

DECISION



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

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29338

FILE: B-213541

DATE: September 18, 1984

MATTER OF: General Aero Products Corporation

DIGEST:

1. Use of specifications in an invitation which need material revisions in order to describe government's actual needs provides compelling reason to cancel invitation after bid opening since award would not enable agency to satisfy its minimum needs and would also be prejudicial to other bidders.
2. Even though original basis for cancellation may have been erroneous, subsequently enunciated basis, which would have supported cancellation had it been advanced originally, is acceptable.

General Aero Products Corporation (General) protests the cancellation after bid opening of Navy Ships Parts Control Center (SPCC) invitation for bids No. N00104-83-B-0535 for MK 48 torpedo connector assemblies. General believes that it should have received the award.

We deny the protest.

The invitation was canceled on the basis of an inadequate treatment of government-furnished material (GFM) in the drawings/specifications. Testing of the connector assemblies necessitated the government furnishing the contractor with six cable assemblies and a clamp assembly. Although both types of assemblies were mentioned in the invitation Weapon Specification 16119, only the cable assemblies were mentioned as being GFM and the invitation contained none of the necessary clauses relating to GFM. Upon learning of the cancellation, General argued that these perceived deficiencies did not constitute a compelling reason for cancellation since no prejudice occurred as the drawings/specifications were known to bidders and had been the basis for identical past procurements. SPCC legal counsel was consulted and he concluded that, since Weapon Specification 16119 did identify the cable assembly as GFM and since there was no evaluation factor for transportation

of GFM in the invitation that would have changed the relative positions of the bids, no adequate reason for the cancellation had been demonstrated.

However, prior to the SPCC legal counsel opinion regarding the cancellation, it was also found that General had questioned various aspects of the same drawings/specifications under the connector assembly contract it was performing at that time and that it had also requested certain items, in addition to those mentioned above, be furnished under that contract as GFM. In view of this information, the SPCC buyer decided that a complete review of the drawings and specifications used under the canceled invitation was necessary. The Naval Undersea Systems Center (NUSC) was requested to make a technical review with particular emphasis upon a clarification of the GFM question and an identification and description of any additional, or revised, drawings/specifications which had not been cited in the original technical data package or the SPCC invitation.

NUSC advised that as regarded GFM, no reference was made in the drawings/specifications as to the source of the clamp assembly. While it found various drawing changes to be minor, it advised of certain revisions to the drawings/specifications which it did not consider to be minor. One such revision added a spring coiled pin to the connector assembly, as well as two types of sleeve screw bushings, and incorporated three notes describing the bonding and alignment of these. A second revision included a note defining the type of locking element to be used on the insert screw, thereby eliminating a short-circuiting problem as well as any ambiguity created by the designation in the specifications of two locking screw configurations. Also NUSC advised that, since this element was a qualified products list (QPL) item and since no waiver of the QPL requirement could be considered for such a critical item, the necessary QPL clauses had to be added to the invitation. A third revision provided the material data for the synthetic rubber that was to be used on the body seal to prevent problems arising from nonconforming material; before this revision, the material had merely been described as synthetic rubber. Most of the revisions concerned correcting a cracking problem that occurred in the insulation usually due to repeated use. By implementing these changes, it was determined that the government could expect to save \$14,000 annually in repair costs.

General contends that the agency has failed to establish that its decision to cancel was not arbitrary or capricious. First, it contends that any discrepancy as regards GFM could be resolved after award by means of a contract modification, as was allegedly done under the contract for the connector assembly that General was performing at the time of cancellation. Second, as to the drawings/specifications changes which the contracting agency now states warrant cancellation, General states that it offered to make the necessary changes under its current contract but that it was not allowed to and was told instead to manufacture the assembly in accordance with the (unrevised) drawings/specifications. It notes further that just prior to the cancellation of this invitation, an award was made to another firm for the same connector assembly and the same number of assemblies less one on the basis of the (unrevised) drawings/specifications. Not only does this show, General believes, that the basis for the cancellation was invalid, but it also indicates a possibility that the purchase being canceled was actually made instead by an award to that firm and at a higher price than that bid by General.

Our Office has held, General notes, that the reason for canceling an invitation after bid opening must be weighed against the harm that may be created by cancellation after bid prices have been disclosed. Further, General argues that inadequate, ambiguous, or otherwise deficient specifications alone are not sufficient reasons for cancellation. Our decisions cited by the contracting agency as support for the cancellation, General states, involved specification deficiencies which precluded the purchase of either items that were safe for use or items which would meet the needs of the government without a resolicitation under revised specifications. General contends that neither of these instances is applicable to this protest.

The agency, in rebuttal, states that it has shown that a sufficient basis for the cancellation existed and that General has not met its burden of disproving that agency showing. It also states that the contract awarded weeks before the cancellation of this invitation was awarded before SPCC became aware of the drawings/specifications problems. While the existence of the problems was known elsewhere in the Department of the Navy, SPCC did not learn of them until December 1983 and by that time the awarded contract was at a point of performance that made cancellation impossible. Further, the fact that the awarded

assemblies were urgently needed also made a revision in the drawings/specifications of the contract impossible since any changes would have delayed the procurement. The agency believes that the relative harm that would result from the purchase of additional connector assemblies which do not meet the agency's minimum needs outweighs any harm that a resolicitation will cause to the bidders.

Contracting officials may cancel an invitation for bids after bid opening when there is a compelling reason to do so. Go Leasing, Inc.; Sierra Pacific Airlines, B-209202; B-209202.2, Apr. 14, 1983, 83-1 C.P.D. ¶ 405. 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 C.P.D. ¶ 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 C.P.D. ¶ 483. The protester bears the burden of showing that the determination to cancel was unreasonable. Surgical Instrument Company of America, B-211368, Nov. 18, 1983, 83-2 C.P.D. ¶ 583.

We have no legal basis to question the agency's position that the drawings/specifications were deficient, that is, were not adequate to assure that bids complying with the drawings/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 C.P.D. ¶ 615. Further, the fact that this deficiency was not corrected in past procurements does not preclude the agency from now correcting it. We also find no evidence that this invitation was canceled because these needs had been satisfied by an award on a prior invitation.

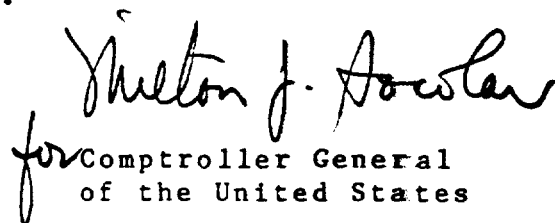
Further, General states that cancellation was not necessary because any contract awarded could be modified to meet the agency's needs. In this respect, we have recognized that the fact that some of the terms of the invitation may be deficient in some way does not, in itself, constitute a compelling reason to cancel the invitation. Our Office generally regards cancellation after opening to be appropriate only when other bidders would be prejudiced by an award

under the ostensibly deficient invitation and when such an award would not serve the actual needs of the government. Dyneteria, Incorporated; Tecom, Incorporated, B-210684.2, Dec. 21, 1983, 84-1 C.P.D. ¶ 10.

We do not believe that an award to General under the circumstances would have been proper. First, it is clear that General's bid itself did not expressly promise to meet the agency's revised needs. Therefore, the agency would have had to negotiate revisions to or modify any contract awarded to General. 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., B-210757, supra; W.M. Grace, Inc., B-202842, Aug. 11, 1981, 81-2 C.P.D. ¶ 121; Intercomp Company, B-213059, May 22, 1984, 84-1 C.P.D. 540. It would appear that the revised specifications would have a material effect--General does not argue the contrary--upon the cost of the connector assembly and that an award under the deficient specifications without material changes therefore would not meet the agency's needs. Second, an award to General under the original invitation would have been prejudicial to the other bidders. It would clearly have been improper to have permitted General, simply because it submitted the low bid on the deficient specifications, an exclusive opportunity to revise its bid. See Winandy Greenhouse Company Incorporated, B-208876, supra.

Finally, even though the basis originally advanced for the cancellation may have been erroneous or inadequate, we have held that a subsequently enunciated basis for cancellation, which would have supported cancellation had it been advanced originally, is acceptable. Monarch Enterprises, Inc., June 15, 1981, 81-1 C.P.D. ¶ 483, affirmed, Aug. 6, 1981, 81-2 C.P.D. ¶ 100.

The protest is denied.


for Comptroller General
of the United States