DECISION

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

Eisen 25013

FILE: B-207485.3 DATE: May 3, 1983

MATTER OF: N.V. Philips Gloellampenfabriken

DIGEST:

1. A solicitation provision which states that the Government is obligated to order the minimum quantity can only be reasonably interpreted as applying to the figure identified in the solicitation as the minimum quantity, not the figure identified as the initial order quantity.

2. Agency properly may cancel solicitation and resolicit in lieu of issuing solicitation amendment and seeking revised proposal where the nature of the Government's requirements is changed from indefinite quantity to a reduced fixed quantity and the fixed quantity is significantly less than the estimated quantity listed in original solicitation.

3. The public disclosure of all offerors' prices does not require that award be made to offeror originally in line for award under initial solicitation, where cancellation of a solicitation and resolicitation are in accordance with Government legal requirements.

4. An auction situation will not be created by a resolicitation even though prices under the initial solicitation were disclosed because the resolicitation reduced the quantity of items to be procured, changed the nature of the contract from

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indefinite to fixed quantity, and was issued approximately 1 year after initial prices were submitted.

N.V. Philips Gloellampenfabriken protests the Air Force's cancellation of request for proposals (RFP) F41608-82-R-7059 for an indefinite quantity of divergent nozzle segments applicable to the F100 aircraft engine and the Air Force's resolicitation of the requirement on a fixed quantity basis under RFP 41608-83-R-7210. The Air Force states it canceled RFP -7059 primarily because, as the result of a bid protest, it incurred substantial delays in attempting to award a contract under that solicitation, during which time it experienced a substantial reduction in its requirements for the segments. Philips contends that there was no reasonable basis for cancellation because the resolicitation actually increased delay by extending the delivery schedule and the Air Force's reduced needs could have been met under the flexible terms of the initial solicitation. Philips further contends that the Air Force has created an auction atmosphere by resoliciting its requirements because the prices offered in response to the initial solicitation have been publicly released.

We deny the protest.

Subsequent to the filing of its protest with our Office, Philips filed suit against the Air Force in the United States Claims Court, seeking injunctive and declaratory relief. N.V. Philips Gloellampenfabriken v. United States, No. 149-83C. By order dated March 21, 1983, the court denied injunctive relief and requested an

advisory opinion from our Office. This decision is in response to that request.[1]

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[1]Philips filed suit on March 17 and on the next day a hearing was held on its application for a temporary restraining order and/or preliminary injunction. We have been provided with a transcript of that hearing. Although the court denied injunctive relief, it retained jurisdiction over the matter and expressed interest in receiving an advisory decision from our Office.

At the March 18 hearing, the parties contemplated that we would be provided with the Air Force's report during the week of March 20. We did not, in fact, receive it until April 4. The report consists of an 11-page cover letter plus supporting documents. The Air Force provided to Philips only the cover letter. When Philips objected, the Air Force released to Philips some of the accompanying documentation. After reviewing this material, Philips again objected to the withholding of documents from it, as the result of which the Air Force provided Philips with additional supporting material. We understand Philips received the last of this material on April 11. On April 13, we received Philips' comments on the Air Force report.

Upon receipt of Philips' comments we closed the record in order to allow sufficient time to issue a decision as requested by the court. We therefore denied Philips' request that a conference be held on April 20 and have not considered any materials furnished us subsequent to April 13.

RFP -7059, issued on December 3, 1981, contemplated a firm fixed price, indefinite quantity contract. The terms of the RFP schedule, as amended, indicated there was an initial order quantity of 15,658; a best estimated quantity of 20,600; a minimum quantity of 10; and a maximum quantity of 38,000.

Procurement of the segments, replacement parts for an engine designed by Pratt & Whitney Aircraft Division, United Technologies Corporation (PWA), was restricted to sources which were previously approved or which could submit data establishing themselves as an acceptable source. The RFP listed Philips and PWA as the only approved sources and provided that offers received from unapproved sources would be considered for award only if, among other conditions, approval could be made in time to meet the Government's requirements.

On January 12, 1982, B.H. Aircraft Company, Inc., an unapproved source, submitted engineering data to the Air Force for evaluation of its acceptability as a source. The agency extended the closing date for the receipt of initial proposals from February 1 to April 2 in order to allow Air Force engineers to determine if B.H. could be qualified as a source in time to meet the Government's requirements. On March 25, the contracting officer was advised by the responsible engineering activity that the source qualification procedures for B.H. included engine tests which would require 6 to 19 months for completion. Proposals were received on April 2 as planned and Philips was determined to be the low offeror. B.H.'s proposal was not considered for award because it did not offer the low price and the waiting period for the firm's approval as a source would significantly delay award.

The Air Force decided to make award solely on the basis of initial proposals so it did not hold discussions with any of the offerors. On May 4, the Air Force mailed a proposed contract, No. F41608-82-D-A075, to Philips, with a cover letter stating that the contract would not be legally binding until executed by the contracting officer and placed in the mail for return to Philips. The proposed contract included quantity requirements which were identical to those set forth in the RFP with one exception:

the "minimum quantity" was listed not as 10, but as 15,658, identical to the "initial order quantity." Philips' representative signed the contract on May 11 and returned it to the Air Force for execution. The Air Force, however, decided to withhold award of this contract when on May 12, 1982, B.H. filed a protest with our Office in which it contended that the Air Force mishandled its request to be approved as a source.

While B.H.'s protest was pending, the Air Force requested on three occasions that Philips, PWA and B.H. extend the acceptance period of their offers. Philips and B.H. granted such extensions, but PWA refused to do so. On October 26, in response to the last request for an extension, B.H. not only extended its offer, but proposed a reduction in its price. The Air Force subsequently reevaluated the offers submitted in light of B.H.'s price reduction[2] and determined that B.H. would displace Philips as the low evaluated offeror.

On October 21, B.H. filed a "further protest" with our Office, in which it contended that the pattern of prices offered by Philips and PWA in prior procurements of this item suggested an "improper affiliation" between the two firms reflecting adversely on their integrity, which the contracting officer had failed to consider while making his determination of Philips' responsibility. Meanwhile, the Air Force was still evaluating B.H.'s acceptability as a source. On October 28, B.H. submitted the required sample parts for engine testing.

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[2]B.H.'s attempted price reduction was a late modification which could not have been considered for award at the time of its receipt by the Air Force. DAR § 7-2002.4, which was incorporated in the solicitation by reference, provides that a price reduction offered by other than the otherwise successful offeror, which was not in response to a request for best and final offers and is received after the time specified for receipt of proposals, cannot be considered. Thus, acceptance of B.H.'s modification was prohibited because B.H. at that time was not otherwise the successful offeror, there was no request for best and final offers, and the modification was received long after the April 2 date for the receipt of proposals. See Corbetta Construction Company of Illinois, Inc., 55 Comp. Gen. 972 (1976), 76-1 CPD 240.

As indicated above, in the course of three extension requests during the 7 months following receipt of proposals on April 2, 1982, one offeror--PWA--had dropped out of the competition and another--B.H.--had attempted to reduce its price below that of the then-low offeror, Philips. In mid-November, the Air Force considered extending the "opening date" indefinitely. According to memoranda in the file, this was seen as a method for putting RFP -7059 "on hold" until B.H.'s protest was resolved, at which time a new "opening date" would be established prior to which discussions would be held with all offerors and a request for best and final offers issued. The Air Force saw this as a means of getting PWA back into the competition, allowing all offerors to adjust their prices and of incorporating any necessary changes to the delivery date and quantities. On December 2, 1982, amendment 0007 to the RFP was issued, extending the hour and date of "opening" to "Indefinite."

On January 6, 1983, B.H. was approved as a source; it subsequently withdrew its protests. Concurrently with the approval of B.H. as a source, the Air Force's buyer at San Antonio requested that the then-outstanding purchase requests for the item be reviewed to determine whether the requirements were still valid.

On February 1, in testimony before the Subcommittee on Defense, Senate Committee on Appropriations, a member of the Subcommittee alleged that "there appears to have been a criminal conspiracy of some sort" among Air Force employees, Philips and PWA which was evidenced by price fluctuations for this item, Philips' consistent under-bidding of PWA and the time and effort required of B.H. to become a qualified source. When two Air Force employees from San Antonio who appeared before the Subcommittee as witnesses gave vague responses to questions about the prices which had been received under RFP -7059, the Member responded by supplying the exact prices offered by each firm. This information was repeated in a number of news-paper articles.

Meanwhile, as a result of its reassessment of its needs, the Air Force determined that it needed only 7,223: 3,016 for Air Force use and 4,207 for foreign military sales. The reason for this decrease in requirements,

according to the Air Force, was that during the period award was pending new repair procedures had been developed which permitted the recycling of used units which previously had been condemned for scrap. With an increased repair capability, the need for new units decreased.

RFP -7059 was canceled on February 11, 1983, the Air Force states, primarily because of this reduced need and the time delay since the solicitation had been issued. The Air Force gave as other reasons for the cancellation (1) the approval of a new source not listed in the solicitation, (2) the prices offered were now old prices, and (3) it now could contract for a fixed quantity instead of an indefinite quantity.

RFP -7210 subsequently was issued on February 16. The new solicitation included the same specifications as the original solicitation, but it provided for a fixed quantity contract for 7,223 units, and listed B.H., Philips and PWA as approved sources. As we have indicated above, Philips filed suit to enjoin the Air Force from receiving proposals in response to this RFP until this protest was resolved, but the motion was denied and proposals were received on March 18 as scheduled.

It is clear from this record that in May 1982 the Air Force was prepared to make award to Philips under RFP -7059 as the low, qualified offeror but did not do so as the result of the bid protest filed with our Office by B.H. In the ensuing 9 months, one offeror withdrew from the competition, B.H. attempted to reduce its price below Philips', B.H. ultimately became an approved source, all the offerors' prices were publicly revealed in hearings before a congressional subcommittee, and the Air Force concluded that in the interim its requirements for the items had been reduced substantially because used items previously condemned for scrap now could be recycled through improved repair procedures. The question before us is whether under these circumstances the cancellation of RFP -7059 was proper.

An agency must have a "reasonable basis" for its decision to cancel a solicitation in a negotiated procurement. Management Services Incorporated, B-197443, June 6, 1980, 80-1 CPD 394. Philips asserts, however, that the more stringent cogent and compelling reason test used in formal advertising, see Defense Acquisition Regulation (DAR) § 2-404.1(a), should be applied. The two different standards exist because in advertised procurements competitive positions are publicly exposed as a result of the public opening of bids, while in negotiated procurements there is no public bid opening. Allied Repair Service, Inc., B-207629, December 16, 1982, 82-2 CPD 541. Philips believes the stricter test is appropriate here because offerors' prices have been disclosed. We need not be concerned, however, with which test might be more appropriate because we believe that under either test the cancellation was justified.

The two principal reasons given by the Air Force for the cancellation of RFP -7059 are: (1) the significant time delay caused by the B.H. protest and (2) the substantial reduction in the quantity of the item needed. On the record before us, Philips has presented no serious challenge to the Air Force's assertion that its current needs have decreased to 7,223 units. Where Philips and the Air Force differ, however, is whether a need for 7,223 units must be satisfied by an award to Philips for that quantity under the initial solicitation.

Philips, relying on cases dealing with formal advertising, contends that cancellation after prices are exposed is inappropriate when an award under the initial solicitation will serve the actual needs of the Government. GAF Corporation; Minnesota Mining and Manufacturing Company, 53 Comp. Gen. 586 (1974), 74-1 CPD 68; 52 Comp. Gen. 285 (1972). Following the line of reasoning in these cases, Philips states that cancellation is not proper here since: (1) there is no reason to believe any companies other than the original offerors would submit offers on the resolicitation since the only offerors solicited under the new solicitation are the same three which submitted offers under the original solicitation; (2) there is no reason to believe any of those companies would offer any different items than they did under the original solicitation since the specifications for the segments under the new solicitation

are identical to those under the original solicitation; and (3) an award to Philips under the original solicitation would serve the actual needs of the Government since award for 7,223 segments can be made under the intentionally flexible terms of the original solicitation.

In order to understand Philips' third point, it is necessary to examine the schedule of RFP -7059. Section B, "Supplies/Services and Prices," which provided in part as follows:

> "The quantity of each line item identified as 'BEQ' is the best estimated total quantity the Government expects may be ordered over the life of the contract.
>
> "0001 2840-01-088-2598PT
> Divergent Nozzle Segment
>
> United Technologies Corp
> P/N: 4056163
>
> "0001AA Initial Order Quantity 15,658 ea
> "0001BA Follow-On Quantity Per Order Indef. ea
>
> 1 ea
> thru
> 25 ea
>
> 26 ea
> thru
> 975 ea
>
> 976 ea
> thru
> 15,971 ea
>
> "BEQ: 20,600 each
>
> "The offeror may indicate different quantity increments for Item 0001BA above, if increments other than those specified will result

in lower prices to the Government; provided, however, that the increment offered must include a price for all quantities between the smallest and largest quantities shown by the Government. If different quantity increments are offered, the offeror need not submit prices for the Government increments set out in Item 0001BA above."

The RFP also included the following provisions:

"QUANTITIES:

(a). MINIMUM QUANTITY: The Government shall order a minimum quantity of the supplies or services to be procured hereunder to the extent of 10.

(b). MAXIMUM QUANTITY: The estimated 'maximum quantity' of the supplies and services to be furnished by the Contractor shall not exceed the total of 15,971.

(c). It is agreed and understood that the Government is under no obligation to order any supplies or services in excess of the 'minimum quantity' specified in paragraph (a) above, and further, that the quantity specified in paragraph (b) above shall not be construed as obligating the Government to any expenditure in excess of the 'minimum quantity.'"

Amendment 0002 to the RFP changed the national stock number and the part number of the item being purchased and increased the maximum quantity stated in paragraph (b) of the "Quantities" clause, quoted above, from 15,971 to 38,000. Therefore, the solicitation established the following:

Minimum Quantity	10
Maximum Quantity	38,000
Initial Order Quantity	15,658
Best Estimated Quantity	20,600

Philips asserts that under these terms, the Air Force had the flexibility to buy any number of segments between 10 units, the minimum quantity, and 38,000, the maximum quantity. It notes that the only reference in the solicitation to 15,658 is as the initial order quantity, and, Philips argues, the solicitation does not create any legal obligation on the part of the Air Force to purchase the initial order quantity; on the other hand, Philips points out, the solicitation explicitly states that the Government "shall order a minimum quantity * * * to the extent of 10" but is "under no obligation to order any supplies * * * in excess of [10]." Philips maintains that the Air Force designated the minimum quantity as only 10 because it was unable to determine the precise quantities that would be needed. As an indication of the Air Force's intent, Philips points to a memorandum of April 29, 1982, in which the Air Force's buyer stated that "A decision was made to have only one minimum order quantity of 10 for all requirements." Philips takes the position that after the Air Force received proposals, it determined that it required 15,658 units as a minimum and consequently included that figure in the proposed contract signed by Philips and returned to the Air Force. Thus, Philips contends, this change in the minimum quantity was not intended to correct an ambiguity in the RFP, but rather to indicate the Air Force's needs at that point in time.

The Air Force disagrees with Philips' argument that the Air Force's reduced requirements could have been met under the canceled solicitation. The Air Force states that it intended 15,658 units to be both the initial order quantity and the minimum quantity, but erroneously listed 10 units as the minimum quantity, thus creating an ambiguity in the solicitation. The Air Force claims that it discovered this error during preparation of the proposed contract with Philips and it eliminated this ambiguity by increasing the minimum quantity in the proposed contract to 15,658. The Air Force argues that Philips was put on notice of its obligation to supply 15,658 units when it signed and returned the proposed contract and it consequently would be improper to award a contract for a quantity so significantly less than originally contemplated.

We agree with Philips on this point. RFP -7059 clearly indicated that 10 units was the minimum quantity

and that the Government was only obligated to order the minimum quantity. Despite the Air Force's contention that it intended to establish 15,658 as the minimum quantity, there is no indication of this intent on the face of the solicitation. The solicitation does not establish 15,658 as the minimum quantity--it is only identified as the initial order quantity. We understand the initial order quantity, as opposed to the minimum quantity, to be only the Government's estimate of what its requirements will be for its first order of items. Thus, the solicitation requirement obligating the Government to order a minimum quantity can only reasonably be interpreted as applying to the figure 10.

In this connection, we do not think, as the Air Force argues, that the solicitation was modified to require a minimum quantity of 15,658. As indicated previously, the Air Force document containing this quantity was never approved by the Air Force and therefore never became effective.

Nonetheless, even though the solicitation's various indefinite quantity provisions did not preclude the Air Force from ordering the 7,223 units, we think its doing so would have been both inappropriate and improper. Although estimates, by their very nature, are not very precise, quantity estimates in a solicitation do establish the general framework of what the Government anticipates purchasing under the contract to be awarded and thus provide the basis for offerors to determine their pricing. Consequently, when the Government knows that there is a serious discrepancy between a solicitation estimate and actual anticipated needs, it should not make award on the basis of the stated estimate, but rather should revise its solicitation so that offerors are provided with the most accurate information available. Cf., TWI Incorporated, B-202966.4, B-202966.5, November 30, 1982, 82-2 CPD 487. We note, in this regard, that even where a firm quantity contract is to be awarded and the Government, under paragraph 10(c) of Standard Form 33[3], could make award for a quantity less than that indicated in the solicitation, we have upheld the propriety of

[3]Paragraph 10(c) is a provision included in the instructions to bidders which provides that "* * * The Government reserves the right to make an award on any item for a quantity less than the quantity offered at the unit prices offered unless the offeror specifies otherwise in his offer."

a cancellation after bid opening when the Government's quantity needs significantly declined from what the solicitation stated. B-169342, B-169351, B-169503, June 19, 1970; cf., 39 Comp. Gen. 397 (1959) (small revision of quantity is not cogent and compelling reason for cancellation of IFB). Since the Air Force was only obligated to purchase a minimum quantity of 10 units, the Air Force had the option of awarding a contract for any quantity between 10 and 38,000 units, it could have placed an order to meet its actual needs of 7,223. Here the reduction in Air Force needs from a best estimated quantity of 20,600 to a definite quantity of 7,223 amounts to a 65 percent decrease. We think this is a substantial reduction that alone warranted the cancellation.

Moreover, the change in Air Force requirements from an indefinite amount to a firm quantity changed the very nature of the procurement. Under an indefinite quantity contract, a contractor must be prepared to furnish, over the contract period, various quantities of the item being procured up to the stated maximum, but it has no assurance that it will be paid for anything more than the stated minimum quantity. Thus, there is a certain risk involved in contracting on an indefinite quantity basis, a risk that potential contractors may reflect in their proposal prices. This is different, of course, from contracting on a firm quantity basis, under which the contractor, upon award, knows precisely how many items must be furnished and by when.

It is a well-established rule that the Government may not solicit offers on one basis when it is to make award on another basis. Union Carbide Corp., 55 Comp. Gen. 802 (1976), 76-1 CPD 134. We think this rule applies here, and that it would be improper to solicit offers on an indefinite quantity basis and then, because the Government's needs have changed, make award on the basis of a fixed quantity. In addition, the regulations which authorize the use of indefinite quantity contracts limit its use to situations where a "recurring need is anticipated." DAR § 3-409.3(b). Clearly, once the Air Force determined that it had a need only for a fixed amount, it no longer anticipated a recurring need.

When the Government's need or the basis for award changes after proposals have been received, the Government may not proceed with award; it must either amend the solicitation to advise offerors of the change and provide the offerors with an opportunity to submit revised proposals, or cancel the solicitation altogether. DAR § 3-805.4. In the words of DAR § 3-805.4(b), "no matter what stage the procurement is in, if a change or modification is so substantial as to warrant a complete revision of a solicitation, the original should be canceled and a new solicitation issued." The change in quantity and the change in contract type clearly are substantial changes that, in our view, warrant cancellation. That action is particularly appropriate, we think, where, as here, the remaining competition was limited to only two offerors and the competition could be expanded by resoliciting.

Additionally, we point out that even if cancellation could be viewed as inappropriate, the Air Force still could not have properly made an award to Philips, but rather would have had to amend the original RFP to reflect its changed needs and provide offerors an opportunity to submit revised proposals. DAR § 3-805.4(a); Union Carbide Corp., supra. Moreover, since B.H. was now an approved source, it would have been appropriate for the Air Force to open negotiations with the competing firms and request revised proposals at the conclusion of those negotiations. That, of course, would have had the same effect as the cancelation and resolicitation, since offerors would get an opportunity to submit revised offers after the exposure of prices took place.

We appreciate Philips' concern that since the prices were disclosed, cancellation could lead to an auction situation. In fact, we generally discourage resolicitation in cases where prices have been disclosed for that reason. See AAA Engineering and Drafting, Inc., B-204140, July 7, 1981, 81-2 CPD 16. However, we believe that in this case the competitive situation on resolicitation will not be solely based on the exposed prices, because the reduced quantity, the changed nature of the contract being solicited and the time delay of approximately 1 year all should affect each offeror's prices. Moreover, an impermissible auction atmosphere is not created by cancellation and

resolicitation after prices are exposed where these actions are in accordance with Government legal requirements, as we have found these actions to be. See American Shipbuilding Company, B-207218, B-207218.2, November 9, 1982, 82-2 CPD 424.

The protest is denied.

for Milton J. Socolar
Comptroller General
of the United States