

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

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OCT 20 1970

Dear Mr. Secretary:

By letter dated July 13, 1970, the Deputy Chief, Contract Placement Division, Directorate of Procurement Policy, Deputy Chief of Staff, Systems and Logistics, Headquarters United States Air Force, furnished our Office with a report on the protests filed by Forest Scientific, Inc., and Contract Machining Corporation under invitation for bids No. F42600-69-B-3486, issued by Hill Air Force Base, Utah, and by Breed Corporation and Forest Scientific, Inc., under invitation for bids No. F42600-70-B-1333, also issued by Hill Air Force Base. These protests are interrelated in that both invitations are for the same item, MAU-87/B drive assembly couplers, and because both invitations were canceled on the basis of alleged significant changes in specifications. But important aspects of the protests are so factually distinct as to require their separate consideration under each invitation. The Forest Scientific and the Contract Machining protests under invitation -3486 will be considered here while the Breed and Forest Scientific protests under invitation -1333 will be considered under files B-168259(4)/B-168732. Copies of those decisions are enclosed.

Oct 21, 1970

Invitation -3486, for 1,028,700 of the subject couplers, was issued on May 27, 1969, on a 50-percent small business labor surplus set-aside basis. June 25, 1969, was fixed as the bid opening date. On September 23, 1969, award of the non-set-aside portion of the invitation was made to EEM Corporation at a unit price of \$2.379. The lowest unit price bid by a qualified small business, labor surplus area concern was submitted by Forest Scientific in the amount of \$2.425. No negotiations leading to award of the labor surplus set-aside quantity were conducted with Forest Scientific, however, as it was determined by the contracting officer on the basis of a negative presaward survey that Forest Scientific was nonresponsible because it lacked tenacity and perseverance in the performance of prior contracts. That determination was protested to our Office by Forest Scientific by telegram dated October 30, 1969.

Thereafter, the matter of Forest Scientific's responsibility was referred to the Small Business Administration (SBA) pursuant to Armed Services Procurement Regulation (ASPR) 1-705.4(c)(vi), as revised by Defense Procurement Circular (DPC) No. 75, December 10, 1969, providing for possible appeal by SBA of agency determinations of nonresponsibility for reasons other than those related to the capacity and credit of a

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small business concern. This referral was accomplished on January 19, 1970, by memorandum from the Directorate, Procurement and Production at Hill Air Force Base. By letter dated February 3, 1970, SBA appealed the Air Force nonresponsibility determination on the ground that prior contract delinquencies of Forest Scientific advanced in substantiation of the company's alleged lack of tenacity and perseverance were caused by its financial difficulties. Therefore, SBA concluded that the non-responsibility of Forest Scientific was for consideration under its certificate of competency (COC) procedures as a matter of capacity and "credit." This appeal by SBA was denied by the head of the procuring activity in accordance with the provision of ASFR 1-705.4(c)(vi) by letter dated February 13, 1970, to the SBA regional office at New York City.

However, in contradiction to the above action, the matter of Forest Scientific's responsibility was formally referred to SBA in late March 1970 for the possible issuance of a COC under the procedures set out at ASFR 1-705.4(c) providing for conclusive determinations of small business bidders' responsibility by SBA in the areas of capacity and credit. This action, in our view, represented a tacit admission by the procurement activity that its original negative tenacity and perseverance determination was not supportable.

In the latter part of April 1970, the New York regional office of SBA determined that a COC evidencing the capacity and credit of Forest Scientific for purposes of the instant procurement would be issued, and responsible procurement personnel at Hill Air Force Base were so advised. No formal COC was issued, however, as Air Force advised SBA that it desired the Defense Contract Administration Services Division (DCASD) which had initially issued a negative preaward survey to conduct an additional preaward survey.

It was at this point in time that instructions were received by Hill Air Force Base to cancel the set-aside portion of invitation -3486. This was accomplished by telegram dated May 11, 1970, from the Deputy Chief, Contract Placement Division, Directorate/Procurement Policy, Deputy Chief of Staff/Systems and Logistics, the body of which is set out below:

"This will confirm telephone conversation of 8 May regarding protest of Forest Scientific. Instruct OOP to cancel unordereed portions of IFB F42600-69-B-3486 in view of specification changes later adopted for these particular couplers. Options should not be exercised. This cancellation will be consistent with actions taken on IFB F42600-70-B-1333 which caused a

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protest by Breed Corporation. Advise when this requested cancellation is completed so that GAO may close its files on the Forest Scientific protest."

Contrary to the hope expressed in the above telegram, the invitation cancellation did not result in the closing of our files in the matter as the cancellation, predictably, was immediately protested by Forest Scientific and also by Contract Machining Corporation.

On June 15, 1970, invitation for bids No. F42600-70-B-3238, for 514,350 couplers, the amount covered by the canceled set-aside portion of invitation -3486, was issued on a 50-percent small business labor surplus set-aside basis with a bid opening date of June 30, 1970. We were advised on August 19, 1970, that award of a contract under this latest invitation can no longer be withheld pending our decision on the protests of Forest Scientific and Contract Machining and that award must now be made on the basis of urgency.

Bids were opened on invitation -3238 as scheduled on June 30, 1970, and the lowest non-set-aside bid was submitted by KEEM Corporation in the amount of \$1.68 each for a total price of \$432,535.53 or \$0.70 less than its original unit price for the same item under IFB -3486. The net overall saving to the Government, considering both set-aside and non-set-aside awards under IFB -3238, is approximately \$360,000. In view of the cost savings thus accruing to the Government, we conclude that reinstatement of invitation -3486 would not serve the Government's interests, and that the protests of Forest Scientific and Contract Machining Corporation must be denied. However, in our opinion, the reasons advanced to our Office in justification of the invitation cancellation before the significantly lower bid prices were known, which reasons did not rely on the expectation of a significant price savings, did not provide sufficient basis at the time they were advanced to justify the action taken.

As a general rule, our Office, while recognizing the principle that invitations should be canceled after bid opening only for cogent and compelling reasons, will not disturb such a cancellation when cancellation was necessitated by significant specification changes. The rationale for this position is that the primary responsibility for determining the Government's needs rests with the agency involved and our Office will accept the agency's determination in that regard except where the evidence of record does not support the determination. But, in appropriate cases, we have directed the reinstatement of a canceled invitation on the ground

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that its cancellation after the exposure of bid prices was detrimental to the integrity of the competitive bidding system.

In the case at hand, the specification changes brought about by accepted value engineering change proposals are described as follows:

"The VECP's accepted 3 Dec 1969 and 19 Jan 1970 changed form of aluminum from bar stock to die cast for the housing body of the coupler and the material in the bearing plate was changed from aluminum to steel. The manufacturing process for bar stock is dramatically different from that for die cast housings."

While these specification changes admittedly changed the manufacturing process of the aluminum coupler housing and actually changed the material used in the bearing plate from aluminum to steel, there is no indication that these changes altered the manner in which the subject couplers performed the function required of them; instead the record before us concerning the cancellation of invitations -3486 and -1333 indicates that the contrary may be the case.

On this question, in a supplemental report dated May 25, 1970, concerning the cancellation of invitation -1333, the contracting officer, in response to our inquiry as to why cancellation of invitation -1333 in January 1970 was necessary while invitation -3486 for the same item was, at least at that date, still in effect, advised that:

" * * * Our basis for not canceling IFB 3486 was that this was an FY70 requirement which was still needed. The bids had been opened, award on this non-set-aside portion had been accomplished and the set-aside portion was being protested by Forest Scientific, Inc., and Breed Corporation. While the newer configuration would have been more desirable, we felt that as the old configuration is usable and the items were urgently needed, the protests could be resolved and the award made more quickly than by canceling and resoliciting the requirement."

As a matter of fact, contrary to the statement in the May 11, 1970, telegram directing cancellation of invitation -3486 that such cancellation would be "consistent with" the -1333 cancellation, the same supplemental report indicates that the primary reason for cancelling invitation -1333 was not specification changes but rather was the fact that the requirement supporting invitation -1333 had ceased to exist. This supplemental report states:

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"IFB F42600-70-B-1754 (hereinafter IFB 1754) was issued 16 Jan 1970 for the second six months production of FY70 programmed requirements. Consideration was being given to adding the requirement of IFB 1333 to the second six months production on IFB 1754 for the purpose of incorporating VECF's approved 3 Dec 1969 and 19 Jan 1970. Before this could be accomplished, the requirement on IFB 1333 was cancelled. This cancellation was effected by reason of the fact that the requirement no longer existed. We considered reducing quantity on IFB 1754 and continuing with award under IFB 1333. This was not considered feasible since FY69 funds were not available for this item. It was determined the best solution was to cancel IFB 1333. This would also result in our getting the new configuration."

Thus, while the acquisition of the new configuration was desirable, it constituted but a minor reason for cancelling invitation -1333.

A final indication that procurement of couplers of the new configuration was not essential in order to adequately serve the Government's needs is that during the pendency of the determination with regard to the responsibility of Forest Scientific, urgent requests were received from the field requesting first, on March 9, 1970, that award of the set-aside portion of invitation -3486 be made to Contract Machining Corporation apparently under the old specifications, and second on April 29, 1970, that award be made to REEM Corporation through the exercise of options under the contract awarded to REEM as a result of invitation -3486. The second request indicates that a reduced price was offered by REEM for the optional quantities presumably as a result of specification savings, although this fact is not made clear by the administrative file.

It seems clear from the above-summarized chronology of events leading to the cancellation of invitation -3486 that the specification changes were not considered to be so significant as to constitute the basis for invitation cancellation. Rather, it appears to us that the changed specifications were used to justify an invitation cancellation in the face of a forthcoming SBA direction which would have the effect of making the low bidder, who had therefore been determined to be nonresponsible for lack of tenacity and perseverance, eligible for award.

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In this regard, we held in 49 Comp. Gen. 211 (1969) that a speculative price savings to be anticipated by resolicitation on the basis of less stringent specifications was not a sufficient basis to justify the cancellation of an invitation after the exposure of bid prices. On the question of the propriety of resolicitation because of anticipated cost savings, we stated at page 215 of that decision:

" * * * While the attorneys for Norton argue that reinstatement of the initial solicitation would be improper unless there is cogent evidence to show that the dollar savings on readvertisement would be relatively small, we are of the view that the savings possible on readvertisement which, at the best, are purely speculative, are not for consideration under circumstances such as involved here. Rather, the primary consideration in this type of situation should be the cost to the Government in the event of an award under the initial solicitation. Since adequate competition was obtained in this case; since the difference between the two low bids is relatively small; and since there is no evidence to indicate that the requirement for wire of 200 ratio precluded other potential bidders from submitting responsive bids, we believe that the circumstances require an award under the initial solicitation."

On the question of the propriety of invitation cancellations as a result of specification changes, the cited decision held that "Although a revision in specifications is, in some instances, a 'compelling reason' to cancel an invitation, it would seem that cancellation on that ground should be limited to instances in which an award under the original specifications would not serve the Government's actual needs." We think that reasoning applies as well to the case at hand.

As indicated above, were it not for the significantly lower prices revealed at the bid opening of invitation -3238, we would be constrained to reinstate invitation -3486 on the basis that the evidence of record did not support the determination that the specification change was so significant as to require invitation cancellation.

We point out these inadequacies so that in the future care may be taken to assure that protest reports are fully documented and provide sufficient legal basis for the action proposed or already taken in a particular procurement.

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The protest of Contract Machining Corporation, in addition to requesting reinstatement of invitation -3486, alternatively argued that since invitation -3486 had reserved 514,350 items for labor surplus participation, it was improper to split invitation -3238--covering only the set-aside portion of invitation -3486--into 50-percent set-aside and non-set-aside portions. However, in view of the prohibition against the payment of price differentials for contracts made for the purpose of relieving economic dislocation set out in the annual Department of Defense Appropriations Acts, Defense Manpower Policy No. 4, and ASPR 1-802, we have advised Contract Machining by letter of today that so long as the cancellation of invitation -3486 is not rescinded, a second 50-percent division of the quantity of couplers called for by that invitation into set-aside and non-set-aside portions is required. See 43 Comp. Gen. 487 (1963).

Sincerely yours,

R.F.KELLER

Assistant Comptroller General
of the United States

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The Honorable
The Secretary of the Air Force

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