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DECISION



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

FILE: B-205116

DATE: June 18, 1982

MATTER OF: LM&E Co., Inc.

DIGEST:

1. Decision to waive first article testing is essentially discretionary one which will not be disturbed unless it is clearly arbitrary or capricious. Where previous procurement indicated specifications were defective, agency was not arbitrary in requiring first article testing for first items produced under revised specifications and in rejecting low bid which was based solely on waiver of first article testing.
2. IFB which solicited alternative bids: (1) with first article testing and (2) without such testing--although it appeared first article testing would be required of all bidders--violated intent of DAR § 1-1903(b), which states that in such cases, the agency should not solicit alternative bids. Although this deficiency is not considered compelling reason for cancellation of procurement, GAO recommends that revised specifications be reviewed by quality control personnel as to need for first article testing prior to, rather than after, issuance of IFB.
3. Where increased quantities added by amendment are no longer needed, agency may accept bid for initial quantities even though bidder did not acknowledge amendment since solicitation did not prohibit bids for less than the specified quantity nor the agency from accepting less than the specified quantity.

LM&E Company, Inc. protests the rejection of its low bid and the proposed award to another bidder of a contract for helicopter blade tie-downs under invitation for bids (IFB) No. DAAJ09-81-B-0626 issued by the U.S. Army Troop Support and Aviation Materiel Readiness Command, St. Louis, Missouri. The IFB provided for alternative bids, one including first article testing and the other without first article testing. LM&E submitted a bid only for performance without first article testing; the Army refused to waive such testing and rejected the bid. LM&E protests rejection of its bid; for other reasons, it also protests acceptance of the lowest bid that included first article testing. For the reasons discussed below, we deny this protest.

The solicitation cautioned that bids based on waiver of first article testing might be determined to be non-responsive unless accompanied by the evidence required by Section L-11. This section reads, in part, as follows:

"Where supplies identical or similar to those called for in the solicitation have been previously furnished by the bidder or offeror and have been accepted by the Government, the requirement for first article approval may be waived by the Contracting Officer. However, the Contracting Officer may determine the waiver of the first article approval requirement is not in the best interest of the Government; therefore all bidders/offerors should submit a bid/offer based on compliance with the first article approval provisions of this solicitation.

"All bidders/offerors who have previously furnished supplies identical or similar to those called for in this solicitation, which have been accepted by the Government, are urged to also submit a bid/offer based on exclusion of the requirement for first article approval. Bidders/offerors who submit a bid/offer based on exclusion of the requirement for first article approval must furnish test reports or other evidence (e.g., number of contract covering a prior procurement or test) with the bid/offer to show that he has manufactured and delivered under any prior Government contract the first article and/or production equipment

which in the case of first article equipment has been approved or conditionally approved prior to the date of opening of this Invitation for Bid/closing date of this Request for Proposal (whichever is applicable) or, in the case of production equipment, has been accepted by the Government prior to said date of opening/closing. Such test reports or other evidence shall be considered in determining whether Government approval without a first article approval requirement may be appropriate for the pending procurement." (Emphasis added.)

The protester asserts that it complied with the invitation requirements to submit the evidence required by Section L-11 and that the Army therefore could not properly reject its bid since it met all applicable invitation requirements relating to bids based on first article waiver. The protester further suggests that it was misled here because on a previous procurement it allegedly had been advised by the agency that if it desired first article waiver it should have submitted a bid only on that basis. LM&E also contends that the specifications for the previous contract and this procurement are nearly identical and differ only with respect to the length of a pin. LM&E therefore asserts that the Army arbitrarily refused to waive first article testing.

The Army advises that the previous specifications to which LM&E had produced were defective and, through no fault of LM&E, resulted in unusable products which had to be scrapped. Revised specifications were used for this procurement, and the Army advises that its refusal to waive first article testing reflects the fact that no company, including LM&E, has produced an item in accordance with the new specifications. According to the Army, the old specifications had a deficiency with respect to the design of the tie-down locking mechanism; the revised specifications corrected that deficiency.

The decision to waive first article testing for a particular bidder is essentially a discretionary one which our Office will not disturb unless it is clearly arbitrary or capricious. Kan-Du Tool & Instrument Corporation,

B-183730, February 23, 1976, 76-1 CPD 121. The language used in the IFB here makes clear that when identical or similar items previously have been successfully furnished, the agency may, but is not required to, waive first article testing. Libby Welding Company, Inc., B-186395, February 25, 1977, 77-1 CPD 139. We cannot agree with LM&E that providing the numbers of its previous contracts for similar items removed the discretion of the contracting officer as to whether first article testing should be waived. The invitation provision upon which the protester relies merely warned that those seeking waiver must submit appropriate data in support of the request for waiver, so that the contracting officer could make a determination regarding the waiver; it did not obligate the contracting officer to grant the waiver solely because the requested data was provided. In view of the previous defective specifications, we cannot conclude the contracting officer was arbitrary or capricious in insisting on first article testing in this case.

The oral advice allegedly given to LM&E with respect to a previous procurement--that it should not submit a bid for first article testing if it desired to have such testing waived--cannot compromise the discretion of the contracting officer here. The invitation language clearly indicates the possibility that first article testing would not be waived, and that language cannot lose its validity because of some previous informal oral advice. In this regard, the solicitation cautions bidders that oral explanations and instructions given before contract award would not be binding, and it is well settled that a bidder who relies upon such oral advice does so at its own risk. Klean-Vu Maintenance, Inc., B-194054, February 22, 1979, 79-1 CPD 126; Delora Haidie, B-194154, April 6, 1979, 79-1 CPD 243. This principle would seem to be even more appropriate when the oral advice was given in connection with another procurement. If the protester had any question about the invitation provision in light of the previous advice it claims to have received, it should have sought clarification from the procuring activity prior to bid opening.

Although we find the agency's decision to require first article testing to be reasonable, we are concerned that the solicitation invited bids on the basis of both waiver of first article testing and non-waiver when it appears there was no likelihood that non-waiver would occur. Defense Acquisition Regulation (DAR) § 1-1903(b)

states that when it is known that first article approval will be required of all bidders, an agency is not to solicit bids in the alternative (with and without first article tests). BEI Electronics, Inc. B-193180, March 13, 1979, 79-1 CPD 202.

Here, after the bids were opened, the contracting officer forwarded them to the agency's quality assurance personnel for evaluation as to whether the first article test requirement could be waived. The reply was that the requirement should not be waived for any bidder because this was the first purchase of the item under specifications which had been recently amended to correct the earlier deficiency. Since the reason for not waiving the first article test requirement related to circumstances which existed at the time the IFB was issued, and had nothing to do with the bids received, bids should have been invited solely on the basis of first article testing. It appears that the situation would have been avoided had there been closer coordination between the procurement and quality assurance offices before the solicitation was issued.

Nevertheless, we do not think this lack of early coordination constitutes a compelling reason on which we could recommend that the solicitation be canceled and reissued. Because of the potential adverse impact on the competitive bidding system of canceling an IFB after all bid prices have been exposed, contracting officers, in exercising their discretion, must find such a compelling reason before they can cancel an IFB. Engineering Research, Inc., 56 Comp. Gen. 364 (1977), 77-1 CPD 106. The fact that the terms of the IFB are deficient in some way does not by itself constitute such a compelling reason. North American Laboratories of Ohio, Inc., 58 Comp. Gen. 724 (1979), 79-2 CPD 106. Two factors must be considered: (1) whether the best interest of the Government would be served by making award under the IFB, and (2) whether bidders would be treated in an unfair manner if an award were made. North American Laboratories of Ohio, supra. Here, it appears the interest of the Government requires an award and receipt of the needed supplies as soon as practicable and all bids, including that of the protester, were evaluated properly under the terms of the IFB as issued. However, we are recommending to the Secretary of the Army that procedures be developed which would require that revised specifications be reviewed by quality control

personnel for a determination of whether first article approval should be required of all bidders, prior to when a purchase request is sent to the procuring office.

As further ground for its protest, LM&E contends the lowest bid which included first article testing is non-responsive since that bidder, GP Company, bid only for the initial quantity of 2,064 units and did not acknowledge an amendment which increased the quantity to 2,436 units. The Army states that after bid opening, it determined that the additional units were no longer needed and the contracting officer "canceled" the amendment. LM&E argues that it should have been notified if the amendment was canceled and it should have been given an opportunity to amend its bid.

The Army points out that Standard Form 33 A (Solicitation Instructions and Conditions, Rev. 1-78), which was incorporated by reference into the solicitation, provides that, unless otherwise provided in the schedule, offers may be submitted for any quantities less than those specified and the Government reserves the right to make an award on any line item for a quantity less than the quantity offered at the unit prices offered unless the offeror specifies otherwise in its bid.

As a general rule, the cancellation of a solicitation after bid opening is improper unless that action is warranted by a compelling reason. One such reason is where, as here, supplies are no longer required. DAR § 2-404.1(b)(iii). In most instances, this would result in the cancellation of an entire solicitation rather than a portion of it. We have recognized, however, that under appropriate circumstances it is permissible, under DAR § 2-404.1(b), to cancel a portion of the solicitation. See, e.g., Hampton Metropolitan Oil Co., Utility Petroleum, Inc., B-186030, B-186509, December 9, 1976, 76-2 CPD 471, affirmed on reconsideration February 10, 1977, 77-1 CPD 102.

We see no reason to compel the agency to purchase more items than it needs and, in view of the agency's reservation of the right in the IFB to make award for less than the total quantity specified, we have no legal objection to the proposed award to GP Company.

The protest is denied.

for *Nancy R. Chen*
Comptroller General
of the United States