

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**

WASHINGTON, D.C. 20548

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**FILE:** B-210911, B-210911.2 **DATE:** April 17, 1984  
B-210911.3  
**MATTER OF:** Heart of America Police Supply; Olin Corporation

**DIGEST:**

1. Failure of a solicitation to specify or adequately describe all required features of a brand name product in a brand name or equal solicitation, resulting in bids which, unknown to the bidder, were not acceptable to the agency provides a cogent and compelling reason to cancel the solicitation after opening.
2. Judgment of the technicians and specialists of the procuring agency as to the technical adequacy of bids will be questioned by our Office only if there is a clear showing of unreasonableness, an arbitrary abuse of discretion, or a violation of the procurement statutes and regulations.
3. In "brand name or equal" procurement, "equal" item need not meet unique features of brand name product so long as salient characteristics listed in IFB are met.
4. Protest that requirement for nickel-plated brass casings on ammunition unduly restricts competition is denied where protester has not shown that the contracting agency's belief that such casings are necessary for accurate firing of ammunition is unreasonable.
5. Failure of contracting officer to comply with regulatory requirements in awarding a contract notwithstanding the pendency of the protest is a procedural defect which does not affect the validity of an otherwise valid award.

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Heart of America Police Supply (Supply) and Olin Corporation (Olin) protest the Department of Justice (Justice) decision to cancel in part invitation for bids (IFB) No. JYJMD-82-B-0063 and to resolicit the canceled items under IFB No. JLJMD-83-B-0030. Supply also protests the award of a contract for one item under the resolicitation. The protests are denied.

#### Initial Solicitation

The initial solicitation was for the procurement of small arms ammunition and tear gas. It was structured to result in one or more requirements contracts for the 49 line items; it specifically authorized multiple awards. A "brand name or equal" description was used for the 49 items.

Bids were opened on November 15, 1982. For all but 13 of the items, the low bidder bid one of the acceptable brand names. Justice asked the Federal Bureau of Investigation (FBI) Academy at Quantico, Virginia, to evaluate the technical acceptability of the 13 alternate items. The FBI found that all but three of the alternates were acceptable.

Supply was the low bidder for the three unacceptable items. Bids for items No. 21 and 37 were found to be unacceptable because the items bid by Supply had aluminum bullet casings instead of nickel-plated brass casings. The FBI believed the aluminum casings were subject to denting and extraction problems. The bid for item No. 35, a round of ammunition used by marksmen and snipers, was rejected because the FBI found it to be less accurate than the round identified in the solicitation.

The agency's report indicates that these three items had complied in all respects to the salient characteristics stated in the solicitation. However, Justice believes that the solicitation did not fully and properly identify the needs of the government. Taking the position that the government's specifications were deficient and ambiguous in that they did not specify nickel-plated brass casings as a requirement for two of the items and did not fully indicate the accuracy requirements for the third item, on February 10, 1983, the agency decided to cancel the solicitation with

respect to those three items and to resolicit the items, using specifications that more precisely described the needs of the government. Supply and Olin both protested that decision.

#### Supply's Protest

Supply protests that Justice lacked a compelling reason for the partial cancellation and claims that, because its bid complied in all respects with the terms of the solicitation, it should receive award for those items.

Justice acknowledges that Supply's bid was responsive to the solicitation. In the technical evaluation of the products that were bid, the FBI determined that the ammunition bid by Supply for items No. 21, 35 and 37 complied in every respect with the salient characteristics described in the solicitation. These items could not be determined not "equal," yet the FBI believed that the items were not acceptable for use. Therefore, Justice decided that cancellation and readvertisement were necessary.

We believe that Justice acted properly in canceling the solicitation for those items. This Office has long recognized that contracting officials have broad discretion to determine whether a solicitation should be canceled and the contract reprocured. Apex International Management Services, Inc., 60 Comp. Gen. 172 (1981), 81-1 CPD 24. Our review is limited to the question of reasonableness of the exercise of discretion. Sperry Univac, B-195028, January 3, 1980, 80-1 CPD 10. To be sustainable, a contracting officer's discretionary decision must reflect the reasoned judgment of the contracting officer based upon the investigation and evaluation of the evidence reasonably available at the time the decision is made. Apex International Management Services, Inc., *supra*. It is incumbent upon the protester to establish that the contracting officer abused this discretion. A&C Building and Industrial Maintenance Corporation, B-205259, December 15, 1981, 81-2 CPD 478.

However, because of the potential adverse impact on the competitive bidding system of canceling an invitation after bid prices have been exposed, the contracting officers, in the exercise of their discretionary authority, must find

that a cogent and compelling reason exists that warrants cancellation. Engineering Research Inc., 56 Comp., Gen. 364 (1977), 77-1 CPD 106; Lapteff Associates, B-195076, November 20, 1979, 79-2 CPD 366. Generally, the use of inadequate specifications provides a sufficient basis for invitation cancellation. Revere Supply Co. Inc., B-187154, January 12, 1979, 79-1 CPD 21. Specifications are inadequate when they do not state the Government's actual needs. Kemp Industries, Inc., B-192301, October 2, 1978, 78-2 CPD 248.

Justice believes that the tests performed by the FBI demonstrated that the three items were clearly unacceptable for the agency's use. Supply disagrees with the technical evaluation performed by the FBI.

Where technical disputes arise, the judgment of the technicians and specialists of the procuring agency as to the technical adequacy of bids or proposals submitted in response to the agency's statement of its needs will generally be accepted by our Office. Interad, Ltd., B-210013, May 10, 1983, 83-1 CPD 497. Such determination will be questioned by our Office only upon a clear showing of unreasonableness, an arbitrary abuse of discretion or a violation of the procurement statutes and regulations. Marine Electric Railway Products, Inc., B-189929, March 9, 1978, 78-1 CPD 187. There was no such showing in the present case.

#### Olin's Protest

Olin also protested the cancellation of the solicitation, contending that the specifications were not defective, deficient, or ambiguous but that Supply's bid was nonresponsive to the specifications. As second low bidder for two of the three items, Olin believes it should have received award for those items as the next low responsive bidder.

Olin contends that Supply's bid is nonresponsive because the three items bid are not "equal" to the brand name products listed in the solicitation. Olin points out that the brand name products listed for items No. 21 and 37 had nickel-plated brass casings and that the brand name

product listed for item No. 35 utilized a "Sierra" type bullet. Olin contends that Supply's bid should be rejected because it proposed ammunition with aluminum casings for two of the items and a cartridge that did not use a "Sierra" type bullet for the third item.

We disagree with Olin's contention. An item offered as an "equal" to a specified brand name in a brand name or equal procurement need not meet the unique features of the brand name so long as the salient characteristics listed in the IFB are met. Business Equipment Center, Ltd., B-208607, February 14, 1983, 83-1 CPD 153. Since Supply's items did comply with the salient characteristics listed in the IFB, the agency acted properly in determining that the three items bid by Supply met the brand name or equal criteria. Therefore, when the agency determined that the items Supply proposed to supply did not meet its minimum needs, it acted properly in canceling the solicitation.

#### Award Under Subsequent Solicitation

On March 1, 1983, Justice issued solicitation No. JIJMD-83-B-0030 to reprocur the three items canceled under solicitation No. JYJMD-82-B-0063. On March 16, 1983, Supply filed a protest with the contracting officer regarding the terms of the solicitation and alleged solicitation improprieties. Bids were opened as scheduled on March 23, 1983.

On April 5, 1983, Supply filed a protest with our Office raising a variety of issues regarding the reprocurement. However, because the agency subsequently canceled the procurement for two of the three items, any issues regarding those two items are now academic and need not be considered by our Office. See International Alliance of Sports Officials, B-209846, April 13, 83-1 CPD 397.

Supply's protest was stated in rather general terms. However, with regard to the one item not canceled in the resolicitation, it appears that Supply is protesting that the specifications used in the protest were unduly restrictive and that Justice acted improperly in awarding a contract for the item while the protest was still pending with our Office. For the reasons discussed below, we must deny Supply's protest under the resolicitation.

### Restrictive Specifications

Supply's protest contends that the requirement that item No. 1 (item No. 21 in the previous solicitation) have nickel-plated brass cartridges is unduly restrictive because this type of ammunition is more expensive than plain brass cartridges and because, in some circumstances, aluminum cartridges or plain brass cartridges were technically superior to nickel-plated cartridges. Supply contends that it was unable to bid on the item because the specifications were so restrictive.

We have held that a procuring agency is accorded broad discretion in determining its minimum needs because government procurement officials familiar with the particular conditions under which the product has to be used are in the best position to know the government's actual needs and to draft appropriate specifications. J. J. Broderick Company, B-209053, July 6, 1983, 83-2 CPD 55. We will not object to an agency's determination of its minimum needs unless the determination is clearly shown to have no reasonable basis. Contract Services Company, Inc., B-211450, B-211569, July 7, 1983, 83-2 CPD 67.

Justice informed us that nickel-plated brass casings were required for this item because they resisted tarnish and corrosion better than brass casings in adverse weather conditions. Justice had rejected aluminum casings under the original solicitation because aluminum casings were subject to possible denting and extraction problems.

Supply has offered no evidence which refutes the agency's conclusion regarding problems with aluminum casings or plain brass casings. Therefore, because we will only question an agency's minimum needs determination if the protester has shown that the determination has no reasonable basis, we will not question the agency position here. Scientific Industries, Inc., B-208307, April 5, 1983, 83-1 CPD 361.

### Award Pending Protest

Supply also protests that Justice violated applicable procurement regulations because it made award to Federal

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Cartridge Corporation for item No. 1 while this protest was pending with our Office.

In view of our conclusion that the specifications were not unduly restrictive and because Supply has not suggested that the procurement was otherwise improper, the propriety of the award to Federal while the protest was pending is academic. Starline Incorporated, 55 Comp. Gen. 160, 172 (1976), 76-1 CPD 365. However, even if the contracting officer failed to comply with the regulatory requirements in awarding a contract notwithstanding the pendency of the protest, that is a procedural defect which does not affect the validity of an otherwise valid award. Creative Electric Incorporated, B-206684, July 15, 1983, 83-2 CPD 95.

Conclusion

The protests filed by both Supply and Olin are denied.)

for *Milton F. Aorolan*  
Comptroller General  
of the United States