



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

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D-177861 (1)

July 13, 1973

Gullivon, Beuregard, Meyers & Clarkson
604 Ring Building
1200 Eighteenth Street, NW
Washington, DC. 20036

Attention: Henry G. Beuregard, Esq.

Gentlemen:

Reference is made to your letters of January 22 and March 23, 1973, on behalf of the Design Pickford Company (DP), and to EB's letter of May 8, 1973, and prior correspondence, protesting against the award of a contract to Bernte/Trasher Division of Mittaker Corporation (Bernte) under request for proposals (RFP) DAAG07-73-R-0016, issued by the United States Army Munitions Command, Joliet, Illinois.

The RFP, issued October 27, 1972, called for 18125, Pos 5 igniters for the 2.75-inch rocket motor, and provided that the contractor submit a first article to the Government for testing within 120 days after award. The solicitation was restricted to the two approved igniter mobilization base producers, Bernte and EB, and both submitted proposals, with Bernte offering lower unit prices. The procurement survey of the low officer was completely favorable and contract DAAG07-73-R-00170 was awarded to that concern on January 16, 1973, for a quantity of 135,000 igniters at a price of \$1,295. EB's offered price for this quantity was \$193,000.

Your protest is premised essentially on two bases: that the Government erred in its evaluation of the proposals; and the manner in which it conducted negotiations with the officers was in violation of the pertinent provisions of the Armed Services Procurement Regulation (ASPR) discussed infra.

Your objection to the evaluation procedure is that the Government, contrary to the terms of the RFP, failed to consider the costs of testing of the first article. EB's March 22, 1973, letter states:

The RFP certainly indicated that whether or not first article testing would be required would be an important consideration in evaluation of proposals. It also stated quite clearly (a) that Government testing of first article samples was mandatory and (b) that waiver of the test requirement

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would be provided only for producers of identical supplies. While the RFP did not state specifically that costs of testing would be used in evaluation, this is the necessary conclusion which must follow from the statement on page 16 of the RFP that award would be based on evaluation of "all applicable factors to determine lowest overall cost to the Government," and the language on page 20 of the RFP to the effect that "waiver of the first article approval will be a factor in the evaluation of bids." Under the RFP as furnished to Insign Bickford, Insign Bickford could only assume that First Article testing was a regulatory requirement and that the relative advantages to the Government in awarding the contract to an offeror eligible for waiver would be considered carefully. It was with these assumptions that Insign Bickford prepared its proposal in the solicitation.

You believe that, since your proposal was lowest in overall cost, because the \$10,315 difference in your price and Bernite's would have been more than offset by the costs to the Government of testing a first article, award should have been made to your concern.

We cannot agree with your contention that the evaluation was contrary to the terms of the RFP. Both offerors quoted unit prices for various quantities of igniters on an alternative basis--one price based on submission of a first article for approval, and a discounted price based on waiver of first article approval. After opening of proposals, it was determined that EB was eligible for waiver of first article approval, but that Bernite was not. However, EB's discounted price was still higher than Bernite's price based on submission of a first article. Therefore, Bernite remained the low offeror even after the proposals had been evaluated on the basis of waiver of first article approval. ASPR 1-1973(a)(iii) provides that cost of testing, to the extent it can be realistically estimated, shall be clearly set forth in the solicitation as a factor which will be considered in evaluating the proposals. This factor was not specifically included in the RFP; thus, the evaluation was properly limited to all applicable factors as set forth in section "D" of the RFP.

As to whether the costs of testing should have been included as an evaluation factor, EB's January 22, 1973, letter estimated such costs at \$20,000-\$40,000. Subsequently, you alleged that the Army has in its possession cost records of the first article tests performed on the same igniter under contract DAM21-72-C-0272 with EB, and that after the testing EB was advised that the costs were approximately \$25,000. You feel that, while it may not be possible to establish the costs down to the

last penny, it is apparent that the costs would be significantly more than the \$10,915 difference between the proposals here.

The question in regard to including costs of testing as an evaluation factor is not whether they appear to exceed the difference in prices after receipt of proposals, but the extent to which they can be realistically estimated prior to the issuance of the RFP. The contracting officer has noted that the RFP called for testing at the Picatinny, New Jersey, Government laboratory, and has stated his belief that it would be impossible to extract the cost of testing one item from the overall costs associated with the operation of the laboratory. In the Army's May 2, 1973, supplementary report, the contracting officer further states:

A review of the solicitation under which Ensign Bickford was awarded Contract DAA21-72-C-0272 revealed that no evaluation factor for the cost of performing a first article test was used and a review of Contract DAA21-72-C-0272 does not reveal any evidence that Ensign Bickford Company was notified that the cost of performing first article tests was approximately \$25,000.00. A review of the solicitation under which Ensign Bickford was awarded its second contract, DAA21-72-C-0310, for this item also revealed that no evaluation factor for the cost of performing a first article test was used which would tend to indicate that the cost of performing the first article test required under Contract DAA21-72-C-0272 was never estimated. What Ensign Bickford failed to indicate in its 22 March 1973 letter when it mentioned the "approximate \$25,000" figure was that its first first article sample failed to pass all the necessary tests and a second group of samples had to be submitted for a second test. As stated previously no where was there any indication in either contract what the cost of testing Ensign Bickford's first first article sample or second sample was.

In view of the lack of accurate historical experience of the costs of testing the limiters, we do not believe the contracting officer's decision to omit the consideration of these costs as an evaluation factor in the RFP can be regarded as an abuse of discretion. D-104643, December 16, 1953. However, we are suggesting to the Secretary of the Army by letter of today, copy enclosed, that additional consideration be given in future procurements to including costs of testing as an evaluation factor.

You also believe that the Government, while failing to conduct meaningful negotiations with EB, was at the same time conducting discussions with Remito whereby the RFP requirements for Government testing of the first article and for use of a certain type of scalant-

Pro-Seal 604F--were improperly waived. You believe these actions were in violation of ASPR 3-005.1(a), which provides that discussions be conducted with all offerors within a competitive range, and ASPR 3-005.1(e), which provides for notification to offerors when a change in the requirements occurs during negotiations.

Your position is essentially that the offerors were not allowed to compete on an equal basis, since E3 was not notified of the change in the requirements. The weakness of your argument is that its premise-- that the two requirements you have cited were actually changed during the course of negotiations with Bernite--has been categorically denied by the Army. The contracting officer has stated that at no time during the negotiations with Bernite was there any discussion of relaxing the requirements for first article testing or the use of Pro-Seal 604F. After the contract award, it was agreed between the parties to allow the Government to perform its testing of the first article at Bernite's plant, at a savings in cost to the Government. There has been no waiver of the requirement that Bernite's first article be tested by the Government. Also, the May 2, 1973, supplementary report states that about 1 1/2 months after award, it was discovered that there was a problem in obtaining Pro-Seal 604F, and the Government authorized the use of an alternate material in consideration of the contractor's agreement to deliver at an accelerated rate a quantity of 150,000 additional igniters. These actions taken in connection with the administration of the contract afford no basis for questioning the legality of the contract as awarded.

With regard to your contention that the Army failed to conduct meaningful negotiations with your concern, but instead made only a telephonic request for a best and final offer, the contracting officer has stated:

Ensign Bickford was contacted by telephone and afforded the opportunity to come to IJCHI, Joliet to participate in meaningful discussions or discuss the solicitation and their proposal over the phone. Ensign Bickford elected the discussion over the telephone method. The Contract Specialist proceeded to discuss Ensign Bickford's proposal as submitted. The areas in which evaluation factors (discounts, 1st Article Waiver and Gov. property) could be applied to its proposal were discussed to make sure all information supplied in Ensign's proposal was correct and complete. Mr. Caldwell was informed that a typographical error was contained in the percentages stated in the solicitation's option clause and also that funds for a total award of 1.35,000 cash had been received and that the awarded quantity would be 105,000 cash. Based on this information Mr. Caldwell was asked if his firm

desired to take another look at its offer. His answer was affirmative. At the conclusion of the discussion Mr. Caldwell was asked if he desired to come to WJCO, Joliet for further discussions. His reply was negative. He was informed that a teletype requesting a confirmation of offers or revised offers would be issued. At no time did Mr. Caldwell mention an evaluation factor for the cost of performing the first article test of samples of a firm who could not qualify for a first article waiver.

The contracting officer further states that the discussions with Bernite were of the same type as indicated above. It appears, then, that both officers were similarly treated in the negotiations. We do not believe the discussions with LI failed to constitute "meaningful" discussions as we have construed that term. See 51 Corp. Gen. 102 (1971).

In view of the foregoing, your protest is denied.

Sincerely yours,

Paul G. Denbling

Acting Comptroller General
of the United States