

DECISION

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

28302

FILE: B-213059**DATE:** May 22, 1984**MATTER OF:** Intercomp Company**DIGEST:**

1. The use of specifications which do not adequately describe the government's actual needs provides a compelling reason to cancel an invitation after bid opening where necessary revisions to the specifications are material.
2. The Small Business Administration's issuance of a certificate of competency requires that the contracting agency not require the bidder to meet any other standards of responsibility, but does not compel the government to make an award if the specifications are found defective.

Intercomp Company, a small business concern, protests the Navy's cancellation of invitation for bids No. N00244-83-B-2008 after Intercomp, the low bidder, was issued a certificate of competency (COC) by the Small Business Administration (SBA). Under the solicitation, the agency had anticipated acquiring 47 portable platform scales for weighing aircraft; the scales are used to ascertain critical flight performance variables such as fuel consumption and flight range. The Navy determined, however, that Intercomp's low bid did not meet the agency's actual needs as a result of the agency's mistaken use of specifications that failed to describe those needs adequately. The Navy therefore canceled the solicitation and issued a new one containing revised specifications.

The protester contends that the purported defects in the original solicitation were minor and did not provide a proper basis for canceling the solicitation after bids had

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been opened. The protester also maintains that the cancellation represents a bad faith effort to circumvent the SBA's statutory authority to determine conclusively all matters of a small business concern's responsibility, that is, its capability to perform the contract.

We deny the protest.

According to the Navy, there was a lack of communication between the using activity, the Naval Air Systems Command (NAVAIR), and the purchasing activity, the Naval Supply Center (NSC). NAVAIR provided NSC with a brief outline of the scales' requirements in the apparent belief that the outline would be used to develop a comprehensive specification. Instead, NSC included only the outline in the solicitation. NAVAIR learned of the error when the project engineer was asked to serve as a technical representative on the preaward survey team convened to review the responsibility of the two low bidders.

Although apparently neither bidder had taken exception to the solicitation's requirements in its bid, during the preaward survey the project engineer found both bidders' planned scales to be unacceptable for NAVAIR's use. Comparing those plans against the solicitation's specifications he then discovered the erroneous inclusion of only the outline, whereupon he concluded that the specifications were so vague that the bidders had misinterpreted NAVAIR's actual needs.

The project engineer identified several areas where specifications failed to depict the agency's actual needs, and where Intercomp's plans or planned production would not meet NAVAIR's needs:

<u>Actual Need</u>	<u>Solicitation</u>	<u>Protester's Plans</u>
1) For modular construction and pre-calibration of replacement parts to prevent inefficient and costly calibration process in making repairs.	Required each scale to be "repairable through component replacement or repair."	Calibration when mounted.

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| 2) For scale to be equipped with either exit ramps or a wheel stop extending the entire width of the platform on the exit side. | Required only that the platform have a stop, curb, end plate or exit ramp. | Plans showed only a 14-inch stop on a weighing surface of 25 inches. |
| 3) For each scale to weigh no more than 130 pounds so it can be lifted by 2 men in accordance with MIL-STD-1472C allowing each man to lift no more than 65 pounds. | Required each scale to weigh no more than 140 pounds. | Drawings indicated actual scale would weigh between 135 and more than 140 pounds when equipped with a stop. |
| 4) For capability to operate on a standard commercial 12-volt battery for 8 hours without recharging. | Required only that the scale be operated without external power. | To provide a battery life of 1 hour. |

The project engineer also determined that the solicitation failed to protect the government's interest because it did not detail the procedures for testing production in units to assure their accuracy, particularly when exposed to varying environmental conditions or when placed on a slightly inclined surface. The project engineer further decided that Intercomp's planned production procedures did not provide for adequate testing.

The project engineer therefore counseled the preaward survey team to recommend no award be made to either bidder on the basis of nonresponsibility, and that award be made to the third low bidder based on its previously having supplied acceptable scales. Subsequently, the survey team made such recommendations. Since Intercomp is a small business concern, the Navy referred the matter to SBA for a conclusive determination of the firm's responsibility under the COC procedures. After SBA issued Intercomp a COC, the Navy determined that the solicitation should be canceled.

The protester argues that only one of the Navy's revisions to the original solicitation would necessitate any change in the design of Intercomp's scale offered under the canceled solicitation. That change would entail the addition

of 11 inches to the wheel stop Intercomp proposed in response to the original solicitation (see deficiency 2 listed above). Arguing that the change is minor, the protester has offered to provide a full-width wheel stop at no cost to the Navy if it awards Intercomp a contract under the original solicitation. The protester also admits it would need to substitute a different battery than it originally intended, but states it could do so without altering the design of the scale. Concerning the other areas of revision, the protester basically contends that it intended to comply with the new requirements anyway and, if awarded the contract, it will do so at no cost to the government.

Citing the project engineer's opposition to its receiving an award under the canceled solicitation while recommending an award to the third low bidder, the protester also contends that the cancellation was not founded on defects in the solicitation, but was effected to avoid awarding Intercomp a contract. This is principally the basis for the protester's argument that the cancellation was a bad faith attempt to circumvent SBA's COC authority.

We have often stated that a contracting agency may cancel an invitation for bids after bid opening where there is a compelling reason to do so, Go Leasing, Inc.; Sierra Pacific Airlines, B-209202; B-209202.2, April 14, 1983, 83-1 CPD ¶ 405, and that the use of specifications which do not adequately describe the government's actual needs generally provides a compelling reason for cancellation. See, e.g., Kings Point Mfg. Co., Inc., B-210757, Sept. 19, 1983, 83-2 CPD ¶ 342. Contracting officials have broad discretion to decide whether or not appropriate circumstances for cancellation exist, and our review is limited to considering the reasonableness of the exercise of that discretion. Professional Carpet Service, B-212442; B-212442.2, Oct. 24, 1983, 83-2 CPD ¶ 483. The protester bears the burden of showing that the determination to cancel was unreasonable, and we therefore will not question such a determination where the record provides a rational basis for the cancellation. Surgical Instrument Company of America, B-211368, Nov. 18, 1983, 83-2 CPD ¶ 583.

We have no legal basis to question the Navy's position that the specifications in the solicitation were deficient, that is, were not adequate to assure that offers complying with the specifications would meet the agency's needs. In this regard, it is primarily the contracting agency's responsibility to determine its minimum needs, and we will not question its determination absent a clear showing that the determination was arbitrary or capricious. Winandy Greenhouse Company Incorporated, B-208876, June 7, 1983, 83-1 CPD ¶ 615.

The Navy has identified several areas where the specifications as written lacked the necessary specificity, and the protester has made no showing that a direct response to those specifications reasonably would have met the agency's actual needs.

Instead, the thrust of Intercomp's argument as we view it really is that even though the Navy may have had in mind specifications it did not express in the invitation, the scales Intercomp intended to build would have, or with minor modifications could have, met all the agency's actual needs. In this respect, we have recognized that the fact that some of the terms of an invitation are in some way deficient does not, in itself, constitute a compelling reason to cancel. Our Office generally regards cancellation after opening to be appropriate only when other bidders would be prejudiced by an award under the ostensibly deficient solicitation, and when such an award would not serve the actual needs of the government. Dyneteria, Incorporated; Tecom, Incorporated, B-210684, B-210684.2, Dec. 21, 1983, 84-1 CPD ¶ 10.

We do not believe, however, that award to Intercomp would have been proper. First, it is clear that Intercomp's bid itself did not expressly promise to meet the agency's revised needs, so that an award to it under the canceled solicitation would not have met the agency's needs. Therefore, the Navy would have had to negotiate certain revisions or modify the contract after award. The general rule in this regard is that the integrity of the competitive bidding system precludes an agency from awarding a contract competed under given specifications with the intent of changing to materially different specifications. See Kings Point Mfg. Co., Inc., supra; W.M. Grace, Inc., B-202842, Aug. 11, 1981, 81-2 CPD ¶ 121. We believe that at least the Navy's revised weight requirement and the more detailed testing requirements may have a substantial effect on the cost and production of the scales, and that the cumulative effect of all the necessary changes almost assuredly does. Award under the deficient solicitation, without material changes, therefore would not have met the agency's needs.

Second, an award to Intercomp under the original solicitation would have been prejudicial to the other bidders. Notwithstanding what Intercomp may have intended to furnish, the fact is that Intercomp competed under deficient specifications, and nothing in its bid indicated that it would meet the Navy's actual needs. It clearly would have been improper to permit Intercomp, simply because it submitted the low bid on the deficient specifications, an exclusive opportunity to revise its bid, or explain what it really meant, in order to keep the contract. See Winandy Greenhouse Company Incorporated, supra.

Concerning the allegation that the revisions were a ruse to circumvent SBA's COC authority, the protester points out that in B-168259, B-168259(3), October 20, 1970, we criticized a contracting agency for canceling an invitation for bids after bid opening in order to avoid a forthcoming SBA determination regarding responsibility. The protester argues that the 1970 case provides a basis for our objecting to the cancellation here. In that case, however, we found that an award under the canceled solicitation would have met the agency's needs; the record indicated that the specifications adequately expressed the agency's needs and that the real basis for cancellation was to avoid the forthcoming SBA action. The 1970 case is inapposite to this protest since here the canceled solicitation would not have met the Navy's needs.

Moreover, the fact that a low bidder is issued a COC does not, in itself, compel the government to make an award under defective specifications, but only requires that the contracting agency not require the bidder to meet any other standards of responsibility if a contract is to be awarded. Go Leasing, Inc.; Sierra Pacific Airlines, supra. Here, the needed changes to the solicitation all involved aspects of what the contractor would be required to provide under the contract, and not additional elements of responsibility. Since the record provides a reasonable basis for the Navy's decision to cancel the solicitation, we reject Intercomp's allegation that the cancellation was a ruse to circumvent SBA's authority. See Surgical Instrument Company of America, supra.

We are compelled to point out, however, that the Navy's actions did not enhance the integrity of the competitive bidding process. A cancellation of a solicitation after bid opening and a resolicitation should be effected as soon as possible. Go Leasing, Inc.; Sierra Pacific Airlines, supra. By not promptly canceling the solicitation when the error of including only an outline of the specifications was discovered, the Navy unnecessarily induced the protester to go through the COC process only to have its bid rejected upon cancellation after the issuance of the COC. We do not believe that the cognizant procurement officials followed sound judgment in this respect, with the result that their conduct engendered unnecessary suspicions and allegations of unfairness. Id. By separate letter, we are advising the Secretary of the Navy of our view.

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The protest is denied.

for *Milton J. Fowler*
Comptroller General
of the United States