

6019



DECISION

PL 1
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-190774

DATE: April 13, 1978

MATTER OF: Keuffel & Esser Company

DIGEST:

1. IFB may permit waiver of technical data requirement for bidders who had furnished such data under prior contracts even though not specifically authorized by ASPR.
2. Waiver of technical data under terms of IFB is not improper even though it clearly results in substantial competitive advantage to bidder.

An invitation for bids was issued by the U.S. Army Troop Support and Aviation Material Readiness Command on September 15, 1977, for 116 Surveying Levels, Dumpy Style, FOB Destination, and associated technical data. There were amendments to the solicitation not affecting this protest which extended the bid opening date to November 29, 1977.

The solicitation is being protested by Keuffel & Esser Company (Keuffel & Esser) due to the inclusion of paragraphs B-7 and D-2 which read respectively as follows:

"B-7 Prior Submission of Bids. An offeror submitting firm prices for data who has delivered or is obligated to deliver to the Government under another contract or subcontract the same data and is agreeable to waiver of such data in the award may identify one such other contract or subcontract for each item of data and state where he has already delivered such data."

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"D-2 Data Evaluation

(a) Offerors submitting a specific response other than firm prices for data will be evaluated on the total amount of their offer. If award is made to such offerors, it will include all data items whether or not previously furnished. Whether or not the offeror is eligible for waiver of such data, it will not be an evaluation factor considered in making award.

"(b) Award to offerors submitting firm prices for data previously furnished may be made for less than the total data requirements listed. The price reduction attributable to waiver of such data items will be an evaluation factor considered in making award."

At the time the solicitation was issued, Dietzgen Corporation had a contract for the same item under an award dated September 25, 1976, requiring the submission of technical data. Dietzgen was experiencing problems on that contract and could not qualify for the waiver of technical data included in the subject solicitation. The protested provisions were included in the invitation for bids (IFB) in case Dietzgen, or, presumably, anyone else, might qualify for the waiver prior to bid opening.

Neither Dietzgen nor Keuffel & Esser was the lowest bidder. None of the six firms submitting bids qualified for the waiver of technical data.

Keuffel & Esser protests the inclusion of the two noted provisions in the solicitation on the grounds that the goal of full and free competition as found in 10 U.S.C. § 2305(a) (1970) will be violated. Protester contends that the inclusion of such

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provisions in a future IFB will effectively preclude competition in favor of an incumbent bidder far beyond the limits of normal competitive advantages enjoyed by any incumbent. Additionally, Keuffel & Esser argues that since the type of waiver involved is not specifically permitted by statute or regulation, inclusion of such a provision should be viewed as illegal.

The relief requested is that the contested provisions be stricken from the present as well as future solicitations. It is argued that even though no bidder qualified for the waiver under the present IFB, denial of this protest will create an unfair advantage akin to a monopoly in favor of the low bidder under this solicitation in all future solicitations.

We will first respond to the argument that an IFB containing such a waiver violates the "full and free competition clause" in 10 U.S.C. § 2305(a) (1970). The concept of full and free competition is not an absolute term but rather a relative one. The achievement of "full and free competition" by the specifications and invitations for bids is limited by the qualification that such competition be "consistent with the procurement of the property and services needed by the agency." An agency should not have to pay twice for what it has already bought nor pay for what it does not need.

Competitive advantages such as incumbency may be found in virtually every procurement and the mere existence of such an advantage does not, in and of itself, violate the principles of full and free competition. In ENSEC Service Corp., B-194803, B-184804, B-184805, January 19, 1976, 76-1 CPD 34, our Office stated that "we have long recognized that certain firms may enjoy a competitive advantage by virtue of their incumbency or their own particular circumstances or as a result of Federal or other public programs." In many cases, we have stated that it is not possible or necessary to eliminate advantages which might accrue to a given firm whether by foreign subsidies, B-175496, November 10, 1972; or

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the acquisition of substantial facilities due to prior contracts, Houston Films, Inc., B-184402, December 22, 1975, 75-2 CPD 404; or the waiver of preproduction tests, B-140361, November 10, 1959; or the waiver of preliminary samples and testing, 42 Comp. Gen. 717 (1963). There is no requirement that factors or handicaps be provided to equalize the competitive advantage enjoyed by a bidder over his competition. B-184402, December 22, 1975, 75-2 CPD 404; 53 Comp. Gen. 86 (1973); 42 Comp. Gen. 717, 721 (1963); B-140361, February 3, 1960. The test to be applied is whether the competitive advantage enjoyed by a particular firm would be the "result of preference or unfair action by the Government." See, B-175834, December 19, 1972.

Applying such a test, we find no objection to an award where the advantage resulting from a contractual provision is the type of normal commercial advantage enjoyed by bidders who are in production of an article on which the Government is soliciting. See Piasecki Aircraft Corporation, B-181913, June 27, 1975, 75-1 CPD 391. We see no difference in the data provisions in this case and the many other situations previously accepted by this Office which result in one party having some advantage over another in the evaluation process.

Consequently, we hold that the mere fact that a competitive advantage may result from a provision in an IFB does not by itself violate the principles of full and free competition so as to render the solicitation void.

Next, we consider protester's argument that provisions providing for the waiver of technical data are illegal because they are not specifically provided for by the Armed Services Procurement Regulation (ASPR § 1-900, et seq. (1976 ed.)).

We find no provisions prohibiting the waiver of technical data in any regulation or statute applicable to this situation. While such a waiver is not specifically enumerated in the regulations,

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we believe such an evaluation factor, along with other items not specifically enumerated, was contemplated by the language used in ASPR:

"The factors set forth in (i) through (vi), among others, may be considered in evaluating bids * * *" (Emphasis added.) (ASPR § 2-407.5 (1976 ed.)).

The absence of a specific provision prohibiting such a waiver indicates that the contracting officer's action in including the waiver in the IFB is proper. This conclusion is consistent with the statutory framework and administrative decisions declaring that procurement procedures be utilized to fulfill the minimum needs of the Government. We are not persuaded by protester's suggestion that the omission of an evaluation factor mandates that it be prohibited from the evaluation especially considering the broad language used in the ASPR provision quoted above.

Since there is nothing improper in the inclusion of a waiver of technical data provision in an IFB, we find no reason to further respond to protester's argument as it relates to future solicitations.

Accordingly, the protest is denied.

Deputy


Comptroller General
of the United States