



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

B-177831

December 28, 1973

40314

The Honorable  
The Secretary of the Army.

Dear Mr. Secretary:

Reference is made to letter AMCGC-P dated August 7, 1973, and prior correspondence, from The Deputy General Counsel, Headquarters United States Army Materiel Command, reporting on the protest of Avien Incorporated (Avien) against the cancellation of invitation for bids (IFB) DAAA21-73-B-0025 and the resolicitation under request for quotations (RFQ) DAAA21-73-Q-0063, issued at Picatinny Arsenal, Dover, New Jersey, on December 20, 1972, for a quantity of X142K1 sequential timers.

IFB DAAA21-72-B-0338 was issued on May 22, 1972, and three bids were received by bid opening scheduled for June 23, 1972. After opening, the IFB was canceled due to changes in the specifications. Thereupon, IFB No. DAAA21-73-B-0025 was issued on July 31, 1972, for quantities of either 96 or 142 X142E1 sequential timers, which are components of the safety and arming system of the Lance missile. The following bids were received in response to the solicitation:

<u>Name of Bidder</u>	<u>Item 0001</u> <u>142 each</u>	<u>Item 0002</u> <u>96 each</u>
Avien	\$2,529.37	\$2,633.54
Sparton Northwest	3,463.67	3,733.80
Applied Resources Corp.	3,488.00	3,770.00
Lockheed Electronic Corp.	3,948.00	4,510.00
Xnt'l Signal & Control Corp.	4,392.00	4,793.00
Sanders Assoc. Inc.	4,540.00	5,127.00
Martin Marietta Corp.	6,958.00	8,108.00

After the opening of bids and prior to the completion of the preaward surveys, the contracting officer became aware that the timers, being produced as in-house work at Picatinny Arsenal, were experiencing a high rejection or scrap rate. The contracting officer determined that the technical data package was in such condition that to award a fixed-price contract would lead to prohibitive losses in cost and administration and delivery time because of engineering changes which were needed to improve the data package. Based on the above reasoning, the contracting officer

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determined to cancel the IFB, discard all bids and resolicit the procurement under a request for quotations. This action was accomplished by the issuance of RFQ DAA21-73-Q-0063 which had for its objective a cost-plus-incentive-fee (CPIF) contract.

The bases for Avien's protest are that the IFB should not have been canceled; that a CPIF-type contract is improper for a production contract where, as Avien alleges occurred here, there is no development effort; and, finally, that the evaluation factors under the RFQ were ambiguous.

After Avien's protest was filed with our Office, a determination was made to make an award based on urgency under paragraph 2-407.8(b)(3)(1) of the Armed Services Procurement Regulation (ASPR) and, pursuant to such determination, award was made to Martin Marietta for 320 timers on a CPIF basis.

A review of the record before our Office shows that the following basis was given by the contracting officer for the cancellation of the IFB as reported in his written determination:

\* \* \* The review and evaluation revealed that some components previously considered to be suitable for procurement through the Formal Advertised Method of procurement are not suitable for this type of procurement action. The Technical Data Package could not be utilized by a contractor as an adequate vehicle for production purposes without considerable prior engineering evaluation. Production complying with the existing drawings and specifications would result in an extremely high rejection rate not attributable to workmanship, but associated with the adequacy of the Technical Package.

"Based on the foregoing, I hereby determine to cancel the Invitation pursuant to ASPR 2-404.1(viii) for other reasons, cancellation is clearly in the best interest of the Government." The resolicitation shall be under a Request for Quotation."

After the above determination was made, a letter was sent to all bidders giving the above reason for the cancellation and advising them to retain the data package for use on the resolicitation.

A review of the record before our Office shows that no change was made in the technical data package under the RFQ except that a quantity of rotary switches would no longer be Government-furnished material (GFM).

The general rule regarding cancellation of a solicitation and the discarding of all bids was established in The Hausman Construction Company v. United States, 102 Ct. Cl. 699, 719 (1945), where it was stated:

"\* \* \* To have a set of bids discarded after they are opened and each bidder has learned his competitor's price is a serious matter, and it should not be permitted except for cogent reasons. \* \* \*"

Our Office has held that the determination whether a cogent reason exists for cancellation is a matter primarily within the discretion of the agency and will not be disturbed in the absence of clear proof of an abuse of that discretion. B-173740(1), November 17, 1971, and 49 Comp. Gen. 584 (1970).

In this case, the discovery of the high scrap rate seems to have been the decisive factor in the cancellation of the IFB and the issuance of the RFQ. However, we note from the IFB that the rotary switches which were supplied as GFM were in excess of the quantity of timers by almost 20 percent, an indication that knowledge of a high scrap rate existed prior to the issuance of the IFB and was used as a basis for computing the number of switches to be supplied.

It appears that at least Avion, the low bidder, understood that the high scrap rate resulted from difficulties in the production of the timer rather than because of any problems with the Government-furnished switches. If Avion and the other bidders could be presumed by the contracting office to have had such knowledge prior to bid opening, a bidder awarded a contract pursuant to the IFB would be expected to assume the risk of the high scrap rate. In that case the switch from a fixed-price advertised contract to a negotiated cost-type contract served only to shift the risk from the contractor to the Government and would, at best, represent poor procurement practice.

Avion alleges that the IFB was canceled to permit a negotiated cost-type award to Martin Marietta Corporation who could not be reached for award under the advertised procurement without displacing six lower bidders. We are not in a position to establish the motive for the contracting officer's action. With the advantage of hindsight, prudence would have dictated that the contracting activity look into the reasonableness of the rejection rate prior to the exposure of bids under the advertised solicitation. Failure to have done so permits the kind of charge leveled by Avion and does nothing to reinforce confidence in the integrity of the Federal procurement process.

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While there is not a sufficient basis in this case to challenge the validity of the award, an administrative review of the procurement practices utilized in this instance appears warranted. We would appreciate advice on the results of the review.

Sincerely yours,

R.F.KELLER

Deputy Comptroller General  
of the United States