

DECISION



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

61043

FILE: B-186134

DATE: June 29, 1976

MATTER OF: National Chemical Laboratories of Pa., Inc.

U98382/98382

DIGEST:

1. Determination to issue requirements solicitation to satisfy needs of Government for cleaning compounds, solicitation containing minimum and maximum order limitation, is valid determination within ambit of sound administrative discretion where solicitation is issued pursuant to requirements of section 1-3.409 of FPR and section 5A-72.105-3(c) of General Services Procurement Regulations and results in overall economy to Government.
2. It is not impossible to forecast costs of items for 1 year in advance even though there is no guaranteed minimum quantity since solicitation supplied estimates of quantities which would be ordered, estimates being based on information made available to GSA such as quantities of particular item ordered on prior contracts. These estimates provide guide or basis for bidding. Also, as basis to estimate freight costs, solicitation listed final destination for each item and estimated peak monthly requirement for each item.
3. Fact that prices of items under contract calling for definite quantity with fixed delivery might be lower than prices under requirements contract does not mean that the overall cost to Government is less since indirect costs associated with definite quantity contract must be considered such as cost of extra warehouse storage for additional inventory, generated excess inventory, cost of transporting excess inventory to other locations.

By letter of March 16, 1976, with enclosures, National Chemical Laboratories of Pa., Inc. (NCL), requested our Office to hold up award under solicitation No. 9PR-814-76/KE pending an investigation as to the propriety of issuing this requirements type solicitation. NCL contends that the above solicitation would furnish supplies to the Government at an excessive price and is also unfair to the contractor involved.

According to NCL, it is virtually impossible to forecast increases in costs for 1 year in advance, not only in the case of raw materials but especially in the case of freight costs to various destinations. Additionally, NCL alleges that since the quantities indicated are only estimated quantities and there is no guaranteed minimum quantity, the Government is under no obligation to order any quantity at all while the contractor must guarantee any quantity that the Government requests and guarantee the price as well. NCL states the view that a definite quantity bid with a fixed delivery date will result in the best possible price to the Government and will eliminate any inequity to the contractor.

The solicitation in question, issued on February 20, 1976, by the General Services Administration (GSA), covers the Government's estimated requirements for specific cleaning compounds for the period July 1, 1976, through June 30, 1977. On the basis of an urgency determination dated May 11, 1976, award was made prior to our resolution of the protest.

The authority for the issuance of requirements contracts is set forth in section 1-3.409 of the Federal Procurement Regulations (FPR) (1964 ed. circ. 1) wherein it states:

"One of the following indefinite delivery type contracts may be used for procurements where the exact time of delivery is not known at time of contracting.

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"(b) Requirements contract--(1) Description. This type of contract provides for filling all actual purchase requirements of specific property or services of designated activities during a specified contract period with deliveries to be scheduled by the timely placement of orders upon the contractor by activities designated either specifically or by class. Depending on the situation, the contract may provide for (i) firm fixed-prices, (ii) price escalation, or, (iii) price redetermination. An estimated total quantity is

stated for the information of prospective contractors, which estimate should be as realistic as possible. The estimate may be obtained from the records of previous requirements and consumption, or by other means. Care should be used in writing and administering this type of contract to avoid imposition of an impossible burden on the contractor. Therefore, the contract shall state, where feasible, the maximum limit of the contractor's obligation to deliver and, in such event, shall also contain appropriate provision limiting the Government's obligation to order. When large individual orders or orders from more than one activity are anticipated, the contract may specify the maximum quantities which may be ordered under each individual order or during a specified period of time. Similarly, when small orders are anticipated, the contract may specify the minimum quantities to be ordered.

"(2) Application. A requirements contract may be used for procurements where it is impossible to determine in advance the precise quantities of the property or services that will be needed by designated activities during a definite period of time. Advantages of this type of contract are:

"(i) Flexibility with respect to both quantities and delivery scheduling;

"(ii) Supplies or services need be ordered only after actual needs have materialized;

"(iii) Where production lead time is involved, deliveries may be made more promptly because the contractor is usually willing to maintain limited stocks in view of the Government's commitment;

"(iv) Price advantages or savings may be realized through combining several anticipated requirements into one quantity procurement; and

"(v) It permits stocks to be maintained at minimum levels and allows direct shipment to the user.

Generally, the requirements contract is appropriate for use when the item or service is commercial or modified commercial in type and when a recurring need is anticipated."

Also, in this connection, section 5A-72.105-3(c)(2) of the General Services Procurement Regulations (GSPR) states as follows:

"The fluctuating demands of our customer agencies makes this type of contract preferable since actual requirement even within a reasonable percentage cannot generally be determined in advance. This type of contract will preclude the necessity for the Federal Supply Service to actually purchase material not required which may later have to be transferred to other depot locations or declared excess with subsequent loss to the General Supply Fund."

This regulation further states that a requirements type contract should not be used if it is found that reasonable prices from responsible sources of supply cannot be obtained. Pursuant to the rationale and authority of the above regulations, the contracting officer decided to issue a requirements type solicitation.

Regarding NCL's contention that it is impossible to forecast costs for 1 year in advance, GSA has provided estimated quantities. These estimates are based on information made available to GSA such as quantities of the particular items ordered on prior contracts. While it is true that these quantities are only estimates and the Government is under no obligation to order the full quantity, they do provide a guide or basis for bidding. Our Office has held, with respect to requirements type contracts, that where the quantities for the various items to be procured are not known, the solicitation must provide some basis for bidding, such as providing estimated quantities for the various items.

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See 52 Comp. Gen. 732, 737 (1973). Regarding freight costs, GSA has listed the final destination of each item with the estimated peak monthly requirement for the item. This would appear, under the circumstances, to be a sound basis to estimate freight costs.

Concerning NCL's complaint that there is no guaranteed minimum quantity which the Government must order while the contractor must guarantee any quantity that the Government orders as well as the price, GSA states that it was not in the Government's best interest to use a guaranteed minimum clause. GSA explained that GSPR 5a-72.105-3(c)(3) provides for the use of a clause similar to the guaranteed minimum clause when it is deemed necessary to shorten the delivery time for initial orders under a new contract by inducing the contractor to produce supplies in advance of receipt of actual purchase orders or where there is a short supply of the item being procured. GSA points out that the present procurement does not shorten the delivery time, nor are the items being procured in short supply. In this regard, it is noted that our Office in 52 Comp. Gen., supra, which involved a requirements contract similar to the one in the present case, held that a provision that "No guarantee is given that any quantities will be purchased" was proper. Also, we note that under the present solicitation, the contractor is not required to furnish all the Government's requirements without limitation, since the Government does agree to abide by certain minimum and maximum order limitations. While the minimum order limitation of \$100 might be considered to be too low, the maximum order limitation of \$30,000 would appear to be sufficient to protect the contractor from being inundated with orders beyond its production capacity.


NCL contends that a solicitation calling for a definite quantity with a fixed delivery date would be preferable to a requirements type solicitation since it would not only be more equitable to the contractor, but would result in the best possible price to the Government. GSA states that a definite quantity solicitation may result in the lowest price to the Government if the only expenditure considered is the amount expended for a given item. However, other indirect expenditures also must be considered such as:

1. The impact on the General Supply Fund
2. Manpower resources
3. Warehouse costs
4. Control of inventory
5. Generated excess
6. Transportation costs to other locations to use up generated excess.

It is GSA's view that if these expenditures are considered, the requirements type solicitation offers the most economically feasible method of procuring the items in question. We see no valid basis on which to question GSA's determination as to the overall economy to the Government of the requirements type solicitation.

We recognize that there are certain difficulties entailed in forecasting costs for a 1-year period in order to submit a bid on a requirements type solicitation and realize that perhaps it would be easier for the bidder if the solicitation were for a definite quantity with a fixed delivery date. However, we have also recognized that the determination of how best to satisfy the Government's requirements is within the ambit of sound administrative discretion, and we will not substitute our judgment for that of the agency in the absence of a clear showing of abuse of the discretion permitted it. 48 Comp. Gen. 62, 65 (1968). In the present case because of the large number of customers to be served and the uncertainty as to their requirements, GSA was of the view that a requirements type contract would best serve its needs. We find no basis to disagree with this view.

For the above reasons, the protest by NCL is denied.


Deputy Comptroller General
of the United States