

1338

04169

Cohen
P.L.I

DECISION



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

FILE: B-190166
B-190195

DATE: November 2, 1977

MATTER OF: A.R.F. Products, Inc.

DIGEST:

1. Possibility of "buy-in" under resolicitation, allegedly made possible by disclosure of prices in connection with GAO decision involving cancellation of initial solicitation, is not proper basis to challenge validity of proposed award.
2. Our Office determined that cancellation of RFP because of withdrawal of funds was proper, and therefore denied claim for proposal preparation costs. Where only evidence presented in reargument that cancellation was improper, and renewal of claim under canceled RFP is that firm is being underbid in resolicitation by alleged "buy-in," prior decision is affirmed.

A.R.F. Products, Inc. (ARF), protests the proposed award by the Naval Avionics Facility, Indianapolis, Indiana (Avionics), of a contract to ITT, the low bidder under invitation for bids (IFB) No. NOO163-77-B-1307, a resolicitation for electronically tuned digital receivers. The initial solicitation (request for proposals (RFP) No. NOO163-76-R-0282) for the items had been canceled after the withdrawal of funds for the project for which the items were required.

In our decision in A.R.F. Products, Inc., 56 Comp. Gen. 201 (1976), 76-2 CPD 541, we considered a claim by ARF for proposal preparation costs incurred in connection with the initial solicitation, under which ARF had been in line for award on the basis of its low offered price of \$359,349. ITT had been next low at \$367,502. ARF argued that the withdrawal of funding and the cancellation were motivated by the desire to preclude it from receiving the contract award. We denied the claim after concluding that the cancellation was not arbitrary or capricious, but rather resulted from a compelling reason.

In its present protest, ARF contends:

"* * * ITT has bid on the current procurement at a price which is under cost and that they are

B-190166

B-190195

'buying in' to a significant degree. * * * ITT has taken full advantage of the exposure of the amount of A.R.F.'s previous offer."

ARF argues that ITT's bid under the resolicitation should therefore be rejected "as in contravention of the ASPR sec. 1-311 policy which discourages 'buying in.'" ARF states that the proposed contract appears to be the initial phase of a larger program, and suggests that ITT's alleged buy-in "will obviously result in the Government paying more for follow on procurements and for subsequent changes as ITT seeks to recoup its loss." In addition, ARF restates the position we rejected in A.R.F. Products, Inc., supra, that the cancellation of the initial solicitation was improper, and reiterates its claim for proposal preparation costs under that RFP.

Although Armed Services Procurement Regulation (ASPR) § 1-311 (1976 ed.) does discourage "buying in," it does not preclude the Government's acceptance of a below-cost bid. See Allied Technology, Inc., B-185866, July 12, 1976, 76-2 CPD 34. Thus, the fact that a low bidder may incur a loss at its bid price does not justify rejecting an otherwise acceptable bid. Inter-Con Security Systems, Inc., B-189165, June 15, 1977, 77-1 CPD 134. However, the regulation does caution contracting officers to assure that amounts excluded in the buying-in contract are not recouped through change orders or follow-on contracts. There is no reason to question whether Avionics will fulfill its responsibility in that regard.

Furthermore, to properly reject a bid as being extremely low would require a determination that the bidder is nonresponsible. See Futronics Industries, Inc., B-185896, March 10, 1976, 76-1 CPD 169. Award to ITT here would necessarily involve an affirmative determination by the contracting officials of ITT's responsibility. Our Office does not consider protests concerning determinations that particular prospective contractors are responsible, unless either fraud is shown on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been met. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Neither exception is involved here, and the protest on that issue is therefore denied.

In regard to ARF's argument that ITT's alleged buy-in was improperly made possible by the disclosure of ARF's price in connection with our decision in A.R.F. Products, Inc., supra, we point out

B-190166

B-190195

that prices were disclosed only after funds for the procurement in issue were withdrawn and the RFP properly canceled. Moreover, since ITT's price, as well as ARF's, was made public, we cannot see how those firms can be considered to have been competing on other than an equal basis on the resolicitation.

The only new evidence submitted by ARF in support of its reargument that cancellation of the initial RFP was improper, and the renewal of its claim for proposal preparation costs incurred thereunder, is that it was underbid by ITT's alleged buy-in under the present IFB, which it contends was predictable if the cancellation were to stand. However, since we previously determined that the cancellation was properly based on a legitimate reprogramming and withdrawal of funds and was not the result of any arbitrary or capricious action towards ARF by the contracting agency, and in view of our discussion above, we see no basis to modify our decision in ARF Products, Inc., supra.


Acting Comptroller General
of the United States