of its actual requirements--for example, relaxation of the stringent drydocking terms, deletion of the central hydraulics work, and reduction of bulkhead repair and removal work. The changes in required drydocking alone are significant, for instance, not only in terms of price, but because the method of drydocking is a core requirement of the drydocking portion of the contract terms.

Regarding the effect on price of the stated changes, although the record does not contain detailed comparisons in this regard, it is clear that the IFB's stringent requirements served as the basis for preparation of the bids and that deletion of the requirements may have a substantial effect on the prices bid for the entire effort.

For instance, bidders reasonably may have included in their bids the cost of acquiring certain initially required, less common supplies (such as the 60-inch keel blocks) or the cost of providing the no-longer needed services (such as meeting the more complex floating drydock requirements).³

In sum, the changes in the stated requirements, which relate to the quantity, quality, and potential price of the supplies and services, are material here. Award on the initially solicited IFB requirements simply would no longer meet the agency's actual requirements in material respects. We therefore conclude that the agency had a compelling reason to reject all bids and resolicit. See Envtl. Safety Consultants, Inc., B-241714, Feb. 26, 1991, 91-1 CPD ¶ 213 at 2. Although Eastern contends that the agency should award it a contract under the IFB, then modify that contract to provide for the changes included in the RFP, it would be improper for an agency to award a contract with the intent of making material changes.⁴ Zwick Energy Research Org., Inc., *supra*, at 3.

The protest is denied.

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³Eastern's post-protest statement that changes in the drydocking requirements alone would not cause it to change its price is unpersuasive here because of its self-serving nature (made by a firm wishing to remain in line for award as the apparent low bidder under the canceled IFB).

⁴Eastern also contends that the agency's failure to provide it with a copy of the solicitation in a prompt fashion is an example of bad faith by the agency. These contentions, however, do not demonstrate that the agency acted with intent to harm the protester. See Virginia Telecomms. & Sec., Inc., B-247368, May 20, 1992, 92-1 CPD ¶ 456 at 4; ASI Universal Corp., Inc.--Recon., B-239680.2, Nov. 13, 1990, 90-2 CPD ¶ 389 at 3.