

DECISION

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

FILE: B-185481

DATE: July 12, 1976

MATTER OF: Infodyne Systems Corp.

DIGEST:

1. Where there are conflicting statements by protester and contracting agency as to whether parties agreed to enter into contract, protester has not met burden of affirmatively proving contract came into existence.
2. Where ambiguity in original specifications was removed and new requirement was added to RFP and contracting agency alleges that ambiguity coupled with short response time adversely affected competition, there was no abuse of administrative discretion in canceling RFP and failure to provide written determination for cancellation was procurement omission which did not affect validity of cancellation.

Request for proposals (RFP) No. 6-35018 was issued by the Department of Commerce on September 4, 1975. The solicitation was for the rental of a magnetic tape subsystem, including both equipment and software, to be used by the Bureau of the Census. Three proposals were received by the closing date of September 23, 1975. Negotiations were held with Infodyne Systems Corp. (Infodyne) during October and November. The Government had until November 23, 1975, to accept the Infodyne offer. On December 1, 1975, Infodyne filed a protest with our Office concerning Commerce's failure to enter into a contract with it. On December 9, 1975, Commerce canceled the procurement action in view of a revision in the Government's requirements.

Infodyne contends that pursuant to a negotiation meeting of November 21, 1975, an oral agreement on all contract terms had been reached with Commerce. Further, it is alleged that, as a result of the meeting, Commerce had agreed to issue a letter of intent to Infodyne on November 24, 1975. Infodyne, citing Penn-Ohio Steel v. United States, 354 F.2d 254 (Ct. Cl. 1965), concludes that a binding contract came into existence on November 21, 1975.

Alternatively, Infodyne argues that Commerce did not have a compelling reason to cancel the solicitation as the revisions in the Government requirements are not substantial.

The record before this Office indicates the first negotiation session between Commerce and Infodyne occurred on October 14, 1975. Infodyne's proposal was lowest in price and technically superior to the others. As a result of the meeting, Infodyne made several changes to its proposal. At the second meeting held on November 21, 1975, the Government disclosed it had decided to develop the software requirements in-house and would only be interested in procuring the hardware portion of the system. It is the outcome of the meeting of November 21 which Commerce and Infodyne disagree on. Infodyne contends that Commerce had agreed to issue a letter of intent on November 24, 1975. On the other hand, Commerce states that no firm commitment was made during the meeting but only explored the possibility of an award without the software. A letter of intent was never issued and the procurement was canceled on December 9, 1975.

Infodyne cites Penn-Ohio Steel in support of its contention that a binding contract had come into existence during the negotiation meeting of November 21, 1975. On November 22, 1975, Infodyne reflected the changes in a letter to Commerce. The Penn-Ohio Steel case is clearly distinguishable from the present protest. There the parties had not only agreed to the terms and conditions but had agreed to an oral contract with a formal instrument being merely pro forma. Here, there are conflicting statements by the protester and contracting agency as to whether the parties agreed to enter into a contract at the November 21 meeting. In this regard, the protester has the burden of affirmatively proving his case. Reliable Maintenance Service, Inc., --request for reconsideration B-185103, May 24, 1976. Such burden has not been met.

Alternatively, Infodyne argues that the cancellation of the RFP was improper because no compelling reason to do so existed and undue influence prevented the contracting officer from exercising his independent judgment.

The original RFP stated that the vendor would supply all software but did not state what software was acceptable. Under the new solicitation, the Bureau of the Census now appears willing to accept any standard operating software that comes with the new system. The removal of the ambiguity in the original software specifications and the specific disk requirements added to the new RFP, in our opinion, constitutes a significant change. Further, Commerce states that the ambiguity in the software requirement coupled with the short response time adversely affected competition.

The authority to cancel a formally advertised procurement after bids are opened is contained in Federal Procurement Regulations (FPR) § 1-2.404-1 (1964 ed. circ. 1). It reads:

"(a) 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. * * *

"(b) Invitations for bids may be cancelled after opening but prior to award, and all bids rejected, where such action is consistent with § 1-2.404-1(a) and the contracting officer determines in writing that cancellation is in the best interest of the Government for reasons such as the following:

"(1) Inadequate, ambiguous, or otherwise deficient specifications were cited in the invitation for bids."

Our Office has long recognized that these principles also apply to negotiated procurements; B-178282, July 27, 1973. Additionally, the contracting officer is clothed with broad powers of discretion in deciding whether a negotiated procurement should or should not be canceled. 50 Comp. Gen. 50, 52 (1970). We will not interfere with such a determination unless it is arbitrary, capricious or not based upon substantial evidence. B-178282, supra.

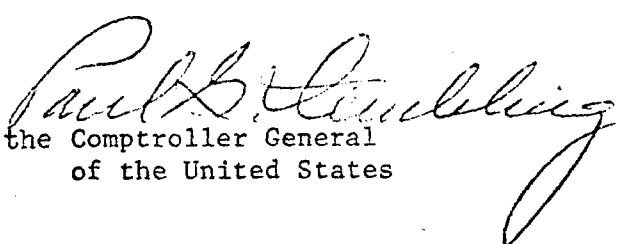
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Although it is unfortunate that the ambiguity in the specification was not discovered until several months after the submission of initial proposals, our review of the record does not disclose an abuse of administrative discretion.

The allegation of undue influence is not substantiated by the evidence. The most that can be said is that the contracting officer availed himself of the advice and expertise of others in reaching the decision to cancel. See FPR § 1-3.801-2 (1964 ed. amend. 52). There is nothing in the record indicating that the decision was not the product of the reasonable exercise of his independent judgment.

Infodyne points out that FPR § 1-2.404-1(b) requires that the contracting officer put in writing the reasons for cancellation. The record is void of any such written determination. In the present situation, we believe the decision to cancel the RFP was proper and based upon a reasonable basis. Therefore, any failure by the contracting officer to provide a written determination for cancellation was a procedural omission which did not affect the validity of the cancellation. See Aviation Specialities Company, B-178255, February 25, 1974, 74-1 CPD 95.

Accordingly, the protest of Infodyne is denied.


For the Comptroller General
of the United States