

**DECISION**



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

60240

FILE: B-184403

DATE: November 28, 1975

MATTER OF: Lite Industries, Inc.

97657

**DIGEST:**

1. Where under terms of RFP Government reserved right to make any number of awards, such reservation can only be regarded as also reserving to Government its right to make more than three awards even though it later indicated that its contemplation was to make maximum of three awards. While offerors were led to believe, because of confusing and misleading language in RFP, that three awards would be made, harm to competitive system generated by Agency's action does not necessitate recommending that corrective action be taken.
2. Since contractor awarded 5,000 units was reasonably led to believe that three awards, each of 10,000 units, would be made, contractor should be afforded opportunity to have its contract terminated for convenience if contractor so desires.
3. In interpreting seemingly inconsistent provisions of RFP it is incumbent upon GAO to attempt to read provisions together.

Request for proposals (RFP) No. DSA100-75-R-0830 was issued on February 21, 1975, seeking offers for item 0001--15,000 each sleeping bags, intermediate cold--and item 0002--15,000 each sleeping bags, extreme cold. The RFP was restricted to 100-percent participation by small business firms under the authority of 10 U.S.C. § 2304(a)(1) (1970). Section "B" of the RFP stated that:

"This is a production test procurement and is for the purpose of determining whether the SLEEPING BAG, INTERMEDIATE COLD TYPE I; SLEEPING BAG, EXTREME COLD, TYPE II being procured herein can be economically manufactured in quantity production in accordance with accepted production practices and the requirement of MIL-S-43880."

Of the 36 firms solicited, offers were received from six. Oral discussions were initiated with the objective of insuring that all offerors fully understood the technical requirements and the exploration of cost areas. A request for best and final offers was issued to the six offerors on April 24, 1975, with a closing date of May 1, 1975. While preaward surveys of the apparently successful offerors

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(including Lite) were being conducted, it appeared that, due to unavailability of funds, awards could not be made until July 1, 1975. As a result of the funding problem and a change in the required delivery schedule, negotiations were reopened on June 6, 1975, with all the firms initially solicited. A June 9, 1975, telegram requested best and final offers in accordance with the revised delivery schedule by June 11, 1975. That telegram also indicated that "The Government intends to award a maximum of three contracts for a quantity of 5,000 each of both Type I and Type II, for a total quantity of 10,000 each \* \* \*."

This intention was arrived at after an examination of the proposals submitted up to June 6, 1975, revealed that this would result in the lowest cost to the Government. It should be noted that the RFP, section B30.86, clause 2, contained the following provisions:

"The Government reserves the right, wherever feasible, to make a minimum of three (3) awards in order to insure successful completion of the production test whereby no one firm or its subsidiaries and affiliates will be awarded more than one contract. However, any number of awards may be made if determined to be in the best interest of the Government. Bidders are requested not to indicate any minimum quantities in excess of 5,000 EA OF EACH ITEM "

And, paragraph 10(c) of standard form (SF) 33A (incorporated into the RFP by reference) states:

"(c) The Government may accept any item or group of items of any offer, unless the offeror qualifies his offer by specific limitations. UNLESS OTHERWISE PROVIDED IN THE SCHEDULE, OFFERS MAY BE SUBMITTED FOR ANY QUANTITIES LESS THAN THOSE SPECIFIED; AND THE GOVERNMENT RESERVES THE RIGHT TO MAKE AN AWARD ON ANY ITEM FOR A QUANTITY LESS THAN THE QUANTITY OFFERED AT THE UNIT PRICES OFFERED UNLESS THE OFFEROR SPECIFIES OTHERWISE IN HIS OFFER."

Seven offers (with apparently only Kings Point having revised its prices at the final closing) were received on June 11, with unit prices as follows:

"OFFERORS	ITEM 0001	ITEM 0002	FOB
Lite Industries	\$61.59	\$80.51	0
	62.59	82.51	D
Hunter Outdoor	84.88	98.88	D
KPB	75.90	88.42	D
LaCrosse	62.84	75.53	D
North Face	61.28	74.43	0
	62.26	75.41	D
Kings Point	64.75	78.88	0
	65.20	79.48	D
M. Rose	71.78	84.53	D"

The Agency report states that:

"An evaluation of final prices revealed that, in order to realize the optimum situation of having 5,000 units of each item manufactured by three firms,\* awards as follows would result in the lowest overall cost to the Government:

"OFFEROR	ITEM 0001		ITEM 0002		Total
	Price	Quantity	Price	Quantity	
Lite	\$61.59	5,000	--	--	\$307,950
LaCrosse	\$62.84	5,000	\$75.53	5,000	\$691,850
North Face	\$61.28	5,000	\$74.43	5,000	\$678,550
Kings Point	--	--	\$78.88	5,000	\$394,400"

Consequently, a total of four awards was made to the above firms for the quantities indicated.

The protester argues that (1) the Government's telegram of June 9 represented a definite commitment by the Government to make a maximum of three awards, i.e., at a total of 10,000 units per award, and this fact was reinforced by "numerous informal discussions with the procurement personnel" and by the plant survey conducted on Lite which was solely on the basis of a proposed award of 10,000 sleeping

\*We can only construe this statement to be in error since four awards were made and the words "at least" should have been inserted before the word "three."

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bags, and (2) since its combined prices for both type I and type II sleeping bags were lower than those submitted by Kings Point Mfg. Co., Inc., Lite should have been awarded 5,000 type II bags as well as 5,000 type I bags.

We believe that it is incumbent upon us in interpreting the RFP, including the June 9 telegram, to attempt, if possible, to read the three provisions relating to award together (i.e., paragraph 10 of SF 33A, clause 2 of section B30.86 and the June 9 telegram).

The Agency's position is that the June 9 telegram merely expressed "the intention of making three awards"; however, it also argues that both by the terms of clause 2 of section B30.86 and paragraph 10 of SF 33A the Government was not obligated to award any set number of contracts. Also, the Agency notes that at no time during oral discussions was any offeror advised that no more than three awards would be made and that if Lite intended to impose any quantity limitations (i.e., accept award only if 5,000 type I and 5,000 type II were awarded), it should have done so in accordance with paragraph 10 of SF 33A.

In examining paragraph 10(c) of SF 33A, we agree that by itself that provision allows the Government to make any number of awards. Consonant with this interpretation is the sentence in clause 2 of section B30.86 which states that "\* \* \* any number of awards may be made if determined to be in the best interest of the Government." However, if this is in fact what the RFP contemplated, there would then seem to be no reason or need for the first sentence of clause 2 of section B30.86 to reserve any rights to the Government to make a minimum of three awards, for the Government already had reserved the right to make any number of awards.

The interpretation of clause 2 of section B30.86 itself is significant since it embodies the essence of the conflicting award terms. First, we believe that the clause by itself gave the Government the right to award three or more contracts wherever this was feasible. Moreover, consistent with this view, since the clause also requested offerors not to indicate minimum quantities in excess of 5,000 for each of the two items, it is clear that by doing so the Government contemplated making as many as six or even more awards (i.e., awards each at 5,000 units or less for a total of 30,000 units). When viewed in this light the Government's reservation of a right to make any number of awards can only be regarded as also reserving to the Government its right to make fewer than three awards. Thus, the

Government had the right to award any number of contracts but contemplated awarding three or more.

The June 9 telegram, in our view, only constituted a revision of the Government's contemplation as to the upper limit of the number of awards because of the pricing of the proposals before it at that time. It did not diminish in any way the right reserved to the Government to where feasible make a minimum of three awards or, in accordance with our interpretation of other portions of clause 2 of section B30.86, to make fewer than three awards. Nor did it modify the specific request that offerors not indicate minimums in excess of 5,000 units of each item. Rather, the June 9 telegram clarified the ramifications of the above request in that no longer would the possibility of four, five, six or more awards be contemplated by the Government but rather only three, and each of these awards would be for 5,000 type I; 5,000 type II--10,000 total.

Nevertheless, while the Government may have retained the right to award more than three contracts, we believe that its clear declaration that it intended to award only three was confusing, misleading and exhibited less than sound procurement practices. However, even though Lite may have relied on the June 9 telegram, the earlier plant survey and perhaps even informal discussions with procurement officials, the fact remains that the Government did have the right to make more than three awards. Thus, while the Agency's actions were questionable, we do not believe that the harm to the competitive system generated by such actions necessitates our recommending termination for convenience of Kings Point's contract as suggested by Lite. In this regard, we note that not every harm generated by an agency's irregular procurement procedures necessitates our disturbing an award.

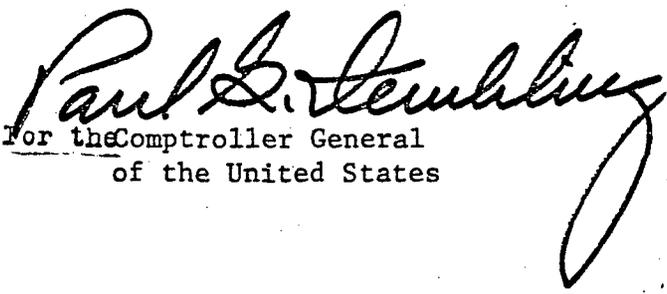
Also, since the Government did have the right to make more than three awards, the Agency's decision to award four contracts did in fact result in the lowest cost to the Government.

However, since we believe that Lite was reasonably led to believe that three awards, each for 10,000 units, would be made, we feel that Lite should be afforded the opportunity to have the contract awarded for 5,000 units terminated for the convenience of the Government if Lite so desires.

We are, therefore, by letter of today advising DSA of (a) our conclusion that in the course of the instant procurement it exhibited less than sound procurement procedures, (b) that in the future it must

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take greater care so as not to mislead offerors with nonbinding declarations of governmental intent, and (c) our feeling that Lite should be afforded the option of having its contract terminated for convenience.

  
For the Comptroller General  
of the United States