



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: General Projection Systems

File: B-241418.2

Date: March 21, 1991

Robert J. Kenney, Jr., Esq., Hogan & Hartson, for the protester.
William K. Dix, Esq., for Science Applications International Corporation, an interested party.
William T. Mohn, Esq., Department of the Navy, for the agency.
Amy M. Shimamura, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

An agency had a reasonable basis to cancel and resolicit a request for proposals (RFP), under which award was to be made to the low-priced acceptable offeror, after the receipt of proposals and disclosure of prices, where the major required item was solicited in the RFP on a "brand name" rather than on a "brand name or equal" basis and an acceptable equal item was proposed, because the RFP overstated the agency's requirements, which caused a reasonable possibility of prejudice to the competitive system since actual and potential offerors did not have the opportunity to compete on the government's actual requirements.

DECISION

General Projection Systems (GPS) protests the decision of the Department of the Navy, Naval Regional Contracting Center, Washington, D.C., to request new proposals under request for proposals (RFP) No. N00600-90-R-3391, for an audiovisual system, including installation, for the U.S. Naval Academy, Annapolis, Maryland.

We deny the protest.

The synopsis of the procurement in the July 17, 1990, edition of the Commerce Business Daily (CBD) under Federal Supply Class (FSC) Code 67 (photographic equipment), advised potential offerors that the entire audiovisual system, including an Eidophor 5171 projector, was being procured on a "brand name or equal" basis.

The RFP was set-aside for small business concerns and did not designate that the procurement fell under any particular FSC code. The schedule and the specifications of the RFP solicited "brand name or equal" products for all required items except for line item 0007, the high-intensity multisync light-value video projector.^{1/} For that item, both line item 0007 of the price schedule and the specifications called for the brand name Eidophor 5171 projector.^{2/} The record indicates that line item 0007 constituted approximately half the cost of the total system. The RFP stated that a single contract would be awarded to the responsible offeror with the lowest-priced, technically acceptable offer.

The solicitation incorporated by reference Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7001, "Buy American Act and Balance of Payments Program." The clause implements the Buy American Act, 41 U.S.C. §§ 10a-d (1988), and the Department of Defense (DOD) Balance of Payment Program by providing an evaluation preference for domestic end products over foreign end products, except for certain classifications of end products of qualifying countries.

Two proposals were received by the September 17 closing date. Science Applications International Corporation's (SAIC) proposal, which offered the Eidophor 5171 projector, was lowest-priced at \$1,246,277. GPS' proposal priced at \$1,246,860 offered an "equal" product, a General Electric (GE) projector--Talaria model 2MLV-SC--for item 0007. Both proposals were found technically acceptable after a review of the submitted descriptive literature. The contract was awarded to SAIC based on its lowest-priced, technically acceptable proposal.

On October 1, GPS filed a protest with our Office contending that the solicitation was subject to the Buy American Act, and that since SAIC's offered product, the Eidophor 5171, is foreign-made, a 12 percent evaluation factor should have been applied in GPS' favor since its offered GE projector is a domestic product.

1/ The schedule listed 94 separate brand name or equal line items or subline items. A variety of manufacturers' brand names were specified.

2/ Specifically, the Eidophor 5171 with 500mm lens, multisync option, NTSC decoder, 50.32.63 Automatic Changeover Device, spare 4.2kW lamp.

The 12 percent evaluation preference, provided for in DFARS § 252.225-7001 and Federal Acquisition Regulation (FAR) § 25.105(a)(2), is generally applicable to DOD procurements for supplies, if the product is not encompassed by the Trade Agreements Act, 19 U.S.C. 2501 et seq. See FAR §§ 25.103; 25.402. Where the lowest domestic offer is from a small business concern, as GPS certifies itself, a 12 percent evaluation preference is applied to lower-priced foreign offers, inclusive of duty, if the foreign product is not an eligible product of a designated country. GPS argued that the Eidophor 5171 projector was not an eligible product of a designated country covered by the Trade Agreements Act and that GPS was therefore entitled to the award as the lowest-priced domestic offer after the evaluation preference was applied.

The Navy agreed with GPS that SAIC had incorrectly certified that the Eidophor 5171 projector was not foreign-made. The Navy found that line item 0007 for Eidophor's brand name product should properly have been classified under FSC Code 58 (communications equipment) rather than under FSC Code 67 (photographic equipment). The Navy stated that FSC Code 67 products fall within the coverage of the Trade Agreements Act, which would negate the Buy American Act evaluation preference, while FSC Code 58 products do not, such that the Buy American Act preference is applicable. The Navy also found that the RFP specifications were overly restrictive, since line item 0007 only called for the brand name product, Eidophor 5171, yet GPS' offered "equal" projector, although not solicited by the RFP, was determined to be technically acceptable.

On November 6, we dismissed GPS' October 1 protest when the Navy advised our Office that the requirement would be resolicited on the basis of a corrected RFP. On November 9, we reopened our file on this protest, when GPS indicated that it was not satisfied by the Navy's corrective action and that it was entitled to award under the RFP.^{3/}

The Navy now asserts that it is not canceling the RFP, but rather is soliciting new proposals from those offerors who requested solicitations. Notwithstanding the Navy's assertion, since the agency is rejecting the two proposals

^{3/} Although the Navy argues that GPS' protest is untimely under our Bid Protest Regulations because it was filed more than 10 working days after October 22, when the Navy informally apprised GPS of its proposed corrective action, GPS' timely October 1 protest to our Office expressly requested award as the proposed relief. Thus, GPS' protest is timely.

received under the RFP and is proposing to resolicit the requirement, the agency is effectively canceling the RFP. See FAR § 15.608(b)(4).

In a negotiated procurement, an agency must have a reasonable basis to cancel an RFP and resolicit after receipt of offers, as opposed to the requirement that an agency have a cogent and compelling reason to cancel an invitation for bids (IFB) and resolicit after receipt of sealed bids. FAR § 14.404-1; Logics, Inc., B-237411, Feb. 1, 1990, 90-1 CPD ¶ 140; Lucas Place, Ltd., B-235423, Aug. 30, 1989, 89-2 CPD ¶ 193. The reason for this is that bids in response to an IFB are publicly exposed, and to reject them and seek new bids would discourage competition. See GAF Corp., 53 Comp. Gen. 586 (1974), 74-1 CPD ¶ 68. The same governmental interest in achieving full and open competition is present, and the same justification for cancellation is applicable, where the cancellation of an RFP occurs after prices have been disclosed, as sometimes occurs during bid protest proceedings. Carson Optical Instruments, Inc., B-228040, Oct. 19, 1987, 87-2 CPD ¶ 373. Under these circumstances, we believe that an agency has a reasonable basis to cancel the RFP and resolicit where the record contains plausible evidence or a reasonable possibility that not to do so would be prejudicial to the government or the integrity of the competitive system itself.^{4/} See Meisel Rohrbau GmbH & Co. KG, 66 Comp. Gen. 383 (1987), 87-1 CPD ¶ 414; Pacific Coast Utilities Serv., Inc., B-220394, Feb. 11, 1986, 86-1 CPD ¶ 150. For example, an agency may cancel a solicitation if it materially overstates the agency's requirements and the agency desires to obtain enhanced competition by relaxing the requirements. See CooperVision, Inc., B-229920.2, Mar. 23, 1988, 88-1 CPD ¶ 301; Aero Innovations, Ltd., B-227677, Oct. 5, 1987, 87-2 CPD ¶ 332.

The Navy states that the requirement here must be resolicited in order to achieve full and open competition since GPS' proposed "equal" product was considered acceptable, even though the RFP only allowed for the brand name product. The Navy asserts that the absence of the words "or equal" in line item 0007 resulted in an overly restrictive specification overstating the Navy's needs, since potential offerors could only supply the brand name product to satisfy the Navy's

^{4/} In contrast, where the possibility of prejudice is merely speculative or hypothetical, the agency should not resolicit, but should make award under the RFP. See Pacific Coast Utilities Serv., Inc., B-220394, *supra*; Tapex Am. Corp., B-224206, Jan. 16, 1987, 87-1 CPD ¶ 63 (reversed in Tapex Am. Corp.--Recon., B-224206.2, June 24, 1987, 87-1 CPD ¶ 626, where the agency provided evidence of prejudice).

stated needs. The Navy states that a clear and less restrictive specification that accurately reflects the Navy's minimum needs should result in additional competition and may ultimately result in a lower price. In this regard, the agency states that only 2 of the 15 sources who requested the RFP submitted proposals.

GPS argues that the omission of the words "or equal" for item 0007 is an obvious typographical error and this omission should not have misled any legitimate potential offeror, since the salient characteristics of this product are listed in the RFP specification, and the CBD announcement clearly indicated this item could be a brand name or equal product. We disagree.

The RFP itself can reasonably be interpreted as only allowing the brand name product for item 0007. In this regard, all other line items in the RFP expressly solicited "brand name or equal" products. Moreover, the CED notice was not incorporated into the RFP. See Hydraudyne Sys. and Eng'g B.V., B-241236; B-241236.2, Jan. 30, 1991, 91-1 CPD ¶ 88. The possibility that this was a typographical error on the RFP schedule is belied by the fact that, unlike the other line items, the pertinent specification also only designates the brand name product and does not provide for an equal product. Thus, this case is different from Environmental Tectonics Corp., B-222568, Sept. 5, 1986, 86-2 CPD ¶ 267 and U.S. Technology Corp., 66 Comp. Gen. 16 (1986), 86-2 CPD ¶ 383 (cited by the protester), where the solicitations could reasonably be interpreted as allowing equal products to be supplied, even though they were not expressly solicited.

In view of this clear ambiguity, an award under the RFP would be prejudicial to the competitive system. The two offerors, and presumably other potential offerors, are small business system integrators, who review the specifications and propose the brand name or equal product that they believe would satisfy the government's requirements at the lowest price. Since the RFP can be reasonably read to state that only the brand name product would be acceptable for item 0007, potential sources might not have considered offering a domestic product that would benefit from the application of the Buy American Act as did GPS. In this regard, one offeror, whose proposal was not evaluated because it was submitted late, is a GE dealer, according to GPS; yet, that firm proposed the brand name, rather than the GE projector, for item 0007. Thus, GPS' proposal of an "equal" product on this RFP should not be accepted as a basis for award, even though it apparently satisfies the government's requirements. See Motorola, Inc.; General Elec. Co., B-221391.2 et al., May 20, 1986, 86-1 CPD ¶ 471.

Additionally, SAIC, which was awarded a contract under the RFP, may have reasonably believed that the product it was offering was an eligible product of Belgium, a qualifying country under Trade Agreements Act, such that the Buy American Act evaluation preference was not applicable. As stated above, the CBD announcement erroneously stated that the products to be supplied were covered by FSC Code 67, which describes eligible products under the Trade Agreements Act. Nothing in the RFP indicated otherwise. Since all parties now apparently agree that item 0007 falls under FSC Code 58 and that the Buy American Act preference is applicable, this could well change SAIC's pricing strategy on this RFP. See Ssangyong Constr. Co., Ltd., B-225947.3, Aug. 20, 1987, 87-2 CPD ¶ 183. Indeed, the agency indicates that it will advise offerors how the Buy American Act preference will be applied in the resolicitation. See Systems-Analytics Group, B-233051, Jan. 23, 1989, 89-1 CPD ¶ 57.

The protest is denied.


James F. Hinchman
General Counsel