



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Nebraska Aluminum Castings, Inc.

File: B-223928

Date: October 17, 1986

DIGEST

Agency's incorporation into the solicitation of a provision cautioning bidders that first article prices must reflect only the reasonable costs associated with the production and testing of those units clearly was appropriate response to the General Accounting Office's earlier recommendation to the agency that steps be taken to discourage the practice of submitting bids with grossly inflated first article prices as a device to obtain unauthorized contract financing.

DECISION

Nebraska Aluminum Castings, Inc. (NAC) protests that certain terms of invitation for bids (IFB) No. DAAK01-86-B-C140, issued by the United States Army Troop Support Command (Army) for the supply of unmounted magnetic compasses are vague, contradictory, and favor the incumbent contractor.

We deny the protest.

BACKGROUND

The IFB solicited bids to furnish 82,000 compasses including 10 units for first article testing. The IFB contained the following caution at section B.2 entitled "FIRST ARTICLE PRICING":

"Bidders/Offerors are reminded that prices [for] First Article units (and testing if performed by the contractor) should reflect only those reasonable costs associated with producing (and testing) those units or run the risk of being unacceptable if the bid/offer is found to be materially unbalanced."

Prior to the scheduled August 11, 1986 bid opening, NAC protested to this Office that this clause was vague, undefined, and provided no guidance to bidders as to the

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proper preparation of their bids. In addition, NAC asserted that the clause contradicted Note 2 to section I.3 of the IFB, which advised bidders that no progress payments would be made to exceed the price of the first articles prior to first article approval. NAC contended that these conditions of the solicitation improperly served to favor the incumbent contractor.

The contracting officer determined that NAC's protest was lacking in merit sufficient enough to cause an extension or postponement in the bid opening, which took place as scheduled on August 11. Five bids were received. The incumbent contractor, Stocker & Yale, was the apparent low bidder with a unit price of \$19.12 for the production items and a unit price of \$347.12 for the 10 first articles. The apparent second and third low bidders unit-priced their production items and first articles, respectively, at \$18.96 and \$2,750, and \$20.03 and \$10,087. NAC was the apparent fourth low bidder with a unit price of \$23.094 for both the production items and the first article quantities. The highest bidder likewise submitted an identical unit price for both the production items and first articles, which was \$25.13. The agency advises that it is currently evaluating the bids, but no award has been made pending our decision on NAC's protest.

ANALYSIS

The clause at section B.2 of the IFB to which NAC objects responds to our decisions in Edgewater Machine & Fabricators, Inc., B-219828, Dec. 5, 1985, 85-2 C.P.D. ¶ 630 and Riverport Industries, Inc., 64 Comp. Gen. 441 (1985), 85-1 C.P.D. ¶ 364, aff'd upon reconsideration, B-218656.2, July 31, 1985, 85-2 ¶ 108, which held that a bid containing grossly inflated first article prices is materially unbalanced per se and must be rejected as nonresponsive.^{1/} Since the Riverport and

^{1/} With respect to the predecessor compass procurement, we held that the Army had properly rejected NAC's bid as nonresponsive where, because of the firm's failure to amortize its special equipment and tooling costs over the total contract period, its first article unit price was more than 1,000 times greater than its production item unit price. See Nebraska Aluminum Castings, Inc., B-222476, June 24, 1986, 86-1 C.P.D. ¶ 582, aff'd upon reconsideration, B-222476.2, Sept. 23, 1986, 86-2 C.P.D. ¶ ____.

Edgewater cases both involved Army procurements, we expressly recommended to the Army that steps be taken to discourage this type of bidding. In our view, the clause in question is consistent with our recommendations in Riverport and Edgewater. We believe that the clause clearly cautions bidders that their first article prices must be based upon legitimate first article production and testing costs, and cannot be inflated beyond the reasonable value of the first articles so that the bid thereby becomes materially unbalanced.

NAC apparently believes that the clause is inappropriate because it does not provide a precise mathematical formula in guiding bidders to the preparation of balanced bids. However, as we have already pointed out to NAC, see Nebraska Aluminum Castings, Inc., B-222476, June 24, 1986, 86-1 C.P.D. ¶ 582, aff'd upon reconsideration, B-222476.2, Sept. 23, 1986, 86-2 C.P.D. ¶ ____, it is neither the percentage differential between the total first article price and the total bid price, nor the degree by which the first article unit price exceeds the production item unit price, that controls in such matters. Rather, a bid is materially unbalanced where, given the nature of the items being acquired, the prices charged for the first articles bear no reasonable relationship with the production and testing costs actually associated with those units. Therefore, contrary to NAC's position, we believe that a specific mathematical formula with respect to first article pricing would be both unworkable in light of the particular circumstances of each procurement and fundamentally inconsistent with the underlying rationale of Riverport and Edgewater.

We also find no merit in NAC's assertion that the IFB's first article pricing clause contradicts the advice to bidders that no progress payments will be made to exceed the price of the first articles prior to approval. We believe that the two provisions, when read together in context, advise bidders that first article prices must be based on legitimate production and testing costs and, accordingly, that progress payments in excess of those costs will not be allowed. We see no contradiction in terms as contended by NAC.

Finally, we see no grounds for NAC's assertion that the provisions of the IFB with respect to first article pricing impermissibly favored the incumbent contractor. The incumbent is charged with the submission of a balanced bid as well as the other bidders, but, as the Army points out, the fact that the incumbent may have much lower first article costs and likely will be granted first article waiver because

of its past performance simply reflects the natural advantages of incumbency that are not legally objectionable. In this regard, it is well settled that an incumbent's competitive advantage provides no legal basis for protest unless it can be shown that the advantage arose because of a preference or other unfair action by the contracting agency. See Rolm Corp., B-214052, Sept. 11, 1984, 84-2 C.P.D. ¶ 280. No such showing has been made here.

In our view, then, the record offers no support for NAC's overall protest position that the IFB's conditions regarding first article pricing worked to its prejudice as a potential successful bidder. Thus, despite NAC's contention that the cautionary clause at section B.2 was unclear, the firm certainly was able to submit a bid without grossly inflated first article prices (as noted, NAC's first article and production item unit prices were identical), and whether the other bids also reflect balanced pricing are questions to be resolved by the Army upon its evaluation of the bids.

The protest is denied.

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