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**DECISION**



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

**FILE:** B-187071

**DATE:** February 17, 1977

**MATTER OF:** Sentinel Electronics, Inc.

**DIGEST:**

Claim for proposal preparation costs based on contention that claimant was unreasonably induced to submit useless proposal is denied, since inducement is due in part to inadvertent misleading statement in RFP and claimant was on notice of restrictions on competition and possibility that alternate proposals might not be accepted.

Prior to the closing date for offers, Sentinel Electronics, Inc. (Sentinel), protested under request for proposals (RFP) DAAA21-76-R-0503, issued by Picatinny Arsenal, New Jersey. The RFP solicited proposals for 280 Klystron power supplies 2A2, part number 10548336, in accordance with a technical data package dated June 23, 1976, attached to the RFP. The power supply supports a radar system.

The genesis of this protest is the predecessor procurement for the same items--RFP -0031. After Sentinel lodged a protest with our Office that the specifications were ambiguous and unduly restrictive of competition, RFP -0031 was canceled to effect what was termed by the Army as "major design changes to the technical data package." Thereafter, the instant RFP was issued.

Sentinel disputed the propriety of two provisions in the new RFP. The first concerned the caution to bidders:

"Due to the delivery schedule set forth herein, only items previously qualified for use shall be furnished."

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In Sentinel's opinion the term "previously qualified" was ambiguous. As a result of Sentinel's protest, the contracting officer decided to delete the provision from the RFP.

The second alleged defect related to the source control drawings referenced in the RFP for transformers and reactors. The drawings limit the sources for eight of the nine key components of the Klystron power supply to two firms: Lockheed Electronics Co. and AEL Entech (AEL). However, Sentinel stated that Lockheed refused to supply any of the transformers to Sentinel at any price and that AEL, a competitor for the procurement, offered to supply the parts at a price so high as to render any competition for the end item meaningless.

Further, Sentinel alleged that neither Lockheed nor AEL manufactures the parts themselves. In Lockheed's case, it allegedly purchases the parts from another manufacturer, Torwico, and merely assigns the Torwico part a Lockheed part number. Sentinel believes that the restrictions to the Lockheed and AEL parts occurred when they constructed and tested prototypes and qualified them, thereby having their part numbers assigned.

Sentinel noted another anomaly in the delivery schedule and first article approval clause in the RFP that restricts the procurement to AEL. The first article approval clause requires that first articles must be delivered to the Government for testing within 330 days of the date of award, with the first article test reports to follow within 30 days, or 360 days after the date of award. Deliveries are required to commence within 390 days of award. Therefore, only 30 days exist between the date of delivery of the first article test report and the required commencement of delivery. A portion of the 30 days will be consumed in considering the first article test report and issuing approval to proceed with production. In this light, Sentinel maintains that it is impossible for any firm not then in production to compete on the basis of first article testing.

In conjunction with this argument, Sentinel noted that the technical data package provided for the use of substitute articles if approved by the contracting officer. However, Sentinel maintains that technical representatives of the Frankford Arsenal told Sentinel during a pre-award survey that the Government did not intend to accept any substitutes. Recognizing that the contracting officer is not bound by oral pre-award representations of his technical representatives, Sentinel nevertheless believed that it is probable that no substitutions would be

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accepted. Sentinel maintains that the totality of the grounds raised indicated, at least, a de facto sole-source situation.

After review of the protest bases, the Army indicated that when it issued the RFP it had been unaware of Lockheed's refusal to supply the components to other firms. Also, upon examination of AEL's quoted price to Sentinel for the components, the Army indicated that " \* \* \* it appears to be considerably inflated and possibly could be interpreted as a means of eliminating competition." Further, the Army acknowledges that the technical package with the RFP is inadequate to:

" \* \* \* assure transformers usable in the radar sets. If the transformers were obtained with the present drawings, it is likely that the characteristics of the produced transformer would vary so widely that interchangeability of the power supplies in the radar set would be impossible. \* \* \*"

Based on the foregoing, the Army concluded that:

" \* \* \* it would be unconscionable for the Government to permit another vendor to enter into a contract when the Government had superior knowledge that the inadequacies of the Technical Package will preclude successful contract performance."

Since the procurement was considered urgent and bore a Uniform Military priority designator "06," the Army initially decided to cancel RFP -0503 and award a sole-source, unpriced task order to AEL under an existing basic ordering agreement, No. DAAA25-70-A-0437.

In response to this proposed course of action, Sentinel maintained that a sole-source award to AEL was improper, since AEL was not the sole source of the restricted component. In any event, assuming an award on an urgency basis would be proper, Sentinel maintained that it is entitled to recover its proposal preparation costs because the Army issued RFP -0503 with actual knowledge of the technical defects in it, thereby unreasonably inducing Sentinel to submit a useless proposal.

By letter dated December 7, 1976, the Army informed Sentinel that in view of the urgency attached to the procurement, award was being made to AEL as the "lowest responsive offer under the solicitation."

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AEL's offer was the lowest at \$1,994.27, excluding first article testing, and \$2,010.54 for first article testing. The Army states that Frankford Arsenal will waive first article testing only for AEL. Sentinel offered \$3,150 with first article testing, and \$2,950 without. Sentinel also offered an alternate proposal based on other than approved sources of supply (assuming a waiver by the contracting officer) of \$1,750 with first article testing and \$1,650 without. The award to AEL operated as the contracting officer's refusal to permit substitute transformers.

The fact that award to AEL was made under the RFP renders academic the question as to the propriety of a sole-source award to AEL under an existing basic ordering agreement.

The Army's response to Sentinel's allegation concerning the manufacture of the parts is as follows:

"\* \* \* It is reiterated that AEL-EMTECH actually manufactures the transformers and is the sole source of supply for eight out of nine of these items. On 23 November 1976, the Government engineers and contracting people at Frankford Arsenal visited the AEL-EMTECH plant and personally observed the actual manufacture of the transformers.

"Concerning Lockheed, it is also reiterated that Lockheed actually manufactured the transformers in question. Eight of the nine transformers used by Lockheed in the Power Supply Assembly were actually manufactured by Lockheed. The single transformer that was purchased by Lockheed is called out on a specification control drawing which by its nature permits competitive procurement amongst subcontractors."

In light of Lockheed's present refusal to supply the restricted items, the Army's position is that AEL is presently the sole source of supply. Also, AEL affirmatively states that it manufactures the transformers in question.

As for Sentinel's claim that it should be reimbursed its costs incurred in submitting its proposal, the Army maintains that its actions were reasonable. Sentinel's argument on this point is based

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upon its allegation that the Army knowingly issued a defective RFP to which no offeror other than AEL or Lockheed could properly respond.

In conjunction with this claim, Sentinel requests that our Office recommend affirmative action by the Army to eliminate the unnecessary restrictions on competition. Sentinel alleges that the present problems are predicated upon prior poor procurement practices of the Army in not requiring sufficiently complete drawings under the initial contract to permit proper competition. Sentinel notes that our Office has taken such affirmative action in the past, citing 52 Comp. Gen. 57 (1972).

The standards applicable to claims for proposal preparation costs have evolved from the courts in response to claims that the Government did not fairly and honestly consider the proposals submitted to satisfy the Government's requests for proposals. The ultimate standard to be applied is whether the Government's conduct was arbitrary and capricious towards the offeror. Keco Industries, Inc. v. United States, 492 F.2d 1200, 203 Ct. Cl. 566 (1974). This ultimate standard may be satisfied if any one of the following criteria are met: (1) subjective bad faith on the part of the procuring officials; (2) no reasonable basis for the administrative action; (3) a sliding degree of proof commensurate with the amount of discretion afforded the procuring official; and (4) proven violation of a statute or regulation which may suffice for recovery. A.R.F. Products, Inc., B-186248, December 30, 1976, 76-2 CPD 541.

The Army, citing DOT Systems, Inc., B-183697, June 11, 1976, 76-1 CPD 368, maintains that Sentinel cannot recover its proposal preparation costs because its offers were evaluated as fourth and fifth low. In DOT Systems, an offeror sixth in line for award was denied recovery of proposal preparation costs claimed because the agency failed to refer the question of the successful offeror's small business status to the SBA. The denial was based on the fact that the claimant was not immediately in line for award. However, see that part of DOT Systems where there was reviewed the same claimant's contention that the contracting agency in bad faith induced it to submit a proposal which the agency did not intend to consider.

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In this case, we do not find that Sentinel was unreasonably induced to submit a useless proposal. As indicated above, at the time of the issuance of the RFP, the Army was unaware that Lockheed would not supply the parts to other firms and that AEL would offer non-competitive prices to competitors. Moreover, the intention to procure Lockheed or AEL parts was indicated in the source control drawing. Although the statement in the caution to bidders regarding "previously qualified" items may have been misleading, there is no showing that the Army was aware of its misleading nature until the matter was raised by Sentinel and then the Army offered to delete the provision when the ambiguity was pointed out. Further, the record indicates that Sentinel was as familiar with the "restrictions" in the source controlled drawings as the Army. In addition, Sentinel knew from conversation with Army personnel before submitting an offer on the RFP that alternate proposals might not be accepted. This was further manifested by the source control provisions quoted by Sentinel which stated:

"\* \* \* The contractor is cautioned, however, that the acquisition of data necessary to substantiate the physical and functional interchangeability of a proposed substitute for an approved source control item, and its long-term reliability in its intended environment, may require facilities, equipment, and resources not available or practically obtainable at the time approval of a substitute item is requested. The Government therefore makes no representation as to the feasibility or probability of approving a substitute item. \* \* \*"

In that connection, the Army has indicated that it does not possess all the data and information that would be necessary to evaluate the acceptability of an offered alternate and that it would take an estimated man-year of effort at a cost of about \$50,000 to make the source control drawings suitable for competition. Thus, the rejection of the alternate proposals does not appear to have been arbitrary.

In the circumstances, if Sentinel was misled by the caution notice, it appears to have been inadvertent by the Army, and Sentinel appears to have been otherwise on notice of the other so-called "restrictive"

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features of the RFP and the possibility that alternate proposals might not be accepted. Therefore, we are unable to conclude that the proposal submitted by Sentinel was the result of any bad faith inducement by the Army.

As for Sentinel's request that we recommend remedial action to obtain drawings adequate for competition, we believe that decision must be weighed in light of other factors. While the Army believed in 1967 that production of the Klystron power supply would be limited, it appears that the need for these items is ongoing. If this is the case, the cost of acquiring drawings suitable for competition must be compared with benefits anticipated to flow from competition. In this case, we note that the total alternate price would be about \$96,000 less than the contract price. However, we recognize that the decision on the drawings is the Army's. We therefore recommend that the Army study the feasibility of obtaining drawings adequate for competitive purposes and communicate its results to our Office.

Accordingly, the claim is denied.

  
Acting Comptroller General  
of the United States