

DECISION

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

FILE: B-219988.3

DATE: December 16, 1985

MATTER OF: Norfolk Shipbuilding and Drydock
Corporation

DIGEST:

1. GAO will review a termination for convenience when it is based on an agency determination that the initial contract award was improper.
2. Agency's decision to terminate a contract for the convenience of the government is reasonable in light of agency's need to revise solicitation specifications to reflect its actual needs.
3. Where agency terminates contract because it determines that the solicitation must be revised and the requirement resolicited, protest that resolicitation will not reflect revisions is premature where revised solicitation has not been issued.

Norfolk Shipbuilding and Drydock Corporation (Norfolk) protests the termination of contract No. DAAK01-85-C-B250 awarded to Norfolk by the Army Materiel Command (AMC) under request for proposals (RFP) No. DAA510-85-R-A003. The RFP solicited offers for the construction of four vessels. AMC decided to terminate Norfolk's contract on the ground that there is uncertainty whether the solicitation purchase description, which contains several hundred technical requirements, adequately reflects the agency's needs.

The protest is denied in part and dismissed in part.

034021

Two of the six offerors who submitted proposals in response to the RFP protested to this Office that AMC improperly rejected their proposals on the basis of a vessel design requirement not stated in the RFP. AMC states that these protests revealed that the evaluation of proposals, based upon a solicitation purchase description which inadequately reflected the agency's needs, resulted in an essentially noncompetitive acquisition. AMC also states that while reviewing the procedures leading to award, it realized that in written negotiations, the agency failed to point out many deficiencies in certain offerors' proposals. Because of these defects in the procurement, AMC was unable to determine that Norfolk's proposal was the most advantageous to the government and, therefore, terminated the firm's contract for the convenience of the government. AMC intends to issue a new solicitation after completing its review of the technical requirements contained in the prior solicitation.

Norfolk maintains that the contract termination and resolicitation are improper. Norfolk points out that AMC determined the firm's proposal to be the most advantageous to the government and, therefore, awarded it the contract. Norfolk asserts that to date there has been no showing that the firm's proposal does not meet the agency's needs or that those needs have changed. Norfolk also contends that AMC should not now be allowed to use its subsequent determination that negotiations were inadequate and that the solicitation specifications require revision as a basis by which to justify contract termination.

As a general rule, our Office will not review an agency decision to terminate a contract for the convenience of the government, since by law this is a matter of contract administration for consideration by a contract appeals board or by a court of competent jurisdiction. Amarillo Aircraft Sales and Services, Inc., 63 Comp. Gen. 568 (1984), 84-2 C.P.D. ¶ 269. However, we will review a termination for convenience where, as here, it is based upon an agency determination that the initial contract award was improper. Amarillo Aircraft Sales and Services, Inc., 63 Comp. Gen. 568, *supra*; EMS Development Corp., B-207786, June 28, 1982, 82-1 C.P.D. ¶ 631; Michael O'Connor, Inc.; Free State Builders, Inc., B-183381, July 6, 1976, 76-2 C.P.D. ¶ 8.

Termination of a contract is permissible where an agency discovers subsequent to award of the contract that the solicitation under which the requirement was procured does not adequately reflect the government's needs. Hemford Company, B-216811, Feb. 8, 1985, 85-1 C.P.D. ¶ 167; EMS Development Corporation, B-207786, June 28, 1982, 82-1 C.P.D. ¶ 631. We have recognized that a solicitation may be canceled where the record shows that the solicitation specifications were deficient. Marmac Industries, Inc., B-203377.5, Jan. 8, 1982, 82-1 C.P.D. ¶ 22.

Here, AMC reports that it contemplates changes to the specifications because the solicitation specifications apparently did not adequately reflect its actual needs. AMC believes that proposal evaluation based upon such inadequate specifications essentially resulted in a noncompetitive procurement. The protester has not shown the agency's position to be incorrect. Therefore, we find no basis to question AMC's decision to terminate the contract. See EMS Development Corporation, B-207786, supra.

With regard to Norfolk's contention that it is improper for AMC to cancel the requirement on the basis of information discovered after award, we have held that an agency may properly determine to cancel a solicitation (and terminate the resultant contract) no matter when the information justifying the cancellation first surfaces. See Chrysler Corp., B-206943, Sept. 24, 1982, 82-2 C.P.D. ¶ 271; Marmac Industries, Inc., B-203377.5, supra.

Further, to the extent Norfolk challenges the agency's intention to revise the solicitation, this basis for protest is premature. McCarthy Manufacturing Co., Inc., B-193069, Mar. 7, 1979, 79-1 C.P.D. ¶ 158. At this time, AMC has not issued a revised solicitation; accordingly, neither this Office nor Norfolk has any basis to question the agency's stated position. Advance Energy Control Systems, Inc., B-201249, May 20, 1981, 81-1 C.P.D. ¶ 392; McCarthy Manufacturing, Co., Inc., B-193069, supra.

Norfolk also argues that a resolicitation of the requirement creates an impermissible auction since Norfolk's price has been exposed. In this case, however, the competitive situation on resolicitation will not be based

solely on the exposed price because AMC intends to revise the specifications and because the time delay of almost 1 year from issuance of the original solicitation should affect each offeror's price. Moreover, an impermissible auction is not created by a resolicitation after prices are exposed where those actions are in accordance with government legal requirements. See N.V. Phillips Gloellampenfabriken, B-207485.3, May 3, 1983, 83-1 C.P.D. ¶ 467; American Shipbuilding Company, B-207218; B-207218.2, Nov. 9, 1982, 82-2 C.P.D. ¶ 424.

Norfolk requests proposal preparation costs and the costs of filing and pursuing its protest. In view of our decision denying in part and dismissing in part Norfolk's protest, its claim for these costs is denied. Digital Radio Corp., B-216441, May 10, 1985, 85-1 C.P.D. ¶ 526. Blinderman Construction Company--Reconsideration, B-218028, Feb. 20, 1985, 85-1 C.P.D. ¶ 214.

for *Raymond E. Van Cleve*
Harry R. Van Cleve
General Counsel