



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Meisel Rohrbau GmbH & Co. KG

File: B-225549, B-225549.2

Date: April 16, 1987

DIGEST

Protest that agency lacks reasonable basis to cancel a request for proposals (RFP) and resolicit requirements of a brand name or equal procurement is denied where record shows that protester is not prejudiced by agency action.

DECISION

Meisel Rohrbau GmbH & Co. KG protests actions of the United States Army Regional Contracting Office in Frankfurt with regard to the procurement of a brand name or equal steel conduit pipe for the connection and repair of various heating lines in Giessen, West Germany, as part of a larger project to connect the Giessen military heating system to the local German utility supplier. Meisel originally protested the November 27, 1986, rejection of its equal offer and the subsequent award to Theodor Gammler GmbH under request for proposals (RFP) No. DAJA76-86-R-0320. Before resolution of this protest, the Army terminated the contract with Gammler on grounds that the technical evaluation of the equal offers received was improperly conducted which made any award under the RFP improper.

The Army states that it intends to recompet the requirements so as to minimize the prejudice to the other offerors while preserving the integrity of the procurement process. Meisel now alleges that the Army should instead reinstate the original solicitation and reevaluate all proposals received in response thereto and make an award under the RFP to the low responsive responsible offeror.

We deny the protest.

The RFP, issued July 25, 1986, contemplated the award of a fixed-price lump sum contract to the firm offering the brand name Kabelmetal steel conduit pipe, or equal. The solicitation contains the "Brand Name or Equal" clause which

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provides, in pertinent part, that an offeror shall identify any "equal" product that it proposes to furnish under the solicitation and that the offeror must furnish descriptive materials necessary for the purchasing activity to determine whether the product offered meets the salient characteristics required by the solicitation.

The record indicates that Meisel, the low offeror, offered Isolrohr or another brand name product as an alternate to Kabelmetal but, according to the Army, the firm did not submit any descriptive material with its proposal for either of these proposed "equals" nor give any indication if it proposed to modify either of these two products to make them conform to the requirements of the solicitation. As a result, the Army reports that its contract specialist made several requests to Meisel for descriptive data for the firm's proposed equal products. In response thereto, Meisel furnished a copy of the Isolrohr catalogue to the contracting activity. The Army states that its technical personnel made the determination that Miesel's proposed nonbrand name pipes were not the equivalent of the brand name pipe specified in the RFP based on the catalogues for Isolrohr and Kabelmetal and prior discussions the evaluator had with Meisel under a previous contract regarding the characteristics of Isolrohr pipe. Based on this allegedly improper technical evaluation, the contracting officer rejected the offers submitted by Meisel as being nonresponsive to the solicitation, and made award to Gammler, the third low offeror, without establishing a competitive range.

During consideration of Meisel's protest which was filed with our Office on December 10, the Army concluded that its evaluation of proposals offering an "equal" product had not been in accordance with the salient characteristics identified in the RFP and that discussions had been held with only one offeror, i.e., Meisel. Therefore, the agency determined that the procurement process was flawed and issued a stop-work order to Gammler on December 12 and terminated the contract for convenience on January 6, 1987. As noted above, the Army states that it intends to resolicit the requirements in order to correct the improprieties which occurred and minimize the harm caused to the other offerors.

Meisel agrees with the Army that it and other firms were prejudiced by the Army's improper technical evaluation and subsequent rejection of proposals. However, the protester challenges the agency's proposed remedy on the ground that no reasonable basis exists which supports the cancellation of the original solicitation. The protester initially argued that the appropriate remedy, under these

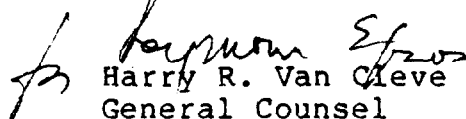
circumstances, was to make an award to it rather than cancel the RFP and recompute the requirements. In its comments on the conference, however, Meisel modified its position to the extent that it now believes the proper remedy should be reevaluation of proposals and award of a contract, on the basis of initial offers received, to the lowest responsive responsible offeror.

We do not find that Meisel was prejudiced by the Army's decision to cancel the RFP. As noted previously, the RFP required offerors to identify any "equal" product that it proposed to furnish under the RFP and to furnish descriptive materials necessary for the purchasing activity to determine whether the product offered met the RFP's salient characteristics. Meisel offered two alternates to the brand name item, but did not submit the required descriptive literature with its proposal. In these circumstances, we have held that the failure to provide descriptive literature sufficient to permit the evaluation of proposal technical acceptability is a material omission and the agency may reject such an offer as technically unacceptable without discussions. See AEG Aktiengesellschaft, 65 Comp. Gen. 419, 86-1 C.P.D. ¶ 267; Hugo Auchther GmbH, B-217400, July 22, 1985, 85-2 C.P.D. ¶ 64. Thus, to the extent that Meisel was provided an opportunity to amplify its offer by submission of required material which it had not otherwise provided in its proposal, it was given an opportunity that was not provided to any of the other offerors. If anything, Meisel was given a competitive advantage, not a disadvantage, before its offer was found unacceptable. See AEG Aktiengesellschaft, 65 Comp. Gen. 419, supra.

Moreover, if Meisel's protest were to be sustained and the RFP reinstated, Meisel would not be eligible for award on the basis of initial proposals since its offer was technically unacceptable for failure to submit the required descriptive literature.

In a negotiated procurement, contracting agencies have broad discretion in determining when it is appropriate to cancel a solicitation and need only establish a reasonable basis to support a decision to cancel. Hewitt, Inc., B-219001, Aug. 20, 1985, 85-2 C.P.D. ¶ 200. In light of what has transpired here, including the termination of the Gammier contract and the fact that Meisel is in no way prejudiced by the cancellation, we find no basis to object to the Army's decision to cancel and resolicit.

The protest is denied.


Harry R. Van Cleave
General Counsel