



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

31194

B-178624

July 19, 1973

Lieutenant General Wallace H. Robinson, Jr.
Director, Defense Supply Agency

Dear General Robinson:

We refer to letter DEAN-G dated June 21, 1973, from the Assistant Counsel, Headquarters, and prior correspondence, reporting on the protests of Drexel Industries, Inc. and Pettibone Corporation. The protests involve the award of a contract to J. I. Case Company, the low bidder, under invitation for bids (IFB) No. DCA/DO-73-D-2031, issued by the Defense Construction Supply Center (DCSC), Columbus, Ohio, for 13 separate contract line items (CLI) of fork lift trucks, 1 CLI for first article testing and 10 data CLI's. In the event we hold adverse to the award to Case, Drexel, the third low bidder, has protested any award to Multi-Pallet Fork Lifts, Inc., the second low bidder.

For the reasons which follow, we recommend that the contract awarded to Case be terminated for the convenience of the Government and the procurement resolicited since the award was made to other than the low responsive bidder under a defective IFB. See 51 Comp. Gen. 792 (1972), and id. 635 (1972). Termination for convenience is being recommended because there is no indication in the record before us that either the contractor or the procurement activity contracted other than in good faith or with intent to deprive other bidders of an equal opportunity to compete. See 52 Comp. Gen. 215 (1972); and 51 id. 451 (1972). We would appreciate advice of the action taken on our recommendation.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510. In view thereof, your attention is directed to section 236 of the act which requires that you submit written statements as to the action taken with respect to the recommendation. The statements are to be sent to the House and Senate Committees on Government Operations not later than 60 days after the date of this letter and to the Committees on Appropriations in connection with the first request for appropriations made by your agency more than 60 days after the date of this letter.

PUBLISHED DECISION
53 Comp. Gen.

~~780790~~ 091335

The basis for the Drexel and Pettibone protests concerns the allegation that the Case bid was nonresponsive to the mandatory IFB requirement that the first production units be delivered no earlier than 365 days after approval by the Government of the first article test report.

The IFB as issued provided for submission of the first article test report by the contractor within 270 days after date of award (AWA), approval or disapproval of the test report by the Government within 30 days thereafter, and delivery of the first production units 365 days AWA. Thus, delivery of the first production units was required 365 days after submission and approval of first article test report. The time of delivery provision of the IFB warned bidders that failure to meet the required delivery schedule would result in a determination of nonresponsiveness. The DCSC Master Solicitation made part of the IFB reads, in pertinent part, as follows:

a. Delivery is required to be made in accordance with the schedule set forth below, except that where delivery for an item is phased, bids may be on any basis provided delivery proposed is within the period required for the entire quantity. Bids failing to meet the required delivery schedule will be rejected as nonresponsive.

CLASS (U)	QUANTITY	TIME (Days after date of award)
-----------	----------	------------------------------------

Para 15 of the IFB set out the required delivery schedule of all CLASS's. Furthermore, the IFB as issued contained two notes to bidders concerning the delivery schedule which dealt with the time for the submission of the first article test report, as follows:

NOTE 2: CONCURRENT DELIVERY WITH THE END ITEM IS REQUIRED FOR STOCK REPAIR PARTS AND PUBLICATIONS. ACCELERATION IN THE DELIVERY OF END ITEM WILL NOT BE ACCEPTABLE SO THE GOVERNMENT USES ALL OTHER SCHEDULED DELIVERIES RELATED TO CONTRACT ITEMS SUCH AS PROVISIONS, ELECTRICAL DOCUMENTATION, DRAWINGS, PUBLICATIONS, OVERPACK MATERIAL, ETC AND SPECIFICALLY FIRST ARTICLE TESTS, ARE ACCELERATED BY AN EQUAL PERIOD OF TIME AND PRIOR APPROVAL OF THE INCUMBENT CONTRACTING OFFICER IS OBTAINED.

NOTE 3: PROVISION (27a - SUPPARAGRAPH (b) [Right of offerors to extend time for first article test report submission/ HAS BEEN DELETED. OFFERORS MAY NOT EXTEND THE TIME FOR SUBMISSION OF FIRST ARTICLE TEST REPORT AS REQUIRED HEREIN.

Amendment 0001 to the IFB provided, in pertinent part, as follows:

The delivery times and acceleration conditions stated in the solicitation are firm. The 12 month lead time between first article approval and first production delivery is necessary to allow for concurrent delivery of repair parts.

Amendment 0002 changed the delivery schedule by requiring delivery of the first production units 755 days ADA and all CLM's by 905 days ADA as opposed to the original IFB requirement of 665 days ADA and 6.5 days ADA, respectively--a 90-day extension. In addition, the first article test report date was extended from the original 270 days ADA to 330 days ADA. Then, Note 3, above, was deleted and the following new Note 3 was substituted (quoted as completed by Case):

THE TIME FOR SUBMISSION OF FIRST ARTICLE TEST REPORT AND DELIVERY SCHEDULE FOR PRODUCTION UNITS MAY BE ACCELERATED OR EXTENDED UNDER THE FOLLOWING CONDITIONS, BUT IN NO CASE MAY FIRST ARTICLE TEST REPORT EXCEED 360 DAYS ADA:

1. THE TIME BETWEEN SCHEDULED GOVERNMENT APPROVAL OF 1ST ARTICLE TEST REPORT (SEE NUMBER OF DAYS SCHEDULED FOR SUBMISSION OF REPORT PLUS 30 DAYS) AND 1ST DELIVERY OF PRODUCTION TRUCKS IS A MINIMUM 365 DAYS.

2. FINAL DELIVERY OF ALL ITEMS DOES NOT EXCEED 905 DAYS.

3. OFFEROR, WITH ACCELERATING OR EXTENDING THE TIME FOR SUBMISSION OF THE 1ST ARTICLE TEST REPORT IS REQUESTED TO INDICATE BELOW HIS ALTERNATE DELIVERY SCHEDULE ENSURE THAT ALL CLM'S COME THROUGH COMB CONSISTENT WITH THE CONDITIONS QUOTED ABOVE OR DATED HEREIN IN THE SOLICITATION.

CLIN	QTY	TIME - NO. DAYS AFTER DATE OF AWARD - MAX. TIME 905 DAYS.
0001, 2 & 3	100	665
0004 & 5	65	695
0006	65	725
0007	65	755
0008, 9 & 10	65	785
0011, 12 & 13	66	815
0014	---	360

[First Article requirement]

We believe that the alternate delivery schedule proposed by Case was nonresponsive to the delivery provisions of the IFB. Case extended the number of days for submission of its first article test report from 330 days ADA to 350 days ADA. However, Case accelerated the delivery time for the first production units from 755 days ADA to 665 days ADA. This alternate schedule provided a period of 275 days between approval of the test report and delivery of the first production units--90 days less than the minimal 365 days required by the IFB, as amended. The Assistant Counsel and contracting officer advise that the purpose of the 365 day interval is to assure delivery of spares, repair parts, and publications concurrently with the first production units. Under this procurement, the contractor has no control over the source or timing of delivery of spares and repair parts. No evidence has been presented which detracts from the materiality of the 365-day interval requirement set forth in the IFB, as amended. Therefore, since the alternate delivery schedule offered by Case permits it to deliver 90 days earlier than required, that schedule is nonresponsive. Case and the contracting officer argue that various provisions of the IFB, as amended, such as Note 2 quoted above, call for concurrent delivery of the end items and spares and repair parts by Case. However, this position ignores the express provision inserted by Case in its bid dealing with delivery time which allows a time interval between submission and approval of the first article report and first production unit delivery contrary to a material delivery requirement of the IFB, as amended. See 46 Comp. Gen. 307, 310 (1966).

In any event, Note 2, quoted above, clearly requires that acceleration in the delivery of end items will not be acceptable unless all other scheduled deliveries relating to contract items, specifically first article testing, are accelerated by an equal period of time. Amendment 0001 reinforces this requirement. The Case alternate delivery schedule accelerated the delivery of the first production units from 755 days ADA to 665 days ADA, however, it extended, rather than accelerated, the date for submission of the first article test report. Thus, the alternate delivery schedule was nonresponsive to the Note 2 and amendment 0001 requirements of the IFB.

The Assistant Counsel and Case argue that, despite a defect fatal to the responsiveness of the alternate delivery schedule, Case may fall back on the required delivery schedule as revised in amendment 0002. The Assistant Counsel views the language of amendment 0002 which inserts a new Note 3 and Note 2 as encouraging bidders to submit alternate delivery schedules for delivery of end items where possible and to permit flexibility in the delivery of the first article test report. Furthermore, the Assistant Counsel contends that there was no intention to bind bidders to any proposed acceleration or extension.

We do not agree. Our review of the Case bid discloses that the submission of the alternate schedule should be construed as a definite offer in lieu of the required delivery schedule. There is nothing in the Case bid which evidences a firm obligation to comply with the required delivery schedule. In our view, Case has a choice of delivery schedules--one of those choices being the unresponsive alternate schedule. The new Note 3 in procurement OAI provides not only for acceleration or extension of the first article test receipt, but also the delivery schedule subject to various conditions. This, plus Note 2's acceleration provisions, reasonably leads to the conclusion that bidders could propose an alternate delivery schedule so long as it complied with the delivery requirements. We believe that Case's alternate or substitute delivery schedule was the only viable, albeit, nonresponsive, schedule remaining in its bid. There was no operative clause in the ITB to permit a construction that if Case's alternate delivery schedule was unacceptable, the required delivery schedule would govern. See 50 Comp. Gen. 319 (1970); and 46 id. 373 supra.

Therefore, the award made to Case should be terminated for the convenience of the Government.

However, no corrective action should be taken on our recommendation which would be based on the ITB, as amended. Note 2 to the ITB, quoted above, permitted acceleration in all item delivery if (1) equal acceleration for the data OAI's and the first article testing OAI, and (2) " * * * UNDER APPLICABLE OF THE PROVISIONS GOVERNMENT CONTRACTS IS OBTAINED." Thus, bidders were invited to deviate from the required delivery schedule at the risk of having that deviation rejected by the procuring contracting officer. The ITB failed to stipulate any standards or criteria regarding the approval or disapproval of an accelerated delivery schedule submitted by a bidder. Bidders were at a loss to determine with any degree of certainty whether a tendered delivery schedule would be acceptable. The decision would be dependent upon the subjective determination of the procuring contracting officer after bid opening. The competitive bidding system requires that all bids be measured against the same objectively determinable standards so that all bids may be evaluated on an equal basis so as to establish the acceptability of the low bid.

We recommend that the procurement should be resolicited with delivery provisions which adequately inform bidders as to what deviations therefrom are permitted from the required delivery schedule and the consequences of the submission of an unacceptable, deviating, or substituted delivery schedule. See sections 1-375, et seq., and 2-401.1(b)(1) of the Armed Services Procurement Regulation; 51 Comp. Gen. 518 (1972); id. 635, supra; 49 id., supra; 46 id. 745 (1967); and 43 id. 544 (1954).

B-178625

In view of our conclusion that the procurement should be resolicited, it is not necessary to consider the protest of Drexel against an award to Multi-Pallet Fork Lifts, Inc.

Sincerely yours,

Paul G. Deabling

For the Comptroller General
of the United States