Proc II

DECISION

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

9818

FILE: B-190653 DATE: April 13, 1979

MATTER OF: Telectro-Mek, Inc.

[Protest Alleging that RFP Should Have Been Canceled and Resolicited]

DIGEST:

1. Allegation that Request for Proposals (RFP) should have been canceled and resolicited because five amendments substantially changed requirements is without merit where all competitors received amendments and no useful purpose would be gained by resolicitation.

2. Contracting agency's decision to solicit the procurement through negotiation and not formally advertise is unwarranted as specifications and drawings are available and the only factor to be negotiated was price.

3. Contracting officer's failure to set aside procurement for small business is not for review by General Accounting Office (GAO) as determination to set aside procurement is matter within authority and discretiion of agency and nothing in Small Business Act or applicable regulation mandates small business set aside for any particular procurement.

4. Amended specifications are not ambiguous where only one reasonable interpretation was possible and record indicates that protester correctly interpreted specifications in its offer.

5. It is not GAO practice under bid protest function to conduct investigations to establish validity of protest on speculative allegations of "buy-in" and irregularities. Burden is on protester to substantiate its case.

DLG00045

Telectro-Mek, Inc. (TMI) protests the award of a contract by the Department of the Navy, Ships Parts Control Center (SPCC) under Request for Proposal (RFP) N00104-77-R-WN08 to Gulton Industries, Inc. (Gulton).

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The contract was a one year fixed-price requirements contract to "restore and/or modify" and "repair and/or modify" contaminated fuel detector units (CFDs).

The RFP was issued on July 15, 1977. Pursuant to the RFP, offerors were required to propose a fixed unit price for supplying "necessary labor, material and services to restore to serviceable operating condition various quantities of CFDs." "Serviceable operating condition" was defined as "capable of functioning as a new unit." Proposals were to be based on an estimated quantity of 77 units, with 32 units available for inspection by prospective offerors prior to the submission of proposals. According to the RFP, these 32 units were "presumed but not guaranteed to constitute a representative sample of the condition of the Navy's * * * inventory." Evaluation for award of the contract was based solely on price as no technical proposals were requested.

In response to questions posed by prospective offerors, SPCC amended the RFP five times. Amendments 0001 and 0002 are not germane to the protest. Amendment 0003, dated September 2, 1977, increased the estimated quantity from 77 units to 197 units and redefined "serviceable operating condition" to be "capable of functioning as a new unit, as described by the attached drawings." The applicable drawings referred to in this new definition were identified as Assembly Drawing 521074 Rev. A (a Gulton drawing). Amendment 0004, dated September 9, 1977, substituted the words "restore and/or modify" in lieu of "restore" and "repair." Amendment 0005, dated September 15, 1977, deleted the definition of "serviceable operating condition" provided by amendment 0003, and redefined it as "capable of functioning as a new unit within the performance criteria of MIL-D-22612B(AS)." The amendment further provided that the drawings referred to in amendment 0003 were to be "utilized for reference only."

Best and final offers were received on October 12, 1977 with the following result:

Gulton Industries, Inc.	$ 800.00/unit
Alton Iron Works, Inc.	$ 966.00/unit
Telectro-Mek, Inc.	$1,166.00/unit

Offers were confirmed and the contract was awarded to Gulton as the low, responsible offeror.

As its bases for protest, TMI alleges that:

1. The original solicitation was changed so substantially by various amendments that it should have been canceled and resolicited.

2. Since drawings and specifications were available and price was the only factor to be negotiated, the procurement should have been formally advertised.

3. The procurement should have been restructured as a partial small business set-aside.

4. The specification was ambiguous and ~~the~~ ambiguity was compounded by the sequences and nature of change to the specification.

5. There were strong indications of a buy-in by Gulton. the low bidder

We address each of these contentions in order.

TMI's first contention is that the ultimate effect of the five amendments substantially changed the requirement thereunder so that a new solicitation was required under Defense Acquisition Regulation (DAR) § 3-805.4(b) (1976 ed.). In this regard, TMI believes that as a result of the increase in repairable CFDs from 77 to 197 the original 32 unit inspection sample was no longer representative so that offerors had no criteria on which to base their offers.

This Office has consistently held that the decision whether to cancel an RFP and resolicit is a matter for the sound judgment and discretion of responsible agency officials and is subject to review by our Office only

if it is clearly shown to be without a reasonable basis. Environmental Protection Agency-Request for Modification of GAO Recommendation, 55 Comp. Gen. 1281 (1976), 76-2 CPD 50; Semiconductor Equipment Corporation, B-187159, February 18, 1977, 77-1 CPD 120. We find that the contracting officer's decision that the amendments to modify the RFP did not warrant resolicitation was reasonable.

For example, cancellation and resolicitation would not have provided TMI with any information relative to the specifications, the estimated quantities or the work requirements which it did not already possess as a result of the five RFP amendments. While the estimated quantities were increased and the specifications modified, we fail to understand how cancellation of the RFP and subsequent resolicitation of the same requirement could have benefitted TMI or its competitors. Moreover, it is the Navy's position that the 32 samples available for inspection were still considered representative of the condition of the Navy's inventory notwithstanding the substantial increase in estimated quantities (the increased estimate is asserted to be based on the best information available to the agency). We have no basis to conclude the Navy's assertions in this respect are incorrect, nor has TMI provided any evidence of their inaccuracy. Thus, we believe that TMI's assertions provide no meaningful basis for protest.

TMI's second contention is that the procurement should have been formally advertised because "drawings and specifications were available and price was the only factor to be negotiated." We agree.

There is a statutory preference for the use of formal advertising as a means of procurement where "such method is feasible and practicable." 10 U.S.C. 2304(a)(1976). One exception to this preference permits negotiated procurements where "purchasing is for property or services for which it is impracticable to obtain competition." 10 U.S.C. § 2304(a)(1) (1976). The Defense Acquisition Regulation (DAR) provides that negotiation may be appropriate "when the contemplated procurement is for technical nonpersonal services in connection with the * * * servicing * * * of equipment of a highly specialized nature," DAR §3-210.2(vii), or when it

involves repairs, alterations or inspection, where the extent of work is not known." DAR § 3-210.1(ix). However, DAR § 3-101(a) states that even when one of the negotiation exceptions to formal advertising could be invoked, formal advertising should still be used when it is feasible and practicable. 51 Comp. Gen. 637 (1972). The use of negotiation therefore is dependent not only upon the existence of the specified situations listed in the DAR but also where it is not practicable to obtain competition through the use of formal advertising. Thus, the pertinent criterion is not the inability to predict the exact amount of work to be done, or the complexity of the product or service, but rather the impracticality of obtaining competition through the use of formal advertising because of the impossibility of drafting a reasonably adequate specification for the work required. B. B. Saxon Company, Inc., 57 Comp. Gen. 501 (1978), 78-1 CPD 410.

In this respect, the contracting officer's Determination and Findings found that it was impracticable to formally advertise because the procurement was for the repair of equipment of a highly specialized and technical nature, the exact nature and amount of work to be performed was not known, and because TMI and Gulton were the only companies known to possess the knowledge of test specifications and procedures applicable. We find none of these rationales persuasive.

The fact that the equipment involved in a procurement is of a highly technical and specialized nature is insufficient by itself to justify the negotiation. Informatics, Inc., B-190203, March 20, 1978, 78-1 CPD 215; Sorbus, Inc., B-183942, July 12, 1976, 76-2 CPD 31. Moreover, the competition was limited to price and the available specifications adequately described the work. That the contracting officer was unaware of the exact nature and amount of work to be performed would not justify the use of negotiation in such circumstances. B. B. Saxon Company, supra. Finally, the contracting officer's finding that only Gulton and TMI possessed the necessary knowledge of the test specifications and procedures involved suggest to us that negotiation was used to some extent to exclude incompetent firms from competing, a reason which does not justify negotiation.

See Bristol Electronics, Inc., B-190341, August 16, 1978, 78-2 CPD 122. This is particularly so in view of the contracting officer's claim that the procurement specifications provide "detailed descriptions of the functional and operational criteria * * * [are] considered definitive as written and * * * should not be confusing to any offeror capable of producing an item meeting the minimum specification requirements."

Thus, under the circumstances of this case, we believe that it was possible to obtain competition through the use of formal advertising and that the use of negotiation was not warranted. However, adequate competition was obtained through the negotiation procedures and Gulton was clearly the low offeror. In circumstances where adequate competition has been obtained and the results would have been the same if the procurement had been formally advertised, we have denied the request for resolicitation because the protester was not prejudiced by the use of negotiation and resolicitation would have been tantamount to sanctioning a prohibited auction. Bethesda Research Laboratories, Inc., B-190870, April 24, 1978, 78-1 CPD 314. Nonetheless, we believe that future procurements of these services, under the same or similar circumstances, should be conducted by means of formal advertising, and are so recommending to the Secretary of the Navy.

TMI's third contention is that the procurement should have been restructured as a partial small business set-aside.

While it is the policy of the Government to award a fair proportion of purchases of supplies and services to small business, there is nothing in the Small Business Act which mandates that there be set aside for small business any particular procurement. General Electrodynamics Corporation, B-190020, January 31, 1978, 78-1 CPD 78. Thus the determination as to whether a procurement should be set aside for small business is a matter within the authority and discretion of the contracting agency. Francis & Jackson, Associates, 57 Comp. Gen. 244 (1978), 78-1 CPD 79. We therefore find no basis to question the contracting officer's determination in this respect.

TMI's fourth contention is that "the specification was ambiguous and that the ambiguity was compounded by the sequences and nature of changes, which SPCC refused to clarify in spite of numerous requests." TMI raises two issues in this regard. TMI complains that the RFP as amended failed to clearly set forth precisely what offerors were required to do and also that it was unclear how the MIL-SPECS were to be applied as a repair standard. These assertions are inconsistent with TMI's prior argument that the procurement should have been formally advertised, as the basic premise in procurement by formal advertising is the existence of clear and unambiguous specifications. See 52 Comp. Gen. 815 (1973).

The requirement that specifications be free from ambiguity is founded on the basic procurement principle that specifications should be sufficiently definite so as to permit competition on a common basis. Johnson Controls, Inc., B-188488, August 3, 1977, 77-2 CPD 75. An ambiguity in the legal sense exists if two or more reasonable interpretations are possible. 48 Comp. Gen. 757, 760 (1969); Kleen-Rite Corporation, B-189458, September 28, 1977, 77-2 CPD 237. In this case, we believe that the specifications as amended could not be reasonably interpreted in two ways and consequently cannot be viewed as ambiguous.

As discussed above, the RFP as originally drafted required bidders to base their proposals on supplying "necessary labor, material, and services to restore to serviceable operating condition various quantities of CFDs." The definition of the phrase "serviceable operating condition" changed from the original meaning "capable of functioning as a new unit" to its second meaning, "capable of functioning as a new unit as described by the attached drawings" as a result of Amendment 0003. Finally, amendment 0005 revised the definition to mean "capable of functioning as a new unit within the performance criteria of MIL-D-22612 (AS)," utilizing the attached drawings (from amendment 0003) "for reference only". Secondly, the amendments changed the duty to "restore" to duty to "restore and/or modify" or "repair and/or modify." TMI alleges that the inclusion of the word "modify" in Amendment 0004,

coupled with the changes in the definition of "serviceable operating condition", rendered offeror's duties under the RFP unclear. Because amendments 0003 and 0004 referenced a Gulton drawing and added the word "modify" to the work requirement, TMI apparently feared that it would be required to modify CFDs of its manufacture to the Gulton standard, even though these units could be "repaired" or "restored" to function properly.

The Navy reports that it was not its desire to require modification of TMI units to the Gulton drawings but that it did require that the "repaired", "modified", or "restored" units meet the performance criteria of the cited MIL-SPEC. In this respect, the Navy claims that while TMI's units of "recent" manufacture would meet these performance requirements without modification, some of the older units manufactured by TMI as long as 16 years ago would require modification for that purpose. Thus amendment 0005 specified that the Gulton drawings were to be used as a "reference only" but required that the units function within the performance criteria of the MIL-SPEC. Inasmuch as both Gulton and TMI units were in the Navy inventory we believe it was not inappropriate to include the Gulton drawings as a "reference" if these units were to be restored or repaired by another contractor. The Navy also points out that the language of the amended specifications is consistent with the language of the Basic Ordering Agreement awarded to TMI, and that TMI's offer under the RFP was predicated on the understanding that the MIL-SPEC was the controlling specification. We do not believe that a fair reading of the RFP as amended can reasonably be considered to be ambiguous in view of the clearly expressed requirements of amendment 0005.

TMI also asserts that the procurement was conducted in a highly irregular manner in which there was a deliberate "buy-in" by Gulton with an implicit understanding by SPCC that Gulton would be able to obtain a substantial increase in its per unit price through the issuance of change orders or modifications. Also TMI contends that these modifications will make the CFDs a proprietary item which could only be repaired by Gulton. We find that this allegation is speculative.

TMI attempts to support this contention by stating SPCC's increase in the estimated quantity was unexplained, but as noted previously this increase was made on the basis of the "best information available." Additionally, TMI has offered no evidence that SPCC and Gulton had an understanding that Gulton would be taken care of through modifications or changes, and its request that this Office investigate the conduct between SPCC and Gulton is denied. It is not our practice under the bid protest function to conduct investigations to establish validity of a protester's speculative statements. Rather, the protester has the burden of substantiating its case. Bowman Enterprises, Inc., B-194015, February 16, 1979, 79-1 CPD 121.

Finally, TMI alleges that First Article Testing approval and waiver provisions were prejudicial since only Gulton could qualify for the waiver and therefore could lower its unit price. In this regard, the record shows that the waiver was not considered for the purpose of evaluating best and final offers so that Gulton did not have a competitive advantage. We therefore find no merit to this contention.

The protest is denied.

R.F. Keller

Deputy Comptroller General
of the United States