



**The Comptroller General
of the United States**

Washington, D.C. 20548

138298

Decision

Matter of: Control Concepts, Inc.

File: B-233354.3

Date: April 6, 1989

DIGEST

1. Contracting officer properly canceled invitation for bids after bid opening and resolicited on the basis of revised specifications where original specifications overstated the government's minimum needs in several respects.
2. Allegation that the specifications were defective is dismissed as untimely where alleged defect was apparent in the specifications but was not raised until after the closing date for receipt of proposals.

DECISION

Control Concepts, Inc., protests the Department of the Army's cancellation of invitation for bids (IFB) No. DAAC89-88-B-0096, for providing equipment for operating, monitoring and controlling an air pollution control system and explosive waste incinerator furnaces. Control Concepts contends that the Army lacked a compelling reason to cancel the solicitation once bids had been opened and that it should be awarded the contract under the IFB because it submitted the lowest responsive bid.

We deny the protest.

The IFB was issued on August 8, 1988. The Army determined that three of the four bids received by the September 22 bid opening date were responsive to the invitation, while the fourth bid was rejected as nonresponsive because it took exception to material specifications and delivery requirements. The Army awarded the contract to Western Controls on October 19 on the basis of its lowest priced bid. Control Concepts, which had submitted the second lowest bid, had previously protested to the Army that Western Controls' bid was nonresponsive to the IFB's requirements relating to the capabilities of loop controllers and the number of serial ports on the programmable logic controller.

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On October 19, the contracting officer informed Control Concepts that reexamination of the bids confirmed that Western Controls' bid was, in fact, responsive to the IFB, and the contract was awarded to Western Controls on that date. By letter of October 24, Control Concepts protested to our Office that the contract improperly had been awarded to Western Controls even though Western Controls' bid was non-responsive to the IFB requirements regarding the capabilities of loop controllers and the number of serial ports on the programmable logic controller.

Subsequently, the Army reexamined the three bids it had initially determined to be responsive. This technical evaluation revealed that each of the three bidders had interpreted paragraph 5.2.4 of the IFB's specifications (concerning three communications functions that the loop controllers would be required to perform) differently. Control Concepts interpreted the specification to require simultaneous performance of all three functions, another bidder provided a system capable of performing two of the three functions at the same time, and Western Controls bid a system that could only perform one function at a time. The Army concluded that the specification was ambiguous and thus that the bidders had not competed on the basis of the same requirement. Accordingly, the Army decided to terminate Western Controls' contract for the convenience of the government and recompute the requirement on the basis of revised specifications that would reflect the government's minimum needs more accurately. After the Army reported these determinations to our Office, we dismissed Control Concepts' protest as academic on November 21, 1988.

On December 12, Control Concepts filed the present protest against the Army's cancellation of the original IFB, contending that the IFB should be reinstated and that Control Concepts should be awarded the contract because it had submitted the lowest responsive bid. On December 13, the Army terminated the contract with Western Controls and issued a new solicitation (request for proposals (RFP) No. DAAC89-89-R-0105) containing revised specifications.

The crux of Control Concepts' present protest is that the original specification contained in the IFB was not ambiguous and, therefore, the contracting officer had no justification for canceling the IFB and resoliciting on the basis of revised specifications. Furthermore, the protester contends that Western Controls' bid was nonresponsive to the IFB's clear requirements that the loop controllers be able to perform the three communications functions specified in paragraph 5.2.4 of the specifications simultaneously and that the programmable logic controller have two serial

ports. Accordingly, Control Concepts requests that our Office recommend that the IFB be reinstated and that the Army award the contract to Control Concepts pursuant to the terms of the IFB.

Contracting officers have broad discretion in determining when it is appropriate to cancel an IFB. However, the preservation of the integrity of the competitive bidding system requires that the determination to cancel an IFB after bid opening be supported by a compelling reason. Federal Acquisition Regulation (FAR) § 14.404-1(a)(1); Nootka Environmental Systems, Inc., B-229837, Apr. 25, 1988, 88-1 CPD ¶ 396. The determination as to whether a compelling reason exists is an administrative one that we will not disturb absent a showing that it was unreasonable. Cantu Services, Inc., B-230142, June 2, 1988, 88-1 CPD ¶ 521. Furthermore, a contracting officer's decision to terminate a contract and resolicit the requirement is not improper when, subsequent to award, the contracting agency discovers that the solicitation under which the requirement was procured did not adequately reflect the government's needs. See Special Waste, Inc., 67 Comp. Gen. 429 (1988), 88-1 CPD ¶ 520. Here, we find the contracting officer's decision to terminate Western Control's contract, cancel the IFB, and resolicit were reasonable because there was a compelling reason to cancel the IFB after bid opening.

The original IFB required at paragraph 5.2.4 of the specifications that the loop controllers provide three communications functions that are relevant to this protest:

(1) isolated auxiliary 4-20 mA [mili-amps] output and 4-20 mA output signal levels; (2) digital input allowing remote setting of setpoints and selecting auto/manual operation; and (3) serial communication between the computer and the loop controllers to pass data (set point changes, auto/manual mode, etc.).

The Army reports that it never intended to require that all three functions be performed at the same time. According to the contracting officer, one of the primary purposes of this procurement was to purchase a system to monitor and operate certain environmental equipment that the Army had been directed to buy by the Environmental Protection Agency (EPA). As the Army had not yet purchased that equipment at the time it issued the IFB, the Army did not know what type of communications would be necessary to link its control system with the EPA-mandated equipment. Thus, the contracting officer explains that the specification was written to allow flexibility to choose the method of communications that the control system would need when the EPA-mandated equipment actually was acquired.

After reevaluating the three bids originally found responsive, however, the contracting officer found that each bidder had interpreted the specification differently, and ultimately concluded that the specification was ambiguous. In addition, between the time the IFB was issued and the Army's determination that the specification was ambiguous, the Army purchased some of the EPA-mandated equipment that was to be maintained and controlled by the system being purchased under the IFB; as a result, the Army was able to describe the communications capabilities the monitor system was required to have more precisely than had been done in the original specifications. The Army then decided to revise the original specifications in a number of ways since in effect they no longer reflected the Army's minimum needs.

For example, the Army deleted the original requirement that the loop controllers provide a second 4-20 mA output signal, now requiring only that the controller provide a "single 4-20 mA output signal level." The revised specification also deletes the digital communications requirement in the original paragraph 5.2.4--specifically, that the loop controllers offer "digital input allowing remote setting of setpoints and selecting Auto/Manual operation"--based on the Army's conclusion that it does not need the extra speed between the environmental equipment furnaces and the loop controllers that digital communications could provide, because the equipment being monitored takes several minutes to activate and deactivate in any event.^{1/} The revised specification also deletes the previous requirement that the programmable logic controller have two serial ports; the Army explains that once the waste feed monitoring system was completed, it realized that the additional ports are not needed. In all, there were a total of 14 changes or clarifications made to the specifications, as well as a change in the delivery schedule.

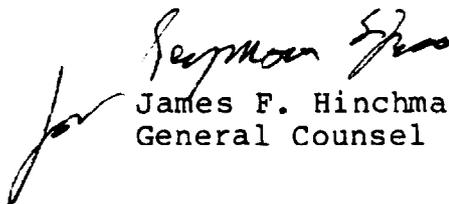
The Competition in Contracting Act of 1984, 10 U.S.C. § 2305(a)(1)(A) (Supp. IV 1986), requires that solicitations be designed in a manner to achieve full and open competition and contain restrictive specifications only to the extent necessary to satisfy the contracting agency's minimum needs.

^{1/} The Army reports that digital communications can be completed in less than 20 milliseconds, whereas a serial link system may take up to 1 second to complete a communication. However, the machinery controlling the operation of the furnaces may take up to 15 minutes to start or stop operations. Thus, the difference between digital and serial communications is not significant.

Where, as here, an agency discovers that a solicitation overstates the government's minimum needs, the best interests of the government require that no award be made under the restrictive solicitation. See Donco Industries, Inc., B-230159.2, June 2, 1988, 88-1 CPD ¶ 522. Accordingly, having determined that the IFB in this case overstated its minimum needs, the Army was justified in terminating the contract with Western Controls, canceling the IFB, and resoliciting on the basis of relaxed specifications that accurately reflect its minimum needs. See Special Waste, Inc., 67 Comp. Gen. 429, *supra*; West Alabama Remodeling, Inc., B-220574, Dec. 26, 1985, 85-2 CPD ¶ 718.

Finally, in its February 9, 1989, comments on the informal conference held on this protest, Control Concepts argues for the first time that the revised specification in the RFP is defective. However, as this alleged defect was apparent on the face of the RFP, Control Concepts was required to protest this issue before the closing date for receipt of initial proposals, January 13, 1989. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1988). Therefore, this protest issue is dismissed as untimely.

The protest is denied in part and dismissed in part.


James F. Hinchman
General Counsel