



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Zwick Energy Research Organization, Inc.

File: B-237520.3

Date: January 25, 1991

Kenneth T. Zwick, Esq., for the protester.
Maj. William R. Medsger, Esq., and Edward J. Korte, Esq.,
Department of the Army, for the agency.
Amy Mito Shimamura, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Contracting agency had compelling reason to cancel solicitation after bid opening where specification required engines driven by gasoline-type fuels for equipment designated for shipment overseas and agency directive required that equipment designated for shipment overseas be designed for utilization of diesel fuels only.
2. Contract may not be awarded to low bidder under solicitation, which required gasoline engine driven air compressors, with the intent of materially modifying the contract after award to require diesel engine driven air compressors.

DECISION

Zwick Energy Research Organization, Inc. protests the cancellation of invitation for bids (IFB) No. DAAK01-89-B-0061, issued by the United States Army Troop Support Command (TROSCOM) for a total estimated quantity of 1,901 gasoline engine driven, hand truck mounted air compressors under a requirements-type contract for a base year and 2 option years. Zwick contends that TROSCOM is required to award the contract to it under the IFB since it is the low responsible bidder. Zwick also claims the costs of pursuing its protests and preparing its bid.

We deny the protest and claim.

Three bids were submitted by the May 31, 1989, bid opening date. After the apparent low bidder alleged a mistake in its

bid and was allowed to withdraw, Zwick became the apparent low bidder with a total bid price of \$3,295,514.

On August 31, 1989, TROSCOM issued amendment No. 4, which canceled the IFB because the solicitation package failed to include certain aperture cards that the agency believed were vital to the production of the required item. Zwick protested the cancellation to the agency and then to our Office on October 20, 1989. TROSCOM ultimately conceded that the missing aperture cards were of no consequence and agreed to reinstate the IFB and make award to Zwick if the firm was determined responsible and funds were available. Thus, we dismissed Zwick's first protest as academic on January 17, 1990.

In April 1990, the proposed contract award to Zwick was disapproved by TROSCOM's Director of Procurement and Production because it contravened the fuel standardization requirement of Department of Defense (DOD) Directive No. 4140.43, dated March 11, 1988. The directive provides that fuel standardization is required in order to minimize the number and complexity of petroleum fuels required outside the continental United States. In order to achieve that objective, the directive requires that new equipment designated for shipment overseas be designed to use diesel fuel rather than gasoline-type fuels. Since the gasoline engine driven compressors were being procured for shipment overseas, TROSCOM again canceled the IFB on June 19, 1990.

Zwick's again protested the cancellation to the agency, which denied its protest. Zwick then filed this protest with our Office, on September 19, 1990.

The protester contends that the cancellation of the IFB was improper and that TROSCOM was required to award it the contract because it was determined to be responsible and funds were available. The protester also contends that because TROSCOM should have known of the existence of the 1988 DOD directive requiring diesel engines, it should not now use the directive as an excuse to alter the government's obligation to award the contract to Zwick. Zwick contends it detrimentally relied on the government's promise of contract award, and the agency should award Zwick the contract, and then modify the specifications to require diesel engines rather than gasoline engines.

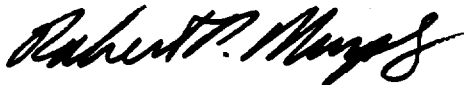
Federal Acquisition Regulation (FAR) § 14.404-1(a)(1) (1990) provides that after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsible bid, unless there is a compelling reason to reject all bids and cancel the invitation. FAR § 14.404-1(c)(2) provides that IFBs may be canceled after bid opening where

specifications have been revised. A cancellation on the basis of revised specifications is generally appropriate where award under the solicitation would not serve the government's actual minimum needs. Aero-Executive Helicopters, B-227133, Aug. 17, 1987, 87-2 CPD ¶ 167.

Here, the gasoline engines called for by the IFB will not meet TROSCOM's needs since diesel engines are required for the air compressors which have been designated for shipment overseas. The agency states that the change from gasoline to diesel engines will require a new statement of work that will differ significantly in cost and complexity from the work originally prescribed in the solicitation. While it may be true that TROSCOM should have been aware of DOD Directive No. 4140.43 at an earlier date, information justifying the cancellation of a solicitation can be considered no matter when the information first surfaces or should have been known. Holk Development Inc., B-236765.2, Jan. 18, 1990, 90-1 CPD ¶ 65. Under the circumstances, TROSCOM had a compelling reason to reject all bids and resolicit.

Zwick contends that TROSCOM should award the contract to its firm under the IFB and then modify the contract to provide for diesel engines. However, it would be improper for TROSCOM to award the contract to Zwick with the intent of issuing a material modification to provide for diesel engines instead of gasoline engines. Id.

The protest is denied. Since Zwick's protest is denied, it is not entitled to recover its bid preparation costs or the costs of pursuing its protest.^{1/} 4 C.F.R. § 21.6(d); Digitize, Inc., B-235206.3, Oct. 5, 1989, 90-1 CPD ¶ 403.



for James F. Hinchman
General Counsel

^{1/} Since the purported promise to make award to Zwick was conditional, Zwick could not reasonably assume it was entitled to the award where intervening circumstances occurred. See James M. Smith, Inc. B-233877, Apr. 19, 1989, 89-1 CPD ¶ 390.