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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Aero Innovations, Ltd.

File: B-227677

Date: October 5, 1987

DIGEST

Where specifications under a brand name or equal solicitation result in limited competition and the contracting officer determines that other firms would compete under relaxed specifications, the procuring agency has a compelling reason to cancel the solicitation after bid opening because it is in the best interest of the government to enhance competition.

DECISION

Aero Innovations Ltd. protests the cancellation after bid opening of solicitation No. F04606-87-R-0496, a total small business set-aside issued by the Air Force for aircraft battery carts and battery chargers. Aero contends that the cancellation was arbitrary and capricious and undermines the integrity of the procurement process. The protester seeks award under the canceled solicitation.

We deny the protest.

The requirement was solicited using two-step sealed bidding procedures. The request for technical proposals (RFTP) was issued using brand name or equal specifications with Aero and Davco Industries battery carts listed as the brand name products. Aero and Davco were the only two vendors who submitted technical proposals under the RFTP. The Air Force conducted a market survey to determine why no other sources responded. As a result of this survey, the Air Force revised the specifications to delete certain restrictive requirements and added an Industrial Battery Engineering (IBE) model battery charger as a brand name reference. The amended RFTP was mailed to 71 vendors on January 14, 1987, but by the February 20 closing date again only Aero and Davco had submitted proposals.

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On April 7 the Air Force issued a solicitation for the second step, requesting only prices for the products which had been offered under step one, with a May 7 closing date. Aero and Davco submitted prices and Aero was determined to be low. Subsequently, the Air Force raised questions about the relationship between the two firms, which had apparently developed the product as a joint effort and continue to have a coordinated production arrangement. In addition, a pre-award survey conducted on Aero resulted in a negative recommendation because of Aero's lack of an acceptable inspection system.

At this time, the Air Force reexamined the specifications and determined that they were still overly restrictive. In this regard, the Air Force noted that there were at least three vendors on the mailing list who stated that they had not received a copy of the revised RFTP, and who indicated that they were capable of supplying the battery cart, particularly if certain of the restrictive feature specifications were relaxed, and that they were interested in competing. In view of this information, the Air Force determined that the restrictive specifications had resulted in limited competition, and that it was in the best interest of the government to cancel the solicitation and resolicit using relaxed specifications. Aero and Davco were advised of this decision by letter dated July 1, and this protest ensued.

As a threshold matter, the Air Force asserts that since Aero is nonresponsible it is not an interested party. However, Aero is a small business and, while there was a negative preaward survey recommendation, the contracting officer did not make a nonresponsibility determination. Had such a determination been made, referral to the Small Business Administration (SBA) for consideration under the certificate of competency procedures would have been required by the Small Business Act, 15 U.S.C. § 637(b)(7)(A) (1982), and the implementing Federal Acquisition Regulation (FAR), 48 C.F.R. § 19-602-1 (1986). Since the contracting officer did not make a nonresponsibility determination, and there was no referral to SBA, Aero can not be considered nonresponsible and Aero is an interested party to protest the cancellation.

Because the solicitation was canceled after bids were exposed under the second step of the procurement, the applicable standard for determining the propriety of the cancellation is FAR, 48 C.F.R. § 14.404-1(a)(1), which applies to sealed bid procurements. John C. Kohler Co., B-218133, Apr. 22, 1985, 85-1 C.P.D. ¶ 460. We note that while the solicitation issued for the second step was designated as a "request for proposals," in fact, it is only a request for prices which is treated essentially as an

invitation for bids under the procedures outlined for two-step sealed bidding. FAR, 48 C.F.R. § 14.503-2(a).

A contracting agency has broad discretion to cancel a solicitation; however, there must be a compelling reason to do so after bid opening, because of the potential adverse impact on the competitive bidding system of cancellation after bid prices have been exposed. FAR, 48 C.F.R. § 14.404-1(a)(1); Tapex American Corp., B-224206, Jan. 16, 1987, 87-1 C.P.D. ¶ 63. The fact that a solicitation is defective in some way does not justify cancellation after bid opening if award under the solicitation would meet the government's actual needs and there is no showing of prejudice to other bidders. Pacific Coast Utilities Service, Inc., B-220394, Feb. 11, 1986, 86-1 C.P.D. ¶ 150. However, the FAR, 48 C.F.R. § 14.404-1(c)(9), specifically permits cancellation, consistent with the compelling reason standard, where cancellation is clearly in the government's interest; a contracting officer's desire to obtain enhanced competition by relaxing a material specification constitutes a valid reason under this FAR standard. Display Sciences, Inc.--Request for Reconsideration, B-222425, Aug. 26, 1986, 86-2 C.P.D. ¶ 223.

Here, the Air Force determined that there are at least three other interested potential vendors, and that relaxing the specifications should result in their participation. In revising the specifications, the Air Force has made numerous changes to achieve this result. Among these changes are: the brand name reference to the IBE battery charger, a model which is specifically built for Davco under proprietary restrictions, has been deleted; the battery connections are no longer restricted to copper buss material and alternative connection methods have been made acceptable; the insulated battery cover is no longer required to be fiberglass; a restriction on swivel casters for the cart wheels has been deleted; a restriction on tire pressure has been deleted; and drawings/artists' conceptions and specifications have been made acceptable, in lieu of the requirement for photographs or detailed drawings of the product. These changes have relaxed requirements which potential competing vendors have indicated were unique to the Davco and Aero products, making it difficult for the competitors' carts and chargers to meet the salient features specifications, or which otherwise limited the vendors' ability to adapt one of their own existing cart models in order to compete.

In view of the statutory mandate in the Competition in Contracting Act, 10 U.S.C. § 2304(a)(1)(A) (Supp. III 1985), that contracting agencies obtain full and open competition, and the fact that enhancing competition is consistent with the compelling reason standard, we find that

the Air Force's determination to cancel the solicitation was proper. Agro Construction and Supply Co., Inc., 65 Comp. Gen. 470 (1986), 86-1 C.P.D. ¶ 352. Aero contends that the Air Force had previously determined that the specifications were not restrictive and that there was adequate competition, and that the cancellation constitutes "harassment" and an attempt to "shop around," which is motivated by the Air Force's unsubstantiated suspicions concerning the business relationship between Aero and Davco, and by the negative preaward survey recommendation. However, none of these allegations detract from the propriety of the determination that the solicitation was, in fact, unduly restrictive of competition. Grumman Corp., B-225621.2 et al., May 20, 1987, 87-1 C.P.D. ¶ 528; Motorola, Inc. et al., B-221391.2 et al., May 20, 1986, 86-1 C.P.D. ¶ 471.

Aero has also claimed proposal preparation costs and the costs of pursuing its protest. Since we have determined that the cancellation was proper, Aero does not qualify for the reimbursement of these costs. John C. Kohler Co., B-218133, supra.

The protest is denied.

James F. Hinchman
General Counsel