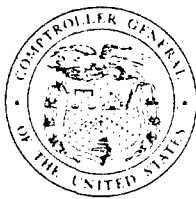


DECISION

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

60615

FILE: B-184227

DATE: March 9, 1976

98509

MATTER OF: Engineered Handling Systems
Litton Unit Handling Systems

DIGEST:

1. Specification provision which, by agency admission, overstated agency's minimum needs and which, if agency interpretation were accepted, would create material specification ambiguity, does not permit full and free competition.
2. Although GAO normally would recommend that ensuing contract be terminated for convenience of Government, termination not recommended in present case in absence of prejudice to any parties and due to the substantial increased costs that Government anticipates from resolicitation. However, deficiency in procurement is brought to attention of agency with recommendation that steps be taken to prevent a recurrence.

Invitation for bids No. M67001-75-B-0034, as amended, was issued by the Marine Corps, Purchasing and Contracting Branch, Camp Lejeune, North Carolina, for the procurement of a mechanized material handling system in accordance with specifications set forth therein.

Prior to the amended bid opening date of June 20, 1975, timely protests were received from Engineered Handling Systems (EHS) and Litton Unit Handling Systems (Litton), neither of which submitted bids under the solicitation, alleging that the specifications were unduly restrictive of competition. Litton's allegation was brief and general, contending that the specifications were predicated directly upon the design criteria set forth in the descriptive literature of Rapistan Incorporated. EHS also alleged that the specifications permitted the supply of equipment only from Rapistan or its authorized distributor, Paul H. Werres Company. EHS, however, protested in some detail a number of specific features, including the number and location of motors shown in the specification blue-print, contending that while 26 were indicated, 7 would be unnecessary if EHS were permitted to use its own system.

By report of October 2, 1975, the Marine Corps advised our Office that bids under the solicitation had expired on August 20, 1975. The extension of the low bid on September 4, 1975, for 30 days, was conditioned upon no increase in the price of steel and

materials. The agency therefore considered it nonresponsive, as a result of which all acceptable bids had expired. In view thereof, the Marine Corps expressed its intent to readvertise the requirement using essentially the same specifications.

In this regard, the report responded at length to each of EHS's specific allegations, setting forth the Marine Corps' reasons why all but one of the protested features were essential to its minimum requirements, and were therefore considered not to be unduly restrictive of competition. With regard to the issue of number and location of motors, however, the Marine Corps conceded that while the subject drawings, showing the motors positioned on each key component of the system where force was applied, did not represent "unreasonable positioning," it was amenable to any number of motors so long as the operation and performance of the system was satisfactory. The Marine Corps stated it did not anticipate that the successor solicitation would specify motor locations.

Upon receipt of that administrative report, the second low bidder, Paul H. Werres Company, Inc., contacted the Marine Corps and advised that its bid had not been permitted to expire, but had been extended through monthly correspondence with the contracting officer from July through October 1975. Pursuant to investigation, agency headquarters corroborated Werres' information with the contracting officer and determined that Werres had in fact kept its bid alive and eligible for acceptance. Along with the foregoing information, an agency report of November 12, 1975, stated that the Marine Corps concurred in Werres' interpretation of the motor number and location requirement, which was that within the industry, the number, actual location and size of the motors is at the option of the vendor and that the drawing included in the specifications was not to be considered mandatory but only as a "guide" covering "general requirements only."

Both Litton and EHS responded to these developments. EHS indicated it had reviewed the administrative reports of October 2 and November 12, but now wished to limit its protest to a single issue: that of the number and location of motors. Litton likewise advised that it would like to have our Office consider this issue as the primary basis of its protest. Since that firm submitted no rebuttal comment as to the other matters raised in the administrative report, it appears that Litton has likewise restricted its protest to this issue.

Both firms submit that the drawing's depiction of 26 motors at the locations shown is a literal and mandatory requirement. Moreover, they state, the combined cost of motors, starters,

disconnects and many hundreds of feet of wiring represent a substantial cost and thereby impose a high financial risk on the contractor should the Marine Corps, after award, change its stated position that the number of motors and their locations on the drawing are not obligatory, but instead require each and every motor specified by the drawing to be supplied or, in the alternative, delete some of the motors and extract consequential monetary consideration from the successful bidder. In view thereof, these arguments must be construed as a protest that the agency's (and Werres') interpretation of the drawing's requirements is not only erroneous but, if accepted, would create a specification requirement that was materially ambiguous and which fails to permit full and free competition.

On November 26, 1975, Werres advised the contracting agency that its bid was predicated upon the furnishing of motors in numbers and at locations strictly in accordance with the drawing (CD 1000) included in the specifications, and that it never intended to furnish anything less under its prospective contract.

By yet another report of the same date, November 26, 1975, the Marine Corps advised that Werres had extended its bid to December 19, 1975. However, the Corps took exception to the foregoing positions of EHS and Litton, stating that the purchase description in the IFB may be described as a "combination design and performance" specification. Reference was made to various narrative sections of the purchase description which established performance requirements but which did not mention horsepower requirements, motor quantities, or motor locations for the accumulating conveyors, requiring only that motors be of sufficient horsepower to handle the prescribed loading. Accordingly, the Corps charges that the protesters have placed the drawing in an unreasonable light since if no horsepower requirements were specified, there could be no determination as to quantities and locations of motors. By way of illustration, the Corps submits that a task could be accomplished equally by three motors of small horsepower or one motor of larger horsepower. The Corps further argued that even if there was an inconsistency between the requirements of the drawing and those narrative segments of the purchase description characterized as performance specifications, thereby resulting in inadequate, ambiguous or otherwise deficient specifications, there was not a compelling reason to cancel the solicitation and readvertise since neither of the protesters nor any of the bidders could be considered to have been thereby prejudiced.

By letter of January 6, 1976, our Office was advised that the contract was awarded to Werres on December 16, 1975, because of its refusal to extend its bid acceptance beyond December 19, 1975. The award was made prior to our resolution of the protest under the authority to do so provided by Armed Services Procurement Regulation (ASPR) § 2-407.8(b)(2) and (3) (1975 ed.) where it is determined that an immediate award is considered advantageous to the Government. Factors cited were the long delay in procurement of the system precipitated by the path of the protest as it has thus evolved, and the savings that would result from an award under the present IFB because of the anticipated inflationary impact of rising material prices on future bids.

With regard to the concession by the Corps in its initial report that it was "amenable to any number of motors so long as the operation and performance of the system is satisfactory", and its anticipation that a successor solicitation would not specify motor quantities and locations as required by the current drawing, it would thereby appear that the drawing has overstated the Corps' minimum needs. In such instances, where a contracting agency has admitted that a specification requirement has overstated its minimum needs, we have held that the specification provision at issue is unduly restrictive of competition and thereby defective by precluding free and full competition. 52 Comp. Gen. 815, 817 (1973). In view thereof, and since EHS's system utilizing seven less motors than shown on the drawing would apparently be acceptable to the Corps providing that it met all of the other specification requirements, it would appear that this particular allegation by EHS is vindicated by the record.

Further, our review of the solicitation does not corroborate the agency position that the drawing (CD 1000) was for reference purposes only and did not require strict adherence thereto. Section 2.0, entitled "General Requirements", references both the drawing and subsequent narrative specifications. Section 2.1 states that "the equipment for the receiving system shall be in strict accordance with the requirements herein specified * * *." Section 2.2 states that "the contractor shall accurately lay out his work according to the drawings and be responsible for the correct location of the equipment." In view thereof, we must conclude that the solicitation required the number of motors and and in the locations set out by CD 1000. If we are to accept the agency's position that other narrative sections of the specifications may be interpreted to leave the number and location of motors to the contractor's discretion, then we must conclude that the latter are at variance and in conflict with section 2.2, resulting in an ambiguity as to that which is required. Moreover,

we would consider such ambiguity to be material since the submissions by Litton and EHS indicate that the number of motors and their concomitant requirements for starters, wiring, etc. would affect the cost of the item and, presumably, bid prices.

In view of the foregoing defect in the specifications, we would ordinarily recommend that the contract be terminated for the convenience of the Government and that the Corps resolicit on the basis of revised specifications consistent with the foregoing conclusions. See Machinery Associates, Inc., B-184476, November 18, 1975, 75-2 CPD 323. Such recommendation, however, must first take into account, inter alia, the estimated cost of termination and whether the integrity of the competitive bidding system so dictates. See Data Test Corporation, 54 Comp. Gen. 715 (1975), 75-1 CPD 138.

In this regard, we note the Corps' assertion that the loss of savings to be realized under installation of the new system, assuming an anticipated 6-month delay incident to resolicitation, would amount to \$29,500. In addition, the estimated price increases in steel and other materials would result in increased bid prices of approximately 12 percent. Where corrective action of the nature herein contemplated would result in a substantial financial loss to the Government, we have held that it would not be in the best interest of the Government to recommend termination. See Data General Corporation, B-182965, May 20, 1975, 75-1 CPD 304.

Concerning the integrity of the competitive bidding system, we have carefully reviewed the record for evidence of prejudice to either the protesting concerns or the other bidders under the solicitation. With regard to the latter, we note that none of them has alleged that it was misled by the specifications in question. Accordingly, we find no prejudice to the firms submitting bids under the solicitation.

With regard to the two protesters, Litton gave no indication that it was deterred from submitting a bid due to the drawing's requirement for numbers and locations of motors. Litton first raised this particular issue only after the report of October 2, 1975, addressed this issue in response to EHS's

allegation. In view thereof, we do not feel that this particular factor was responsible for Litton's failure to submit a bid, and must therefore conclude that Litton was not thereby prejudiced. EHS did protest this particular requirement prior to bid opening. However, this allegation was not included among EHS's principal objections, numbered one through five, rather it was mentioned only in ancillary manner incidental to the five principal features to which objections were made. Accordingly, it is extremely doubtful that EHS's decision not to submit a bid would have been altered by the elimination of the drawing's requirement for the number and location of motors. Thus, we are without a clear basis upon which to conclude that EHS was prejudiced either. In the absence of a clear indication from the record of prejudice to any of the bidders [or protesters], we have taken the position that interference with an otherwise improper award would not be warranted. See 53 Comp. Gen. 320, 327-8 (1973).

In view of the substantial anticipated costs to the Government of termination and resolicitation, as well as the absence of prejudice to either the bidders or the protesters, we do not believe termination would be warranted in the instant case. However, we are, by separate letter, bringing the noted defect in the procurement to the attention of the Secretary of the Navy with a recommendation that appropriate procedures be utilized to prevent a recurrence.

Acting Comptroller General
of the United States