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DECISION

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

B-194185, B-195175, B-195209,
B-195401, B-196269

FILE:

DATE: November 20, 1979

MATTER OF: Therm-Air Mfg. Co., Inc. - DLG 01648

MATTER OF:
[Protest of Solicitation Cancellation]
DIGEST:

1. Since contracting agency had not taken any adverse action on February 1 protest filed with it at time February 23 protest was filed in GAO, latter protest was filed timely and is for consideration on merits.
2. Cancellation of solicitation after opening of bids to require spare parts to be furnished with equipment in order to insure that parts will be available when needed by user to repair equipment is proper, since changing requirements of procurement after opening of bids to properly express minimum needs of Government constitutes compelling reason for cancellation of solicitation.
3. Although protester states that modified compressors will meet agency's requirement for repairability, provision in solicitations precluding modified units is upheld, since record provides reasonable justification for provision.

DLG 01648

Therm-Air Mfg. Co., Inc., protests the cancellation of Navy Ships Parts Control Center (NSPCC) solicitation N00104-78-B-1079 and certain of the requirements in NSPCC solicitations N00104-79-B-0695, -0770, PPK044-9125-6743 and N04638-83-23V340.

The protests against the cancellation and the other solicitations are denied, except in the respect noted below.

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B-194185
B-195175
B-195209
B-195401
B-196269

2

Contrary to the NSPCC position, the Therm-Air protest against the cancellation is timely. The February 1 letter to it from Therm-Air constituted a protest. The letter states that "cancellation has been issued without regard for the protection afforded by ASPR [DAR] 2-404.1" and "requests that the award be made to the lowest responsible bidder." Although the letter did not use the word "protest," it is clear from the objection to the contracting activity's action and the request for award under the solicitation that a protest was lodged. A letter reasonably understood to be questioning the contracting activity's action need not contain the word "protest" to be characterized as a formal bid protest. TM Systems, Inc., 56 Comp. Gen. 300 (1977), 77-1 CPD 61. Since the agency had not taken any adverse action on the February 1 protest at the time the February 23 protest was filed in our Office, the latter protest was filed timely and is for consideration on the merits.

Cancellation of solicitation -1079 for air conditioners was proper. The solicitation was canceled after the opening of bids because it was decided that spare parts for the compressors should be obtained with the air conditioners in order to insure that parts will be available when needed by the user to repair the compressors. Changing the requirements of a procurement after the opening of bids to properly express the minimum needs of the Government constitutes a compelling reason for the cancellation of a solicitation. Creative Electric, Inc., 57 Comp. Gen. 861 (1978), 78-2 CPD 231.

Among the requirements for the compressor is a statement that "a welded or sealed hermetic type compressor modified for accessibility is not acceptable." Therm-Air objects to this provision because it precludes Therm-Air from furnishing the modified Copeland Corporation compressors it furnished in past procurements. NSPCC explains that it has included this requirement essentially because the Copeland compressor is not designed to be repaired. NSPCC relies on a statement from Copeland to that effect. Further,

B-194185
B-195175
B-195209
B-195401
B-196269

3

NSPCC states that repairability of the units is complicated by the tolerance deviations that exist between individual units because they are not built to be repaired. In support of its position, NSPCC additionally relies on the fact that when it attempted to have Therm-Air fix a number of units in need of repair, Therm-Air refused. NSPCC indicates that on another occasion, when it attempted to obtain a replacement valve from a Therm-Air dealer, it was advised that the valve was unavailable because it was obsolete, but that complete compressor units were available.

Therm-Air has responded that the compressors that it purchases from Copeland are "changed in their entirety to meet the specifications" and that the letter of refusal to repair the units only indicates that the basis for the refusal is that the "cost of administration and the cost of labor inefficiency caused by negotiation between the start and completion of each individual job will approach the cost of a new compressor." Further, as to a dealer being unable to supply a part, Therm-Air maintains that it is not responsible for the erroneous representations and actions of its dealers.

We have consistently held that the establishment of specifications reflecting the actual needs of the Government is primarily the responsibility of the administrative agency. American Electric Construction Co., Inc., B-189532, November 8, 1977, 77-2 CPD 350. It has also been held that the advertising statutes require that every effort be made to draw specifications in such terms as will permit the broadest field of competition consistent with the Government's actual needs. We have recognized that Government procurement officials, who are familiar with the conditions under which supplies, equipment or services have been used in the past, and how they are to be used in the future, are generally in the best position to know the Government's actual needs, and therefore, are best able to draft appropriate specifications. Manufacturing Data Systems Incorporated, B-180586, B-180608, January 6, 1975, 75-1 CPD 6; Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181. Consequently, we will not

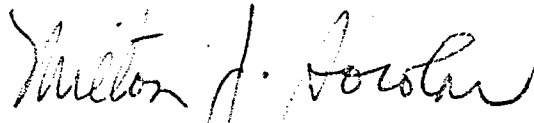
B-194185
B-195175
B-195209
B-195401
B-196269

4

question an agency's determination of what its actual needs are unless there is a clear showing that the determination has no reasonable basis. Maremont Corporation, supra; Jarrell-Ash Division of the Fisher Scientific Company, B-185582, January 12, 1977, 77-1 CPD 19; Drexel Dynamics Corporation, B-188277, June 2, 1977, 77-1 CPD 385.

We think that the record provides a reasonable justification for the requirement precluding units modified for accessibility. Based on engineering analysis and actual experience, NSPCC has concluded that there is a necessity for imposing a restriction against the furnishing of modified units. Although Therm-Air has indicated that the modified compressors will meet the agency's requirement for repairability, we cannot say that the experience NSPCC has had, despite protestations to the contrary, does not provide support for its position.

Therm-Air also protested the utilization in the solicitations of the general requirements for "other materials approved by the Naval Ship Engineering Center" and for "specific devices." NSPCC, recognizing the validity of the complaint, did amend some of the solicitations to clarify the requirements. We recommend that any of the protested solicitations which have not been amended to clarify the meaning of the terms quoted in this paragraph be revised likewise.



For The Comptroller General
of the United States