

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

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FILE: B-212770

DATE: December 20, 1983

MATTER OF: Sentinel Electronics, Inc.

DIGEST:

1. GAO will not question an agency's quantity requirements for an item absent a clear showing that the determination to procure the quantity is unreasonable.
2. GAO will not question an agency's decision to procure an item competitively rather than on a sole source basis, since the objective of the bid protest function is to insure full and free competition for government contracts.
3. GAO will not consider protest by incumbent contractor of allegedly restrictive delivery terms of solicitation where protester has not demonstrated any economic interest or harm at stake in raising issue and protest is essentially on behalf of other participating bidders.
4. GAO will not consider incumbent contractor's contention that agency should have exercised contract option provision instead of issuing new solicitation where option is renewable at sole discretion of government.
5. GAO will not consider contention that specifications should be more restrictive to meet the needs of the user agency since matter is one to be resolved by agencies and activities involved.
6. Contention that procuring activity should have used an economic price adjustment clause in its IFB is rejected because use of such a clause is discretionary with agency and no abuse of discretion has been shown.
7. Award pending protest is permissible under provisions of Defense Acquisition Regulation § 2-407.8(b)(3).

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8. GAO has no authority under Freedom of Information Act to determine what information must be disclosed by government agencies.
9. Evidence of agent's authority to sign bid may be established after bid opening.

Sentinel Electronics, Inc. protests the terms and conditions of invitation for bids (IFB) No. DAAB07-83-B-B221, issued by the Army Communications-Electronics Command, Fort Monmouth, New Jersey, and the subsequent award of a contract to Keystone General, Inc. for 1,810 radio sets and related components. We dismiss the protest in part and deny it in part.

First, Sentinel complains that the quantity of radio sets being purchased by the Army is an uneconomical production run for any firm other than a current producer and can result in irresponsible bidding practices. The Army states that the quantity does represent an economical production quantity and, in support of its position, points to the more than adequate competition which was obtained in response to the solicitation.

It is well established that the expression of the government's requirements in a solicitation must reflect the actual and legitimate minimum needs of the government. 47 Comp. Gen. 175 (1967). We think this principle necessarily applies to the quantity of an item which an agency determines to be necessary to perform its mission. Here, the agency insists that the quantity solicited represents its actual and legitimate minimum needs and that the purchase requests were issued on a critical and urgent basis by the Defense Security Assistance Agency. In this regard, we have often stated that an agency has the responsibility to determine its minimum needs and the best way of accommodating those needs, and we will not question its determination absent a clear showing that it is unreasonable. Logistical Support, Inc., B-205724, June 17, 1982, 82-1 CPD 599.

Other than an assertion that the complexity of the item requires a larger production quantity to be economical and that it believes a prior government analysis indicates a production sum of between 9,500 and 10,000 is necessary to meet "realistic" economic requirements, Sentinel has offered no evidence that the determination to competitively procure 2,210 units is clearly unreasonable. In any event,

we will not question an agency's decision to procure an item competitively rather than to obtain it from the current producer on a sole source basis, since the objective of our bid protest function is to insure full and free competition for government contracts. See Belden Corporation, B-206351, August 27, 1982, 82-2 CPD 181. Accordingly, we see no legal merit in this contention.

Second, Sentinel also believes that the solicitation's delivery schedule is unrealistically short for any firm other than a current producer. This portion of the protest will not be considered.

Under section 21.1(a) of our Bid Protest Procedures, 4 C.F.R. Part 21 (1983), a party must be "interested" in order to have its protest considered by our Office. Whether a party is sufficiently interested depends on its status in relation to the procurement, the nature of the issues raised, and how these circumstances show the existence of a direct or substantial economic interest on the part of the protester. See Die Mesh Corporation, 58 Comp. Gen. 111 (1978), 78-2 CPD 374. We do not view Sentinel as an interested party with respect to this issue.

As the incumbent, Sentinel states that it is the current producer for this item and can produce the required quantity within the stated delivery schedule. Sentinel's protest, therefore, is essentially one on behalf of the other nine bidders which participated in the procurement and which would be economically affected by the solicitation's delivery terms. Stated somewhat differently, the direct and substantial economic interests at stake here are those of the other nine bidders which responded to the solicitation but could not timely produce the item because of its allegedly restrictive terms. Thus, assuming Sentinel's allegation is true, the other nine bidders were the ones which were harmed and they would have been the appropriate parties to file a protest regarding the issue. See Continental Water Systems Corporation, 61 Comp. Gen. 503 (1982), 82-1 CPD 627. We therefore conclude that Sentinel is not an interested party to raise this issue.

Third, Sentinel contends that the current solicitation should not have been issued because Sentinel's contract contains an option clause which could have been exercised to provide a major portion of the required quantity at prices that have been validated by recent market tests. However, where, as here, an option is exercisable at the discretion of the government, a decision to exercise or not exercise the option is a matter of contract administration and not for consideration under our Bid Protest Procedures. C. G. Ashe Enterprises, 56 Comp. Gen. 397 (1977), 77-1 CPD 166. Accordingly, this portion of Sentinel's protest is dismissed.

Fourth, Sentinel argues that the solicitation improperly calls for certain contractor furnished electronic test equipment which Sentinel has "proved" to be an inadequate testing method under its current contract. Sentinel believes that the solicitation should instead require an improved testing procedure which Sentinel is currently developing. Sentinel also believes that preproduction first article should be required by the solicitation rather than the less stringent initial production first article currently specified. In essence, Sentinel is contending that the Army should increase the testing methodology and levels to what Sentinel considers to be adequate.

We generally will not consider an allegation that the government's interest as a user of the product is not adequately protected by adequate test or other specification provisions. Assurance that sufficiently rigorous specifications are used is ordinarily of primary concern to procurement personnel and user activities. It is they who must suffer any difficulties resulting by reason of inadequate equipment. We have therefore held that it would be inappropriate to resolve such issues pursuant to our bid protest function, absent evidence of possible fraud or willful misconduct by procurement or user personnel acting other than in good faith, neither of which is alleged by Sentinel. See Miltope Corporation--Reconsideration, B-188342, June 9, 1977, 77-1 CPD 417, aff'd Miltope Corporation--Reconsideration (Second), B-188342, July 1, 1977, 77-2 CPD 3; Security Assistance Forces & Equipment OHG, B-209555, November 16, 1982, 82-2 CPD 449. We dismiss this portion of Sentinel's protest.

Fifth, Sentinel complains that although deliveries under the solicitation extend to 43 months after award of the contract, the contracting officer failed to insert an

economic price adjustment (EPA) provision in the solicitation.

It is the bidder's responsibility in bidding a fixed-price contract to project costs and to include in the basic contract price a factor covering any projected cost increases. Risk is inherent in most types of contracts, but especially in fixed-price contracts such as the one involved here, and bidders are expected to allow for that risk in computing their bids. Palmetto Enterprises, 57 Comp. Gen. 271 (1978), 78-1 CPD 116. The purpose of an EPA provision is to protect the government in case of a decrease in the cost of labor or material and the contractor in the event of an increase. However, the use of an EPA provision is discretionary with the procuring activity. Patty Precision Products Company, B-182861, May 8, 1975, 75-1 CPD 286.

The Army reports that an analysis was performed to determine whether an EPA provision was appropriate for this solicitation using the guidance set forth in DAR § 3-404.3(a) (1976 ed.). In making his decision, the contracting officer considered the estimated dollar amount, the production period, and the nature of the item being procured. Because capable producers were available and because of the recent stable economic conditions, the contracting officer concluded that the bidders could reasonably "forward price" the item without an EPA provision. Since the use of an EPA provision is discretionary and in view of the relative recent economic stability which the protester does not dispute, we can find no basis to question the Army's decision.

Sentinel also protests that bids were opened and award made in disregard of its protest. However, the agency made an appropriate determination to proceed with award, as required by DAR § 2-407.8(b)(3), and notified our Office of its intention to award notwithstanding the protest, as required. We therefore have no basis to object to that award.

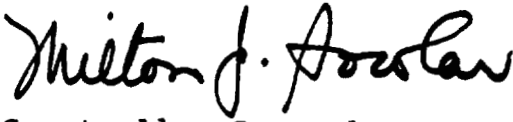
Sentinel next contends that the Army improperly refused to disclose certain documents which Sentinel considers necessary to pursue its protest. In this connection, Sentinel requested these documents under the Freedom of Information Act (FOIA). However, our Office has no authority under FOIA or otherwise to determine what information government agencies must disclose. Westec Services, Inc., B-204871, March 19, 1982, 82-1 CPD 257.

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Thus, Sentinel's sole recourse is to continue to pursue the remedies provided by FOIA. Bell & Howell Corporation, B-196165, July 20, 1981, 81-2 CPD 49.

Finally, Sentinel contends that Keystone's bid was nonresponsive because the bid was executed by an unauthorized individual. The contracting officer reports, however, that conclusive proof of the individual's authority was furnished after bid opening. The protester has not disputed this fact. Therefore, since it is permissible to furnish proof of an agent's authority after bid opening, Sentinel's protest on this basis is without legal merit. See Marine Power and Equipment Company, Inc., 63 Comp. Gen. 75 (1982), 82-2 CPD 514.

The protest is dismissed in part and denied in part.

for 
Comptroller General
of the United States