

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548



B-176071

DEC 27 1972

AIR MAIL

Hopkins Engineering Company
c/o Ruderman, Levin, Ballin & Plotkin
12650 Riverside Drive
North Hollywood, California 91607

Attention: Mr. Robert Hanna
Vice President-Marketing

Gentlemen:

This is in reply to your letters of May 16 and November 30, 1972, and your counsel's letters of November 2 and 3, 1972, protesting against the award of a contract to any other firm under Invitation for Bids No. DAAB05-72-B-0432, issued by the U. S. Army Electronics Command, Philadelphia, Pennsylvania.

The solicitation sought bids on two items. Item 0001 covered a requirement for various ranges of quantities of radar interference filters. A contractor-furnished first article test report for the filters was the second item required. Bidders were required to state either a price for Item 0002 or that there would be no charge. Since your bid, which was submitted in the form of a letter instead of on the bid form, failed to do either, and since the Army has determined that the test report cannot be waived in your case, it proposes to reject your bid as nonresponsive.

The record shows that invitations were mailed to 43 potential bidders, including your firm, on April 21, 1972, and that five bids were received and opened on May 11, 1972, at 4:00 p.m. It was announced at bid opening that the Army would procure a number of filters covered under range "C", that is, from 573 to 766 of the items. In this range your bid for Item 0001 was low.

You state that you received your copy of the invitation late, apparently because it was sent to an incorrect street address, that is, to No. 2900 rather than to 12900 Foothill Boulevard. Since you did not believe there was sufficient time to submit your

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bid by mail, you called and discussed this problem with the Government representative listed on the invitation. Your letter of May 16 states that you "were advised that a letter would have to be hand-carried to the bid room stating our price and conformance to the format of the solicitation offer." Your contract representative in the Philadelphia area thereafter submitted a timely letter bid on your behalf, quoting prices only for ranges of Item 0001 and further stating that you intended to comply with all the conditions in the solicitation.

It is your position that your bid price for Item 0001 included the cost of the first article test report and, since you relied upon and complied with the oral advice of the Government's representative, the award should, in fairness, be made to your firm. In the alternative you argue that you have manufactured all ranges of the products requested in this solicitation and that the requirement for the first article test report should be waived, pursuant to the waiver provisions of the solicitation.

In connection with your objection to the late receipt of the invitation, which you imply justifies questioning the award to be made in this case, it is significant that there is no indication in the record, nor do you contend, that there has been any conscious or deliberate intention to exclude you from the competition. In the absence of such intent or purpose, an inadvertent failure to timely furnish a copy of an invitation to a particular contractor does not constitute a sufficient basis to cancel the invitation or to question an otherwise proper award. See B-171213, December 31, 1970, and 34 Comp. Gen. 684 (1955).

With regard to the waiver of first article testing the solicitation provides, in part, as follows:

"B.15 WAIVER OF FIRST ARTICLE TESTING (1970 Dec)

a. The Government reserves the right, with respect to bidders/offers who offer products previously accepted or tested by the Government, to waive the requirement for first article tests. Bidders/offers who offer such products and wish to rely on such previous acceptance or test must furnish, with their bids/offers, evidence that prior Government acceptance or approval is applicable to the product(s) proposed to be furnished hereunder.

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"Where First Article is set forth as a separate item, and is separately priced, and if the Government elects to exercise its right to waive first article testing, the applicable First Article Item in SECTION E will be deleted from the resulting contract and bids/offers will be evaluated on the basis of the First Article Item being deleted. * * *"

The record shows that you are not a prior producer of the exact equipment called for under this solicitation and that on October 17, 1972, the Army decided it would not waive the requirement for first article testing for your firm. While you apparently submitted a test report dated August 1965 on equipment which you claim is sufficiently similar to permit the Army to waive the test requirement in this case, the Army's technical evaluators do not agree that the items are sufficiently similar to justify such waiver. Subsequently, you submitted a sample filter to the Army's testing facility, but your request for waiver was again denied since the filter submitted was not the filter evaluated in the 1965 test report. Rather, the filter submitted appeared to have been manufactured in accordance with the specifications of the instant solicitation, but no evidence was submitted to indicate that a first article test report had ever been submitted on this filter.

Generally, the determination whether to grant a waiver of first article testing rests solely within the discretion of the procuring agency, and this Office will not question such determination unless it is shown to be arbitrary, capricious, or not supported by substantial evidence. B-168557, January 23, 1970. The record shows that the Army considered your letter dated July 26, 1972, which transmitted the 1965 test report and included a summary of differences and similarities between the filter solicited in this case and the filter evaluated in the 1965 report. The Army concluded that the two filters were not sufficiently similar to permit waiver of first article testing. From our review of your July 26 letter, we cannot say that the Army's determination is unreasonable, particularly in view of the increased life requirement from 250 hours to 750 hours.

As to your submission of a sample filter, which you say will meet the specifications in this case, it appears that testing would first have to be performed on the filter before your contention could be

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verified, since you presented no evidence that such tests had already been conducted on the item. To require the Army to now conduct the testing necessary to permit waiver would subject the Army to testing expenses which in fairness should be considered in evaluation of bids. We also believe such action would be inimical to the integrity of the bidding system, in that it would permit you an option after all bids have been exposed to either submit, or decline to submit, a filter for first article testing. For the foregoing reasons, we must conclude that neither the information furnished with your bid nor the sample filter you submitted after bid opening presents a proper basis for waving the first article tests contemplated by the provisions of the solicitation.

The question then arises as to whether your failure to state a price or indicate there would be no charge for first article testing requires the rejection of your bid as nonresponsive. In this connection, the invitation provides as follows:

Provision C.24, Evaluation of Bids/Offers (1969 Mar), page 10:

"A bidder/offeror must quote on all items in this solicitation to be eligible for award. All items will be awarded only as a unit. Evaluation of bids/offers will be based, among other factors, upon the total price quoted for all items."

Note on IFB, page 17, at end of Schedule E:

"Enter prices where space is provided above in the unit price amount column for all items. If an item is offered at no charge, enter N/C. DO NOT LEAVE BLANK. Failure to follow this instruction will render the offer nonresponsive."

In addition, under the terms of the solicitation a bidder is obligated to furnish only those items for which a price (or no charge) is indicated in his bid. See the "OFFER" portion of Standard Form 33, Solicitation, Offer and Award.

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In his report to this Office the contracting officer agrees that the representation in your May 16 letter of the oral advice given to you by the Government representative is essentially correct, that is, that a letter bid signed by an authorized person and stating your conformance to the terms and conditions of the solicitation would be acceptable. While we need not here decide the validity of this advice, we find no reason why such advice should have resulted in your failure to state a price on a line item of the solicitation. Nothing which was said appears to have misled you into believing that a bid on line Item 0001 was unnecessary, and we see no basis for reaching a different conclusion as to the second item listed in the solicitation. We have noted that your attorney's letter of November 3, 1972, states that the contracting officer dictated the language of your letter bid and "indicated that the language would be sufficient to cover all contract terms upon which unit prices were not required, including testing for which Hopkins was imposing no charge." While it is not clear from this statement whether it is not alleged that the contracting officer represented that you did not need to either bid a price on Item 0002 or indicate that there would be no charge, we think it is significant that you made no such allegation in your original protest. In any event such oral explanations or instructions are not binding on the contracting agency. See Standard Form 33A, Solicitation Instructions and Conditions, paragraph 3. See also B-167202, March 18, 1968.

Although your letter bid states that you would comply with all conditions in the solicitation, we do not believe such a statement would obligate you to furnish both the first article test report and the filters for the price bid on the filter. The furnishing of the report was not a condition of the solicitation, but rather it was a specific requirement spelled out as a line item in the schedule of the solicitation.

Generally, we have held that a failure to quote a price, where such price is necessary for bid evaluation purposes, constitutes a material deviation which may not be waived under the authority of paragraph 2-405 of the Armed Services Procurement Regulation. 50 Comp. Gen. 852 (1971); 46 id. 434 (1964); and 41 id. 412 (1961). Also see 51 id. 543, B-174298, March 2, 1972, where we state that the integrity of the competitive bid system requires adherence

Application
Bid at 10:00 AM
Mailed 1/10/54

Application
Test
First article
Waived

COMPTROLLER
General
Washington, D.C.

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Test to determine procedure

to this rule since bidders should not be given an option after bid opening to establish an obligation by means which are extraneous to the bid, even if the rule appears to require a harsh result in a given case.

Since the first article test could not be waived for your firm, your failure to quote a price thereon, or in any way indicate that the cost was included in the Item 0001 price, raises a substantial question as to whether you could be required to perform the test at no additional charge and necessitates the rejection of your bid.

Accordingly, your protest must be denied.

Very truly yours,

R.F. KELLER

Deputy Comptroller General
of the United States