



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

B-176420

JAN 4 1973

Mr. R. Craig McManigal
Attorney at Law
619 West Foothill Boulevard
Claremont, California 91711

Dear Mr. McManigal:

This is in reference to the protest of Cryogenic Service Corporation (CSC) against any award in connection with bids submitted and opened on June 30, 1972, in response to solicitation No. F41608-72-B-1105 issued by the Department of the Air Force, Directorate of Procurement and Production, San Antonio Air Materiel Area, Kelly Air Force Base, Texas.

The invitation for bids (IFB) for a best estimated quantity (BEQ) of 1,920 liters of propellant, liquid neon, FSN 9135-800-1815, on a requirements basis, was issued on June 2, 1972. Solicitation amendment 0001 was issued on June 15, 1972, to increase the BEQ to a revised total of 3,600 liters. The procurement required f.o.b. destination deliveries in contractor-furnished dewars, deliveries to be made within 15 workdays after receipt of a delivery schedule unless a longer period was specified. In addition, the procurement was structured on a subline basis which contemplated multiple awards.

Responsive bids were submitted by four bidders and were opened on June 30, 1972. The low bidder by a substantial amount on each subline item was Union Carbide Corporation, Linde Division, New York, New York. CSC submitted the highest bid price on each subline item, except one. Although your protest was filed before award of a contract, award of all subline items was made to Union Carbide on August 30, 1972, pursuant to Armed Services Procurement Regulation (ASPR) 2-407.8(b)(3), following notice to our Office of the intention to make an immediate award notwithstanding the protest.

Your protest is to the effect that award of a contract to the low bidder would not be in the best interests of the Government because the low bidder plans to ship the liquid neon propellant by common carrier-- a shipment method which you contend has resulted in costly evaporation loss of propellant when delivery is delayed. In this regard, we understand that liquid neon propellant has a high evaporation rate with the result that it will "boil off" as the shipping container absorbs heat. If delivery is not timely accomplished, therefore, the quantity received will be less than that shipped with the possibility that the contractor-furnished dewar might be delivered empty. It is your position that this

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problem has been particularly acute at the New Mexico contract locations where you maintain that timely deliveries can only be maintained by the use of company owned trucks, a service offered only by CSC. Therefore, you conclude that award to CSC at its higher price would benefit the Government in view of its assurance of timely delivery.

Further, by letter dated October 2, 1972, Mr. E. Del Smith, CSC's Washington representative, stated that it would be in the best interest of the Government to conduct a thorough audit at the end of the present contract period and that the Air Force's next fiscal year propellant contract should be on a small-business set-aside basis.

The Air Force administrative report, on the other hand, states that the solicitation requirement for delivery "within 15 workdays after contractor receipt of a delivery schedule" is adequate for the Government's needs and can be met by means of common carrier shipment, also contemplated by the solicitation terms. Therefore, it is concluded that payment of a higher price to CSC for its quicker delivery capability is not warranted. The report further states that there has been no information relative to inadequate performance or delinquent deliveries by the previous contractor except for one instance where a using activity (Holloman Air Force Base, New Mexico) indicated some dissatisfaction with previous supply actions, but no monetary loss to the Government could be established. In this regard, it is reported that a small quantity of 25 liters was procured on an emergency basis at increased cost from CSC at that time. It is concluded, however, that this emergency procurement represented an exception to usual procurement procedures. It is further stated that Union Carbide, the successful bidder, is the leading cryogenics supplier to the Government and has performed adequately on a prior neon contract, and that Union Carbide verified its bid prices before award of the subject contract.

As indicated above, your protest challenges the validity of the solicitation specifications with respect to delivery requirements, while the procurement officials have determined that the manner of delivery specified in the solicitation is sufficient to meet the Government's minimum needs. In this regard, our Office has consistently taken the position that the preparation and establishment of specifications to reflect the needs of the Government are matters primarily within the jurisdiction of the procurement agency, to be questioned by our Office only when not supported by substantial evidence. 38 Comp. Gen. 190 (1958); 37 id. 757 (1958); 17 id. 554 (1938). We recognize that Government procurement officials, who are familiar with the conditions under which supplies or equipment will be used and with past results

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obtained in the use of similar equipment, are generally in the best position to know the Government's needs and best able to draft appropriate specifications. Thus, we have held that the Government cannot be placed in the position of allowing bidders to dictate specifications which would have the effect of requiring acceptance of goods not meeting the considered needs of the procurement agency. Furthermore, questions relating to specifications should be raised before, not after, the opening of bids. 50 Comp. Gen. 193 (1970); 36 Comp. Gen. 291 (1956); 16 id. 38 (1936). Accordingly, we conclude that the actions of the procurement officials in this instance are not subject to question by our Office.

With respect to CSC's request for a thorough audit at the end of the present contract period, this Office does not consider it appropriate to conduct an audit at this time on the basis of CSC's bare allegation that the contract cannot be successfully performed at the contract price accepted by the Government, especially in view of the finding by the contracting officer, unrefuted by CSC, that no significant losses to the Government have occurred because of past contractor performance. Further, the contract provides contractor sanctions for failure to perform in accordance with the contract terms which would seem to adequately protect the Government's interests in the event of late or insufficient deliveries.

In connection with CSC's recommendation that a small-business set-aside should be advertised for the next contract period, reference is made to Armed Services Procurement Regulation 1-706.1(a) which provides that the determination to make a set-aside is to be made by the contracting officer normally upon initiation by the small-business specialist. Therefore, CSC should address its recommendation for a set-aside accordingly.

Accordingly, the protests of Cryogenic Service Corporation are denied.

Very truly yours,

R.F. KELLER

Deputy | Comptroller General
of the United States