



The Comptroller General
of the United States

Washington, D.C. 20548

Therrell

132029

Decision

Matter of: Pride Container Corporation
File: B-224678; B-224679
Date: January 16, 1987

DIGEST

Where agency reasonably determines after bid opening that solicitations' terms which restrict subcontracting overstate its minimum needs, do not permit full and free competition on an equal basis, and may have unnecessarily increased the government's costs, the agency has a compelling reason for cancellation of the solicitations.

DECISION

Pride Container Corporation (Pride) protests the cancellation after bid opening of invitation for bids (IFBs) Nos. 160-791 and 160-793, and the proposed award of contracts to the Georgia Pacific Corporation (GPC) under the resolicitation of these IFBs issued by the Government Printing Office (GPO) for the procurement of mailing tubes, express mail boxes, and instruction sheets and forms for the United States Postal Service.

We deny the protests.

The solicitations were mailed in early August 1986 to more than 30 prospective bidders. Bids were opened under both IFB's as scheduled on August 18. Three bids were received under IFB No. 160-791, and four bids were received under IFB No. 160-793. Pride submitted the lowest bid under each of the IFB's.

On August 19, GPO notified Pride that it was the low bidder under both solicitations and therefore was in line for the award of both contracts. Pride then informed GPO that it would be subcontracting the printing aspects of the contract work. On August 20, GPO again telephoned Pride, and notified Pride that paragraph 2-4 of GPO contract terms No. 1 (revised

10/80),^{1/} incorporated by reference into the two solicitations, prohibits the subcontracting of the predominant production function of GPO contracts, and that if a predominant production function other than presswork (printing) is not identified in the specification, it is deemed to be presswork. GPO thereby notified Pride that it would be prohibited by the solicitations' terms from subcontracting the presswork. Pride told GPO that it thought the clause in question created an ambiguity concerning the propriety of subcontracting the presswork, that Pride did not have any available presstime, and that notwithstanding the solicitations' alleged prohibition against it, Pride still planned to subcontract the presswork.

Pride telephoned GPO on August 21, and reiterated its intention to subcontract the printing. At that time, the contracting officer for the solicitations notified Pride that because he believed that the clause in question prohibited the subcontracting of the presswork, he had no choice but to find Pride nonresponsible.

By letter dated August 22, Pride filed a protest with GPO against GPO's rejection of Pride's two bids. Pride argued that since printing only represented 7.1 percent of its total bid prices, it is not the predominant production function and therefore Pride should not be prohibited from subcontracting this aspect of the job under paragraph 2-4 of the contract terms. Pride also contended that GPO should not readvertise its requirements since bid prices had already been exposed and resolicitations would prejudice Pride.

GPO denied Pride's protest against the nonresponsibility determination by letter dated August 28. However, in that letter, GPO agreed with Pride that the predominant production

^{1/} Paragraph 2-4 of GPO Contract terms No. 1 states:

"2-4. Subcontracts. The contractor may make contracts with any other party for the furnishing of any part of the articles or work called for in the contract, with the exception that the predominant production function required in the performance of the contract shall not be subcontracted, unless prior written approval is obtained from the Contracting Officer. If the predominant production function is other than presswork, it shall be so identified in the specifications."

function could be the fabrication of the containers. Nonetheless, GPO stated that it decided that it must cancel the solicitations and resolicit because paragraph 2-4 of GPO contract terms No. 1 states that the predominant function is presswork unless otherwise stated in the solicitations, and the predominant function may not be subcontracted. GPO concluded that the award of contracts to Pride, in conflict with GPO contract terms, would be prejudicial to other potential or actual bidders that believed that the contract terms prohibited subcontracting of the presswork and therefore either did not bid or varied their prices based on the prohibition against subcontracting of the printing. Therefore, GPO decided that in order to protect the integrity of the bidding system and to obtain the lowest cost to the government, it would cancel and readvertise the solicitations, giving the bidders the option to subcontract either the presswork or the construction of mailing containers.

On September 4, GPO resolicited bids and amended the relevant specification by stating: "The provisions of the article entitled 'subcontract,' GPO Pub. 310.2 are modified to permit subcontracting of either the presswork or the construction of the container." Telephone bids were permitted under the resolicitations. Bids were opened as scheduled, on September 12, and GPC, which had not bid on the earlier solicitations (for a reason other than any deficiency in the solicitations), was the low bidder under both resolicitations. Award of these contracts has not yet been made.

Pride filed its protests with our Office on September 15 against the rejection of its first bids and the cancellation of the original solicitations. Citing our decision in American Mutual Protective Bureau, 62 Comp. Gen. 354 (1983), 83-1 C.P.D. ¶ 469, Pride argues that although the solicitations contained deficiencies concerning the subcontracting provisions, there was not a compelling or cogent reason to cancel the IFB's and resolicit because the government would receive the goods it wanted and there was no showing of prejudice to bidders.

While we agree with the protester that under the original solicitation, GPO would have received the product it wanted, we cannot agree that there was no showing of prejudice to the bidders at the time the contracting officer made his determination to cancel the IFB. In American Mutual Protective Bureau, 62 Comp. Gen. 354, supra, the record clearly indicated that the six lowest bidders had, notwithstanding an ambiguity in the IFB which provided two Service Contract Act guard rates, bid the proper guard rate of the two contained in the IFB.

Thus, no actual prejudice to bidders could be shown based on the original bids.

Here, however, the protester refers to the resolicitation results to show that the contracting officer's concern, that prejudice to other bidders must have resulted from the waiver of the subcontracting provision, was unjustified. While the solicitation gave the contracting officer the unilateral right to permit the awardee to subcontract the predominant function, the protester, prior to award, sought to condition the award on the contracting officer's waiver of the subcontracting prohibition, in effect taking exception to an IFB requirement. The contracting officer, while recognizing that he could waive the subcontracting prohibition, reasonably concluded, in our view, that granting a waiver of this provision to Pride without affording the other bidders the opportunity to bid on the less restrictive basis which would permit subcontracting of the presswork would be unfair and potentially prejudicial.

Thus, at the time it canceled the solicitations it appeared to GPO that other actual and potential bidders were prejudiced by the original solicitations' more restrictive contract terms. GPO also concluded that bidders might have had to increase their prices due to the prohibition against subcontracting of the presswork and therefore the government could save money by more clearly expressing its minimum needs by resoliciting. In addition, other potential bidders may have been precluded from bidding due to the prohibition. In these circumstances, cancellation of the IFBs was proper. Alliance Properties, Inc., 64 Comp. Gen. 854 (1985), 85-2 C.P.D. ¶ 299; Meds Marketing, Inc., B-213352, Mar. 16, 1984, 84-1 C.P.D. ¶ 318.

The protests are denied.


Harry R. Van Cleve
General Counsel