

DECISION



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

61233

FILE: B-184403

DATE: July 29, 1976

98791

MATTER OF: Lite Industries, Inc.--Reconsideration

DIGEST:

Decision of 55 Comp. Gen. 529 (1975) is affirmed since factual information presented does not provide basis for determination that earlier decision was in error. Additional points raised in request for reconsideration concern emphasis, interpretation and conclusion of prior decision but protester has not presented new factual information or cited legal precedent which would indicate a mistake of law.

Lite Industries, Inc. (Lite) has requested reconsideration of our decision Lite Industries, Inc., 55 Comp. Gen. 529 (1975), 75-2 CPD 363. There we held that Lite, awarded a contract under request for proposals (RFP) No. DSA100-75-R-0830, should be afforded the opportunity to have its contract terminated for the convenience of the Government if Lite so desired.

Pursuant to the above-referenced RFP, characterized as a production test procurement, offers were sought by the Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania on two separate items: Item 0001--15,000 each sleeping bags, intermediate cold; Item 0002--15,000 each sleeping bags, extreme cold. After best and final offers had been received on June 11, 1975, it was determined that awards to four offerors in the following manner represented the lowest overall cost to the Government:

"OFFEROR	ITEM 0001		ITEM 0002		Total
	Price	Quantity	Price	Quantity	
Lite	\$61.59	5,000	--	--	\$307,950
LaCrosse	\$62.84	5,000	\$75.53	5,000	\$691,850
North Face	\$61.28	5,000	\$74.43	5,000	\$678,550
Kings Point	--	--	\$78.88	5,000	\$394,400"

Thereafter, Lite protested that DPSC, through a telegram dated June 9, 1975, and in "numerous informal discussions with the procurement personnel" had committed itself to make a maximum of three awards consisting of 5,000 units of each of the two Items, a total of 10,000 units per award. Accordingly, Lite argued that since its combined prices for both types of sleeping bags were lower than those submitted by Kings Point, Lite and not Kings Point should have received award of the contract for 5,000, Item 0002 sleeping bags.

The June 9th telegram had requested best and final offers and had also stated that "The Government intends to award a maximum of three contracts for a quantity of 5,000 each of both Type I and Type II, for a total quantity of 10,000 each * * *".

In our decision we noted that in addition to the language of the June 9th telegram, two other provisions pertaining to making awards had application to the subject RFP. These provisions, section B30.86, clause 2, and paragraph 10(c) of standard form 33A, provided, respectively, as follows:

"The Government reserves the right, wherever feasible, to make a minimum of three (3) awards in order to insure successful completion of the production tests whereby no one firm or its subsidiaries and affiliates will be awarded more than one contract. However, any number of awards may be made if determined to be in the best interest of the Government. Bidders are requested not to indicate any minimum quantities in excess of 5,000 EA OF EACH ITEM"

* * * * *

"(c) The Government may accept any item or group of items of any offer, unless the offeror qualifies his offer by specific limitations. UNLESS OTHERWISE PROVIDED IN THE SCHEDULE, OFFERS MAY BE SUBMITTED FOR ANY QUANTITIES LESS THAN THOSE SPECIFIED; AND THE GOVERNMENT RESERVES THE RIGHT TO MAKE AN AWARD ON ANY ITEM FOR A QUANTITY LESS THAN THE QUANTITY OFFERED AT THE UNIT PRICES OFFERED UNLESS THE OFFEROR SPECIFIES OTHERWISE IN HIS OFFER."

In view of all three provisions, we concluded that the language of the RFP authorized award by DPSC of any number of contracts.

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However, we recognized that the June 9 telegram requesting best and final offers, which in our view only expressed the agency's contemplated upper limit of the number of awards, was confusing and could have misled Lite. Therefore, we suggested that Lite should be afforded the opportunity to request termination of its 5000 unit award. At the same time, we found no reason to recommend a termination for convenience of Kings Point's contract as suggested by Lite. We pointed out that since DPSC had the right to make more than three awards, the decision to award four contracts was not only proper but also resulted in the lowest cost to the Government.

In its request for reconsideration Lite again asserts that through the language of the RFP, DPSC committed itself to make a maximum of three awards consisting of 5,000 units each of the two Items. In support of this contention Lite takes issue with our determination that more than three awards could be made under this RFP.

Lite argues that our decision reflects a lack of understanding of the established practice with respect to production test contracts, in that such contracts have historically been awarded to three offerors unless a lack of qualified bidders prevents making that many awards. It asserts that our Office should not have interpreted these three provisions together; Lite also argues, apparently in the alternative, that our Office has improperly interpreted the three provisions relating to award and that these same provisions can be read together as limiting to three the number of awards that can be made. Lite also emphasizes that the primary purpose of production tests procurements is not to obtain the best price but rather to involve three established manufacturers in the production of new items to obtain the benefit of their experience. Award of more than three contracts in these circumstances is viewed by Lite as "completely inexplicable".

Finally Lite contends that both types sleeping bags are almost identical and that in these circumstances production of less than 10,000 items is not practical either for the contractor or the Government; that the relief suggested by our Office is not realistic because it deprives Lite of manufacturing experience and places Kings Point in an advantageous position.

We believe our determination, based on an examination of specific language applicable to the RFP, that DPSC had the right to make more than three awards, is correct. In this regard we note that this interpretation gives a reasonable meaning to all

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parts of the RFP and at the same time applies the preferred rule of interpretation that provisions of an instrument should be construed as being in conflict with one another only if no other reasonable interpretation is possible. 4 Williston, Contracts §§ 619 at 731 (3rd ed. 1961); Hol-Gar Manufacturing Corp. v. United States, 351 F. 2d 972 (Ct. Cl. 1965), and cases cited therein. See Data 100 Corporation, B-182397, February 12, 1975, 75-1 CPD 89.

Additionally, we note that DPSC has submitted its views pointing out that there were two separate and distinct items subject to production tests procedures under this RFP. The agency states that this action was taken because of the similarity of each of the two Items and the likelihood that the same offerors would compete for both Items. In this regard we note that combining two items in one solicitation is a proper exercise of procurement discretion since preparation and establishment of specifications to reflect the needs of the Government are matters primarily within the jurisdiction of the procurement agency. See Paul R. Jackson Construction Company, Inc., and Swindell-Dressler Company, a Division of Pullman, Incorporated, a Joint Venture, 55 Comp. Gen. 366 (1975), 75-2 CPD 220.

DPSC has also informed our Office that the awards made under the subject RFP were in furtherance of the objectives of production test procurements.

"* * * because of the purpose of this type of procurement it would be in the best interest of the Government to award three (3) contracts for each item. The reasons behind this decision are self-evident. To achieve the goal behind production tests it is necessary to see if a cross section of the contractors in a particular industry can mass-produce the subject item. Accordingly it was determined that a minimum of three (3) awards for each item would be necessary in order to see if the subject item could be mass produced. * * *"

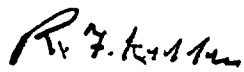
Further, DPSC points out that the evaluation factors contained in the RFP required that award be made to the low offerors who were responsible and agreed to all the terms of the RFP. Thus, the four awards were made because they reflected the lowest cost to the Government.

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It is our policy to reconsider our decision if a material mistake of law or fact is alleged or proven. National Flooring Company, B-183844, August 21, 1975, 75-2 CPD 122; Datawest Corporation--request for reconsideration, B-180919, April 16, 1975, 75-1 CPD 228. Fritz A. Nachant, Inc., B-181028, October 21, 1974, 74-2 CPD 216. Lite's present arguments concern the emphasis, interpretation and conclusions of our prior decision but it has not presented new factual information or cited legal precedent which would indicate a mistake of law.

Accordingly, our decision of November 28, 1975, is affirmed.

Deputy


Comptroller General
of the United States