

DECISION



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

FILE: B-188404

DATE: July 20, 1977

MATTER OF: Switlik Parachute Company, Inc.

DIGEST:

1. Military specification that required qualified products listing (QPL) is not regarded as substitute for provision required by ASPR § 1-1107.2 and does not evidence such requirement where IFB failed to contain required clause found in ASPR § 7-2003.6.
2. Failure to provide notice of waiver of QPL in IFB in contravention of ASPR § 1-1108 renders solicitation defective for failing to clearly state whether qualification requirement existed or waiver of product qualification was intended and should be readvertised.
3. Bidder is not put on notice as to true but unstated intent of solicitation by competitor's comments on subject.

Switlik Parachute Company, Inc. (Switlik), has protested against the award of a contract to Lite Industries, Inc. (Lite), under invitation for bids (IFB) No. DSA100-77-B-0219 issued by the Defense Logistics Agency, Defense Personnel Support Center (DPSC).

The procurement was for 5,024 Anti-G Garment, Cutaway, Type CSU-13B/P. On February 14, 1977, the following seven bids were received and opened:

Marmac Ind., Inc.	\$113.00
Lite Industries, Inc.	125.92
Switlik	136.00
Kings Point Mfg. Co., Inc.	138.40
Rubber Crafting of W. Va., Inc.	157.37
RDR Ind., Inc.	191.12
Alamo Mfg. Co., Inc.	194.34

After bid opening, Switlik protested to this Office on the basis that the referenced military specification requires that a bidder be an approved Qualified Products List (QPL) source and, therefore, award to a non-QPL source would violate that requirement.

Military specification MIL-A-83406B covered the requirements for the Anti-G garments. Paragraph 3.1 thereof provided:

"3. REQUIREMENTS

"3.1 Qualification. The anti-g garment furnished under this specification shall be a product which is qualified for listing on the applicable qualified products list at the time set for opening of bids (see 4.4 and 6.6)."

Additionally, paragraph 6.6 of the specification stated:

"6.6 Qualification. With respect to products requiring qualification, awards will be made only for products which are, at the time set for opening of bids, qualified for inclusion in the applicable qualified products list whether or not such products have actually been so listed by that date. The attention of the supplier is called to this requirement, and manufacturers are urged to arrange to have the products that they propose to offer to the Federal Government tested for qualification in order that they may be eligible to be awarded contracts or orders for the products covered by this specification. The activity responsible for the qualified products list is the Aeronautical Systems Division (Attention: ASD/ENCCE), Wright-Patterson Air Force Base, Ohio 45433, and information pertaining to qualification may be obtained from that activity."

Despite the QPL provision in MIL-A-83406B, there was no indication on the face of the solicitation that it was restricted to QPL products. DPSC indicates that the QPL requirement was waived but notice of the waiver was omitted from the IFB.

Switlik presents basically two bases for protest: (1) the QPL requirement applied to the instant procurement and (2) the Government did not waive the QPL requirement in MIL-A-83406B. With respect to the argument that the QPL requirement applied to the instant procurement, Armed Services Procurement Regulation (ASPR) § 1-1107.1(a) (1976 ed.) provides:

"(a) Whenever qualified products are to be procured by the Government as end items, only bids or proposals offering products which are qualified for listing on the applicable Qualified Products List at the time set for opening of bids or award of negotiated contracts shall be considered in making awards."

Further, ASPR § 1-1107.2(a) requires the insertion of the provision in ASPR § 7-2003.6 to give effect to ASPR § 1-1107.1(a).

We have held that the failure to include the prescribed clause renders the IFB defective and that a QPL requirement contained in a military specification is not an acceptable substitute for the requirement imposed by ASPR § 1-1107. See B-171831, June 9, 1971.

We agree with the protester on the issue that the Government did not properly waive the QPL requirement. Under ASPR § 1-1108 notice of waiver of QPL requirements by the activity which prepared the specification shall be specifically included in the solicitation. In this respect the IFB was defective since the solicitation did not clearly state whether a qualification requirement existed or waiver of product qualification was intended.

We did state in Edward B. Friel, Inc., 55 Comp. Gen. 231, (1975), 75-2 CPD 164, that "The fact that the terms of an IFB are deficient in some way does not necessarily justify cancellation after bids have been opened and bidders' prices exposed." See Joy Manufacturing Company, 54 Comp. Gen. 237, (1974), 74-2 CPD 183. However, in determining if such a cogent and compelling reason exists to justify cancellation two factors must be examined: (1) whether the best interest of the Government would be served by making an award under the subject solicitation, and (2) whether bidders would be treated in an unfair and unequal manner if such an award were made.

Under Switlik's interpretation, the IFB contained a QPL requirement. At the time of bid opening, only three concerns were on the QPL. The QPL concerns may have been prejudiced in that had they realized that the competition would include non-QPL concerns which did not have to amortize the qualification costs, those firms may have refrained from bidding or bid lower in an attempt to secure the award.

Moreover, prospective bidders who failed to bid because of doubts as to their ability to comply with the QPL requirement may also have been prejudiced had they interpreted the defective IFB to require a QPL. Accordingly, a cogent and compelling reason did exist and the IFB should have been canceled. Although award was made to Lite in May 1977, the procurement procedures followed were prejudicial and unfair to Switlik. Therefore, the contract should be terminated for convenience and the requirements resolicited. See Haughton Elevator Division, Reliance Electric Company, 55 Comp. Gen. 1051 (1976), 76-1 CPD 294.

DPSC, in an attempt to show Switlik was not prejudiced by the failure to insert the waiver in the solicitation, indicated that Switlik had received, prior to bid opening, actual notice of the waiver of the QPL requirement from another QPL bidder. Switlik denies receiving such notice. Even assuming for the sake of argument that another QPL bidder passed on the information it had received from the Government concerning waiver of the qualification, paragraph 3 of standard form 33A, incorporated by reference, states "* * * oral explanation or instructions given before the award of the contract will not be binding. Any information given to a prospective offeror concerning a solicitation will be furnished to all prospective offerors as an amendment of the solicitation, * * * if the lack of such information would be prejudicial to uninformed offerors." We cannot conclude that a bidder may be charged with notice based on a competitor's comments.

If DPSC still wishes to waive the QPL requirement, the IFB should contain notice that the qualification requirement is inapplicable in accordance with ASPR § 1-1108 so that all bidders may be bidding on an equal basis and the resolicitation based upon a proper statement of actual needs in clear and precise terms.

As this decision contains recommendations for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency(s) involved to the House Committee on Government Operations, Senate Committee on Governmental Affairs, and the House and Senate Committees on Appropriations concerning the actions taken with respect to our recommendations.

R. F. Ketter
Deputy Comptroller General
of the United States