

restricts competition and has been used to reject additional sources of supply. Magnaco states that the contracting officer was aware of its interest in the procurement and the fact that it could not finance the tooling of a sample without the assurance of a contract. The protester also states that it has in the past suggested that GSA delete the bid sample clause and substitute a preproduction sample clause. Magnaco alleges that, by not taking steps to foster competition, the contracting officer violated FAR, § 15.105, 48 Fed. Reg. 42,187, (to be codified at 48 C.F.R. § 15.105) and did not act in the best interest of the government.

With respect to the contention that the contracting officer knew that Magnaco did not have the monies to invest in tooling without the assurance of a contract, GSA responds that the government cannot grant one contractor the assurance of a contract so that it can develop new product lines without granting all other interested vendors the same consideration. GSA contends that such action would place the risk of Magnaco's nonperformance on the government, and would jeopardize GSA's ability to meet customer needs on items required for major weapons systems maintenance.

With regard to Magnaco's allegation that the contracting officer did not promote competition, GSA states that contrary to the allegation, a pre-solicitation notice was distributed to approximately 200 companies which resulted in a favorable response from 29 percent of the companies. Additionally, GSA states these firms were sent a copy of the solicitation and a synopsis of the solicitation was published in the Commerce Business Daily. Further, in order to allow Magnaco the time to provide the required bid sample, the GSA states that it contacted Magnaco prior to the issuance of the solicitation.

With respect to Magnaco's request that the solicitation be changed from a negotiated to a formally advertised procurement in order to promote competition, GSA notes that FAR, § 15.210(a)(2), 48 Fed. Reg. 42,189 (to be codified at 48 C.F.R. § 15.210(a)(2)) specifically authorizes negotiation for supplies or services if it is impracticable to secure competition by formal advertising. GSA states that as a result of the requirement in

section 723, of the joint resolution providing continuing appropriations for FY 1983, Pub. L. No. 97-377, 96 Stat. 1830, 1854 (1982), that certain procurement items, including hand tools, be domestically produced, formally advertised procurements for wire twister pliers have resulted in only one acceptable bid for the past 2 years. GSA asserts that this justifies a negotiated procurement.

GSA required bid samples for evaluation to determine whether pliers complied with all characteristics listed for examination in the solicitation. The solicitation listed only "subjective characteristics," as follows:

"Samples will be inspected for those visually determinable workmanship characteristics which impair serviceability, durability and/or safety."

Under "workmanship," the solicitation specified:

". . . Each article shall be constructed of first-class material and workmanship and must perform the functions for its intended use."

In response to Magnaco's objection to bid samples, GSA states that no test exists to determine whether the pliers are free of surface or coating defects which would affect durability, serviceability or appearance, or cause hand injuries to the user. GSA contends that because of the different levels of quality in the tools available, it is in the best interest of the government to determine, in accordance with FAR, § 14.202-4, supra, whether a tool is suitable, from the standpoint of balance, facility of use, general "feel," color and pattern, prior to contract award. Additionally, GSA notes that because the specifications do not adequately describe the spiral mechanism and locking device of the wire twister pliers, a subjective inspection and testing of sample pliers is required in order to assure, inter alia, that the overall design and operation will produce the desired twisting action in a manner easily controlled by the user.

The use of bid samples is authorized by FAR, § 14-202-4, id., and has been sanctioned by our Office where it is determined that the specifications are not sufficiently definite to allow a determination that an

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item offered will meet the government's minimum needs without samples. Aul Instruments, Inc., Boonton Electronics Corporation, B-186854, June 29, 1977, 77-1 C.P.D. ¶ 461.

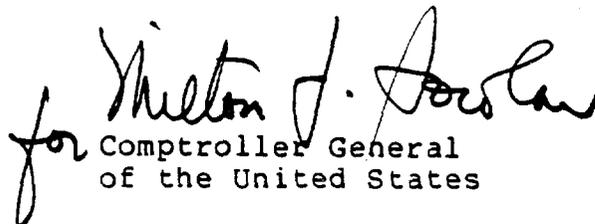
The record shows that bid samples were required because GSA could not draft adequate specifications in that a visual inspection was required in order to determine whether pliers meet the workmanship and performance requirements. See Lutz Superdyne, Inc., B-210161, May 17, 1983, 83-1 C.P.D. ¶ 526. Additionally, as noted by GSA, the government would assume the risk of contracting for an unacceptable product if bid samples were not required.

In view of the subjective nature of the technical evaluation required, we do not find that the requirement for bid samples is unreasonable and find no basis upon which to object.

We are informally advised that although 60 firms expressed an interest in the solicitation, only 2 offers were received in response to the solicitation. One offeror, a small business, was the only firm that had previously provided GSA with the pliers. The other offeror, a large business, is a distributor of the small business offeror's pliers. In effect, there is only one product being offered, so the use of negotiation procedures did not widen the competition.

The protester's primary concern that the bid sample requirement restricts competition seems to be confirmed, particularly in view of the number of firms apparently expected to compete. Although we uphold the bid sample requirement here, we expect that GSA will continue to take steps to try to increase competition in this area.

The protest is denied.

for 
Comptroller General
of the United States