



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Nidek, Inc.

File: B-272255

Date: September 11, 1996

Polly Zygaczenko for the protester.

Helen Henningsen, Esq., Philip Kauffman, Esq., and Phillipa L. Anderson, Esq.,
Department of Veterans Affairs, for the agency.

C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General
Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting officer had a reasonable basis for canceling a solicitation where solicitation failed to include evaluation factors upon which the agency would evaluate offers and where the record shows that specifications in the solicitation may not accurately reflect agency's minimum needs.

DECISION

Nidek, Inc. protests the cancellation of solicitation No. 556-96-01, issued by the Department of Veterans Affairs (VA) Medical Center in North Chicago, Illinois, for a laser system. Nidek disputes the agency's determination that the solicitation omitted critical information, which prevented the evaluation of offers on a common basis.

We deny the protest.

In March 1996, the agency identified a need for a YAG (yttrium-aluminum garnet)/argon combination laser unit for use in the Medical Center's ophthalmology section. The unit was unavailable under the Federal Supply Schedule, and the agency decided to issue a solicitation. Accordingly, the agency published a notice in the Commerce Business Daily (CBD) of its intention to issue a solicitation for a "Zeiss YAG II/Argon II combination laser or equal," in response to which any responsible source could submit a "quotation."

The solicitation, which was issued in early April, did not identify the brand name (Zeiss) referenced in the CBD, but sought offers for a "YAG/Argon laser combo or equal" with installation, shipping, and handling. The solicitation contained a list of

"salient features" for the unit to be provided. The solicitation generally followed the format prescribed by Federal Acquisition Regulation (FAR) Subpart 12.3 (FAC 90-32), for the acquisition of commercial items. FAR § 12.301(c) provides that when the use of evaluation factors is appropriate, the RFP should include the clause at FAR § 52.212-2, Evaluation--Commercial Items, which provides for award to the offeror whose proposal is most advantageous based on "price and other factors." FAR § 52.212-2 contains a block for identifying the evaluation factors; here, the contract specialist entered the word "None."

Although the CBD notice advised potential offerors to submit offers by May 1, 1996, the solicitation contained no instructions for submission of offers. Upon discovering this omission, the specialist telephoned prospective offerors and advised them that proposals were due by the close of business on April 30. Five firms submitted offers on that date.

The lowest price submitted was based on separate rather than combination units. Nidek submitted the low price for a combination unit, as well as an alternate proposal, advising the agency that the specifications were "slightly outdated and below current standards of technology" and offering a "newer technology" model for consideration. The contract specialist referred Nidek's proposal for evaluation. The evaluator, a doctor who had also generated the requirement, reviewed Nidek's literature. He was unable, however, to determine whether Nidek fully complied with the requirements set forth in the solicitation. Further, Nidek had not offered a Zeiss split lamp delivery system, as the doctor had expected. Not having defined the characteristics of the Zeiss system necessary for his work, the doctor had no basis upon which to judge the Nidek model unit. The contract specialist contacted Nidek, and requested and received additional information needed to demonstrate that the protester could and, in fact, intended to meet the requirements set forth in the solicitation. The doctor advised the contract specialist that he had no objection to purchase of the Nidek model.

On May 6, the contract specialist advised Nidek that its price was low and that it would be awarded a contract. When the procurement was reviewed by a contracting officer, however, several deficiencies were noted. Almost none of the information normally inserted into the blocks of standard form 1449, the first page of the solicitation, was present. The type of solicitation--whether invitation for bids (IFB) or request for proposals (RFP)--was not specified. No time and place for submission of bids or receipt of offers was provided. The solicitation contained no evaluation or selection factors. Further, the contracting officer learned of the contract specialist's change to the date for submission of offers and her negotiations with Nidek. Finally, although the doctor had been willing for the agency to purchase the Nidek unit, it was uncertain whether all of his needs were set forth in the solicitation or whether the solicitation reflected the agency's minimum needs.

In view of these deficiencies, the contracting officer determined that the solicitation should be canceled. Specifically, on May 21, the contracting officer executed a determination to cancel the solicitation based on the lack of evaluation factors, which she deemed critical for the fair consideration of offers and necessary for identification of the product or firm providing the best value to the government.

By letter dated May 28, the agency advised Nidek of its decision, and this protest followed.

Nidek challenges the agency's decision to cancel the solicitation. Nidek argues that the omission of evaluation factors was a conscious decision on the part of the agency, since the entry "N/A" appears in the appropriate block of FAR § 52.212-2. Nidek contends that it obtained the award fairly and that the agency is attempting to rewrite the specifications around a specific product in order to lock Nidek and other offerors out of the competition. Nidek argues that no vendor raised objections to the solicitation during the process and that the agency therefore had no reasonable basis for canceling the solicitation.

In a negotiated procurement, an agency must have a reasonable basis to cancel an RFP and resolicit after receipt of offers, as opposed to the requirement that an agency have a cogent and compelling reason to cancel an IFB and resolicit after receipt of sealed bids. See FAR § 14.404-1; General Projection Sys., 70 Comp. Gen. 345 (1991), 91-1 CPD ¶ 308. The difference in standards arose because bids in response to an IFB are publicly exposed, and the rejection of bids, in order to seek new bids, discourages competition. Id.

While the procurement here most closely resembles a negotiated competition because there was no public opening and thus no exposure of prices, we conclude that the cancellation was proper even under the more stringent standard applicable to cancellation of IFBs after bid opening. Here, the agency reports that it included the clause at FAR § 52.212-2 because it intended to include evaluation factors. Since in the absence of such factors the agency cannot determine the offer most advantageous to the government, the solicitation was materially deficient. Such a deficiency warrants cancellation.

In addition, during the evaluation here, concerns were raised whether all of the features listed in the solicitation represented legitimate needs, and whether the solicitation had failed to identify other legitimate needs. Where a solicitation does not contain specifications that reflect the agency's actual needs, the agency has sufficient reason to cancel. See FAR § 14.404-1(c)(1); Days Inn Marina, B-254913, Jan. 18, 1994, 94-1 CPD ¶ 23 (IFB); LB&B Assocs., Inc. B-254708, Dec. 30, 1993, 93-2 CPD ¶ 346 (RFP). Here, even the protester, in its proposal, questioned the legitimacy of the agency's description of its requirements. While the agency doctor may have been willing for the agency to purchase the Nidek unit to ascertain

whether it met his needs, it was not unreasonable for the contracting officer to cancel the solicitation until such time as the medical staff developed an accurate statement of its needs, upon which all firms could submit an offer. Although the contracting officer did not incorporate this concern into her written determination, the contracting officer states that she considered it in her decision. See General Aero Prods. Corp., B-213541, Sept. 18, 1984, 84-2 CPD ¶ 310 (General Accounting Office will consider a subsequently enunciated basis for cancellation).

The agency advises our Office that pending the resolution of this protest, it has not yet identified its minimum requirements for the resolicitation. The resolicitation, including the description of the agency's needs, will be handled by a different office and different personnel. To the extent that Nidek predicts that the agency will revise the specifications around a specific product to prevent it and other offerors from competing, Nidek's arguments are speculative and premature since the agency has not issued a new solicitation. In any event, absent an allegation that the features required by a solicitation exceed the agency's minimum needs, the mere assertion that a specification is written around design features of a particular product does not provide a valid basis of protest. See Staveley Instruments, Inc., B-259548.3, May 24, 1995, 95-1 CPD ¶ 256.

The protest is denied.

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