



Comptroller General
of the United States

349223

Washington, D.C. 20548

Decision

Matter of: Canadian Commercial Corporation/Ballard
Battery Systems Corporation

File: B-255642

Date: March 18, 1994

Paul Shnitzer, Esq., and Dolly Bowman Hauck, Esq., Crowell & Moring, for the protester.
Vera Meza, Esq., and Harry W. Longbottom, Esq., Department of the Army, for the agency.
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DIGEST

Agency does not have a compelling reason to cancel a solicitation after bid opening based upon alleged ambiguous price evaluation provision, where the solicitation when read as a whole has only one reasonable interpretation of how the multiple unit prices will be evaluated for award to the lowest and second lowest bidders.

DECISION

The Canadian Commercial Corporation (CCC)/Ballard Battery Systems Corporation¹ protests the cancellation after bid opening of invitation for bids (IFB) No. DAAB07-93-B-Q508 issued by the Department of the Army, Communication-Electronics Command for BA-5372/U lithium, manganese dioxide batteries.

We sustain the protest.

The Army issued the IFB on September 13, 1993, contemplating award of fixed price, indefinite delivery, indefinite quantity contracts for 1 base and 2 option years. The battery supplies memory backup power for communications and electronics equipment critical to the agency's battlefield

¹Ballard, as a Canadian bidder under agreement between the governments of Canada and the United States, submitted its bid through CCC and, in the event that CCC should be awarded a contract, CCC will subcontract 100 percent of the contract with Ballard.

mission. The battery is not commercially produced and is currently available from only one manufacturer.

In order to expand the domestic production base and to provide sufficient production capacity in the event of mobilization or national emergency, the IFB limited competition to United States and Canadian firms, and stated that two awards would be made--one for 70 percent of the requirement to the lowest bidder and the other for 30 percent of the requirement to the second lowest bidder. The IFB further provided that if there was only one responsive, responsible bidder, an award for 100 percent of the requirement would be made.

The IFB stated the minimum guaranteed order quantities for each of the base and option years under each of these three possible award conditions, i.e., 100, 70 and 30 percent of the requirement. The resulting bid schedule had a contract line item number (CLIN) for each year under each of the three possible award conditions, or nine CLINs. The IFB included the following instruction for submitting bids:

"In order to be considered for award bidders are required to submit bids for all award quantities (70%, 30%, and 100%)" [emphasis in original].

The IFB also requested a range of unit prices to permit the agency to benefit from the economies of increased production in the event the actual quantities ordered significantly exceeded the guaranteed minimum quantities. In this regard, the IFB stated five quantity ranges and solicited a separate unit price for each range. Each CLIN had five sub-line items for item prices, one for each of the five quantity ranges.

Due to the range of unit prices, the IFB set forth a formula for calculating the total bid price to be evaluated for award. The formula multiplied weights stated in the IFB for each order quantity range by the respective unit prices to produce weighted unit prices. The sum of these weighted prices yields an average weighted unit price, which then is multiplied by the minimum guaranteed order quantity to produce the total bid price.² The IFB provided an example of the calculation for an average weighted unit price using

²The bid schedule also included CLINs for first article requirements and various data items. The IFB contemplated including bid prices for the first article and data item requirements in the total evaluated price. Since all bidders bid these items as "NSP" (Not Specifically Priced), the inclusion of these CLIN prices in the calculation turned out to be unnecessary.

hypothetical unit prices. The example multiplied the average weighted unit price by the minimum order quantity, which in this case was the minimum order quantity for the award condition for 100 percent of the agency's battery requirement.³

The IFB also required bidders to submit bid samples which the agency would test for compliance with the required characteristics of the battery stated in the IFB. Bid samples failing the test would render the bid nonresponsive.

Based on a market survey conducted prior to issuing the IFB, the agency expected only three firms--Ballard, Power Conversion, Inc. (PCI), and Ultralife Batteries, Inc.--to submit bids. Both PCI and Ultralife submitted questions to the Army before the bid opening date of October 13, 1993. One question submitted by both firms asked whether the award would be based solely on prices bid for 100 percent of the agency's requirement. The Army replied to both firms by referring them to the terms stated in the IFB.

Ballard, PCI, and Ultralife submitted bids by bid opening on October 13.⁴ Ballard's evaluated bid price was lowest for all three possible award conditions. PCI's evaluated bid price was second lowest for the 70 and 30 percent requirements award conditions; however, Ultralife's evaluated bid price was second lowest for the 100 percent requirement award condition.⁵

³No sample calculation for the 70 and 30 percent requirements award conditions were provided in the solicitation.

⁴The agency has not tested the bid samples.

⁵The agency calculates the total prices for each of the three award conditions as follows:

	<u>70 Percent</u>	<u>30 Percent</u>
Ballard	\$3,933,930	\$1,851,450
PCI	5,948,600	2,752,800
Ultralife	6,853,000	3,543,000
	<u>100 Percent</u>	
Ballard	\$5,619,900	
Ultralife	6,552,000	
PCI	7,558,000	

After reviewing the bids, the Army formed the opinion that all three bidders had submitted bids under the assumption that bids would be evaluated for award based only on the 100 percent requirement bid prices. In support of this opinion, the agency notes that the IFB stated that award would be made to the lowest and second lowest priced bidders, and the example given in the IFB for calculating the evaluated bid price used the guaranteed minimum order quantity for the 100 percent requirement and did not illustrate the calculation for the 70 and 30 percent requirements. The Army further assumed that, since the bidders allegedly only competed on price with regard to the 100 percent requirement, the prices bid for the 70 and 30 percent requirements would not represent the lowest price to the government. On October 21, the agency canceled the solicitation because it had determined that the stated evaluation scheme was ambiguous. This protest followed.

An agency generally may cancel an IFB after bid opening and expose prices only if there is a compelling reason to do so. Federal Acquisition Regulation (FAR) § 14.404-1(a)(1); Shetland Properties of Cook County Ltd. Partnership, B-225790.2, July 1, 1987, 87-2 CPD ¶ 2. Whether cancellation is warranted on the basis of ambiguous or inadequate specifications is a decision of the contracting agency, whose determination will not be disturbed by our Office unless it is shown to be arbitrary, capricious, or not supported by substantial evidence. City Wide Press, Inc., B-231469, Aug. 10, 1988, 88-2 CPD ¶ 127. A term in a solicitation is ambiguous if it is susceptible to more than one reasonable interpretation when read in the context of the solicitation as a whole. TUMI Int'l, Inc., B-235348, Aug. 24, 1989, 89-2 CPD ¶ 174; Energy Maintenance Corp., B-223328, Aug. 27, 1986, 86-2 CPD ¶ 234. When a dispute exists as to the actual meaning of a solicitation term, we will resolve the dispute by reading the solicitation as a whole and in a manner that gives effect to all of its provisions. Id. The fact that some terms of an IFB are in some way deficient does not, in itself, constitute a compelling reason to cancel. Twehous Excavating Co., Inc., B-208189, Jan. 17, 1983, 83-1 CPD ¶ 42. In any event, our Office generally regards cancellation after opening as inappropriate when other bidders would not be prejudiced by an award under an ostensibly deficient solicitation, Hild Floor Mach. Co., Inc., B-196419, Feb. 19, 1980, 80-1 CPD ¶ 140, and when such an award would serve the actual needs of the government. GAF Corp. et al., 53 Comp. Gen. 586 (1974), 74-1 CPD ¶ 68; Twehous Excavating Co., Inc., supra.

Here, although the IFB provision for evaluating bid prices for award is unwieldy, it has only one reasonable meaning when read in the context of the IFB as a whole. The IFB expressly stated that two awards would be made if there were

two or more responsive, responsible bidders; one for 70 percent of the requirement to the lowest priced bidder, and the other for 30 percent of the requirement to the next lowest bidder. The IFB included the provision at FAR § 52.214-10, "Contract Award--Sealed Bidding," which included the following terms:

"(a) The [g]overnment will evaluate bids in response to this solicitation without discussions and will award a contract to the responsible bidder whose bid, conforming to the solicitation, will be most advantageous to the [g]overnment considering only price and the price-related factors specified elsewhere in the solicitation."

"(c) The [g]overnment may accept any item or group of items of a bid, unless the bidder qualifies the bid by specific limitations. . . . The [g]overnment reserves the right to make an award on any item . . . at the unit prices offered, unless the bidder specifies otherwise in the bid" [emphasis in original].

The bid schedule provided separate CLINs for bidding on the 70, 30, and 100 percent requirement contracts, and required bidders to submit prices on all three requirement possibilities. The IFB also illustrated how the evaluated bid prices would be calculated, which included using the guaranteed minimum order quantity, and set forth minimum order quantities for the three possible requirement possibilities. Thus, the evaluated bid prices for each possibility could be readily calculated from the face of the IFB.

The use of the words "lowest price" and "second lowest price" could have been misleading if the rest of the solicitation did not show clearly what the agency intended. Such unartful language does not reasonably support an interpretation that prices for the CLINs for one quantity requirement possibility (100 percent) would be used to award a contract on the CLINs for another quantity requirement possibility (30 percent). The IFB clearly states that award will be made only on the basis of price and price-related factors, which logically means that an award for one or a series of separately priced CLINs must be based on the prices bid for those CLINs. Using prices bid for other CLINs not included in the proposed award to determine the successful bidders would be contrary to the award provision at FAR § 52.214-10 and the terms of the IFB which provide for award on any CLIN or group of CLINs at the unit prices offered. Therefore, the IFB provision stating that an award

for 70 percent of the requirement would be made to the lowest priced bidder reasonably can only mean the lowest price submitted for the 70 percent CLINs. The provision for an award of 30 percent of the requirement to be made to the second lowest bidder can only reasonably mean the next bidder in line for award of the 30 percent requirement using the prices bid on the 30 percent CLINs after excluding the bidder that received the 70 percent award. The 100 percent CLINs would only be considered in the event that only one bidder was found to be responsive and responsible.

The guaranteed minimum order quantity for the 100 percent requirement possibility was used as the example illustrating the formula for calculating bid prices. This example does not reasonably imply that only the CLIN prices for 100 percent of the requirement would be evaluated, since the example was clearly identified as such in the IFB and the guaranteed minimum order quantities for the 70 and 30 percent requirement possibilities were likewise clearly identified in the IFB. An example for each and every possible application of the evaluation formula was unnecessary and the absence of such an example does not suggest exclusion of the unillustrated logical applications. See Twehous Excavating Co., Inc., supra (simple mathematical calculations needed to evaluate bids, which are not explicitly stated in the IFB but where the IFB evaluation scheme obviously reflects what the agency intended to do, are not solicitation deficiencies).

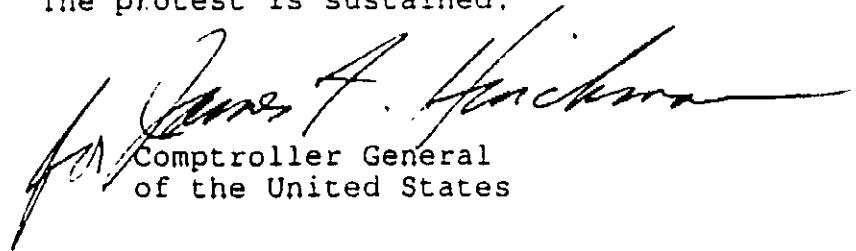
Since the basis for making award stated in the IFB was not defective, the Army did not have a compelling reason to cancel the solicitation.⁶

We recommend that the Army reinstate the canceled solicitation and proceed with testing of bid samples. The agency should award contracts for 70 percent of the requirement to Ballard and the remaining 30 percent to PCI assuming the bids and bidders are responsive and

⁶Ballard stated an alternative argument requesting award for 100 percent of the requirement regardless of the presence of other responsive and responsible bidders because it was the low bidder for all possible awards. However, since the solicitation stated that two awards would be made if two or more bidders were responsive and responsible in order to expand the Army's mobilization base, Ballard should have protested this alleged impropriety apparent on the face of the solicitation prior to bid opening in order for our Office to consider it timely under our Bid Protest Regulations. 4 C.F.R. § 21.2(a)(1) (1993).

responsible, and the bid prices are not unreasonable. We also find that Ballard is entitled to recover the reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1). The protester should submit its certified claim for protest costs directly to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.


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⁷If Ballard is found to be the only responsive and responsible bidder, the agency should award a contract for 100 percent of the requirement to Ballard.