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**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Rezcorp
File: B-230260
Date: June 14, 1988

DIGEST

1. A protest contending that a solicitation's inspection and testing provision is an unreasonable method of determining compliance with specifications is denied where the provision reasonably reflects the contracting agency's actual needs; a contracting agency's responsibility for determining its actual needs includes determining the type and amount of testing necessary to ensure product compliance with specifications and the General Accounting Office will not question such a determination absent a clear showing that it was arbitrary or capricious.
2. Protest against bid sample requirement and allegedly subjective inspection provision in solicitation is untimely, and will not be considered, where raised after bid opening.

DECISION

Rezcorp protests the terms of invitation for bids (IFB) No. 50-PAPT-8-00002, issued by the Patent and Trademark Office, Department of Commerce, for full color/part-color photoprints of plant patents.

We deny the protest in part and dismiss it in part.

The IFB solicited bids for a firm, fixed price requirements contract with renewal options. Prior to issuing the IFB, the agency used a draft solicitation to obtain industry comments with a view towards possibly improving the statement of work. Rezcorp submitted comments questioning the agency's proposed use of the Munsell Color Chip Book as a basis for inspection of the photoprint proofs furnished by the contractor, but Commerce issued the IFB with provision for use of this inspection method. In this regard, the IFB provided as follows:

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"The Munsell Color Chip Book (1979 Matte) may be used to compare original to proof color differences in four areas. Each original color/part-color drawing area is compared with the corresponding area in the proof color/part-color photoprint by finding a Munsell Chip which matches the area under C.I.E. standard daylight viewing conditions. If any one area of the proof color photoprint exceeds a color difference of one (1) Munsell Color Chip from the original color/part-color drawing area matching chip, then the proof color/part-color photoprint will be rejected. The portion(s) which caused the rejection will be marked/circled on the rejected photoprint proof."

The IFB also required the submission of bid samples which also would be evaluated using the Munsell book. Award was to be made on the basis of the lowest total bid and on the successful production of the pre-award color/part-color photo print samples. Six bids were received from five firms on February 19, 1988. Rezcorp did not submit a bid.

The protester objects to the agency's use of the Munsell Color Chip Book for evaluation of photoprint proofs to be furnished by the contractor, arguing that use of the Munsell book is outdated and that standard commercial practice has abandoned it in favor of densitometer readings. Rezcorp further contends that it actually is legally impossible to perform acceptably based on the agency's inspection method. Rezcorp explains in this regard that since correction of a color shift in one area of a proof will cause a change in another, if one of four inspected areas of a proof is found unacceptable, correcting the color in that area also will change another area, making it unacceptable. Rezcorp also contends that since the IFB indicated only that the Munsell book may be used, the IFB failed to state adequately which inspection process would be used to evaluate the products furnished.

The agency responds that the Munsell book is in fact an industry standard by which color prints may be evaluated and that the Patent and Trademark Office has used and is presently using the Munsell book as an inspection method on other contracts for this requirement. The contracting officer contends that the use of a densitometer would not necessarily provide the consistent results suggested by Rezcorp since calibration factors would determine the accuracy of the units' readings and, to be perfectly accurate, frequent calibration adjustments must be made to the units.

We have held that the contracting agency's responsibility for determining its actual needs includes determining the type and amount of testing necessary to ensure product compliance with the specifications. Lunn Industries, Inc., B-210747, Oct. 25, 1983, 83-2 CPD ¶ 491. Our Office will not question a determination that certain testing is necessary absent a clear showing that the determination was arbitrary or capricious. Janke & Co., Inc., B-225710.2, et al., Feb. 17, 1988, 88-1 CPD ¶ 155.

Rezcorp has not established that the agency's reliance on the Munsell book is unreasonable. Rather, the protester's argument boils down to a disagreement over whether use of the Munsell book or a densitometer is the best method of determining compliance with the specifications. We see nothing inherently objectionable in Commerce's decision to continue employing an inspection method it has used, and still uses, on other similar contracts, even if Rezcorp is correct that a higher technology is available for this purpose. Commerce clearly has considered the relative advantages of the two alternative methods and concluded, simply, that any greater accuracy in densitometer measurements is offset by the need for frequent calibration. The agency also reports that, while the densitometer methodology favored by Rezcorp may indeed result in a more accurate negative, its requirement is for an accurate proof, and an acceptable negative does not necessarily equate with an accurate proof. While Rezcorp disagrees with the agency's judgment, the record does not establish that the agency's position is unreasonable.

Rezcorp's allegation of impossibility of performance also is not supported in the record. While Rezcorp apparently is correct that adjusting the color in one section of a print may alter the color in another section, the Munsell book methodology appears to account for this eventuality. Specifically, Commerce explains that, to avoid this situation, the specifications permit some deviation from a perfect color match, requiring only that the inspected areas of the proof be within one Munsell book shade of the true color. For example, an area one and a quarter shades off can be corrected to within one shade while leaving all other areas of the print well within the plus or minus one shade requirement.

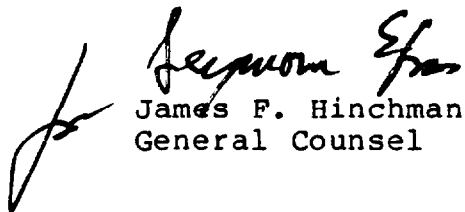
We also do not agree with Rezcorp that the IFB does not adequately state which inspection process will be used to evaluate the products. Although the IFB only states that the Munsell book (1979 Matte edition) may be used, the contracting officer explains that this language was primarily intended to allow the use of a later edition of the Munsell book if it became available during the contract

term. Commerce further states that it did not want to preclude the use of any more accurate or otherwise desirable source of color comparison that may become available. We find nothing objectionable in the agency's approach. If, after award, a contractor believes Commerce has adopted an unreasonable inspection method, it would have recourse under the disputes provisions of its contract.

In comments filed on March 24, Rezcorp alleged for the first time that an IFB provision permitting resubmission of rejected bid samples is improper, and that if the agency uses the Munsell book, more objective color comparison criteria must be established. Our Bid Protest Regulations require that protests based upon alleged improprieties apparent on the face of a solicitation shall be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1988). Since these alleged deficiencies were not raised until after the February 19 bid opening, they are untimely and will not be considered. See Beckman Instruments, Inc., B-230701, May 31, 1988, 88-1 CPD ¶ 326.

Rezcorp requests reimbursement of its costs of pursuing this protest, including attorneys' fees. Since the protest is without merit, the request is denied. See Bay Decking Co., Inc., B-227833, Sept. 28, 1987, 87-2 CPD ¶ 307.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel