

DOCUMENT RESUME

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[Protest against Contract Award under Resolicitation]. B-192705.
November 29, 1978. 6 pp.

Decision re: Gertenslager Co.; by Robert F. Keller, Deputy
Comptroller General.

Contact: Office of the General Counsel: Procurement Law II.

Organization Concerned: Department of the Army: Military

District of Washington; Calumet Coach Co.

Authority: 4 C.F.R. 20. 54 Comp. Gen. 699. 36 Comp. Gen. 364.

39 Comp. Gen. 396. 56 Comp. Gen. 976. Defense Acquisition

Regulation 2-406.3. Defense Acquisition Regulation 2-404.1.

Defense Acquisition Regulation 2-407.8. B-190546 (1978).

B-189329 (1978). B-190605 (1978). E-186411 (1976). B-181607

(1975). B-181057 (1974). B-186441 (1976). E-191169 (1978).

A company protested certain agency actions relating to a procurement, including: allowing the awardee to withdraw its bid under the original solicitation, rejection of the protester's bid under the original solicitation as unreasonably high, cancellation of the original solicitation after bid opening, the determination that the awardee was responsible, and award of the contract prior to resolution of a preaward protest to GAO. The agency's actions were proper or not reviewed since there was a reasonable basis for allowing withdrawal of the mistaken bid; rejection of the bid which exceeded the Government estimate after review was a matter of administrative discretion; cancellation of the solicitation based on the finding that bids were at unreasonable prices was reasonable; a mistaken bidder may bid on resolicitation, and the agency's affirmative determination of responsibility was not reviewable under these circumstances; and the agency properly followed procedures in awarding the contract prior to resolution of the protest. (HTF)

DECISION

H. Baker *PK 9*
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548
8461

FILE: B-192705

DATE: November 29, 1978

MATTER OF: The Gerstenslager Company

DIGEST:

1. Review of record reveals reasonable basis for agency action allowing withdrawal of mistaken bid.
2. Agency determination to reject, as unreasonably high, a bid which exceeds Government estimate by an excessive amount after review and re-verification of Government estimate is a matter of administrative discretion which GAO will not question absent circumstances not present here.
3. Agency's determination to cancel IFB after bid opening based on DAR § 2-404.1(b)(vi) finding that all otherwise acceptable bids are at unreasonable prices is reasonable and will not be disturbed by GAO.
4. No regulation or decision prohibits mistaken bidder from bidding on resolicitation. Matter of agency's affirmative determination of responsibility of such bidder is not reviewable by GAO absent circumstances not present here.
5. GAO Bid Protest Procedures at 4 C.F.R. § 20.4 (1978) provide guidance for award during the pendency of a pre-award protest to GAO. Record in instant case indicates that agency properly followed these procedures and applicable regulations in awarding contract prior to resolution of protest.

The Military District of Washington, Department of the Army, issued an invitation for bids No. DAHC30-78-B-0047 (original IFB) for one expansible trailer

van vehicle to be used for exhibit purposes by a recruiting support center. Two bidders responded with the following amounts:

Calumet Coach Company	\$ 77,600.00
The Gerstenslager Company	\$129,814.00

In response to a request to verify its low bid, Calumet claimed a mistake and was subsequently allowed to withdraw its bid. Once the Calumet bid was withdrawn, and the Government estimate of \$90,000.00 reverified, the Army determined the remaining Gerstenslager bid to be unreasonably high and rejected it on that basis. Both bidders were notified that the original IFB was canceled and a new solicitation No. DAHC30-78-B-0106 (second IFB) which contained specification modifications was issued. The same two bidders responded with the following amounts:

Calumet	\$ 97,250.00
Gerstenslager	\$133,529.00

As a result of bids received on the second IFB, Army determined that Calumet was the low responsive, responsible bidder and awarded a contract to that company.

Gerstenslager protests several of the Army actions relating to this procurement. Briefly stated the disputed actions are:

1. The Army's determination that Calumet made a mistake and allowing the firm to withdraw its bid under the original IFB.
2. The Army's rejection of the Gerstenslager bid under the original IFB based on a determination that it was unreasonably high.
3. The Army's cancellation of the original IFB after bid opening.

4. The Army's allowing Calumet to bid under the second IFB and the subsequent determination that Calumet was a responsible bidder.
5. The Army's award of a contract to Calumet under the second IFB prior to resolution of Gerstenslager's pre-award protest to our Office.

Section 2-406.3(a)(1) of the Defense Acquisition Regulation (DAR) on which the Army relied in its determination to allow Calumet to withdraw its mistaken bid states:

"When the bidder requests permission to withdraw a bid and clear and convincing evidence establishes the existence of a mistake, a determination permitting the bidder to withdraw his bid may be made."

Our analysis of the correspondence between Calumet and the Army, which included some bid preparation work sheets, discloses that Calumet's underbidding was due to its misinterpretation of certain specifications. (The Army's admission that these specifications were unclear and its subsequent revision of them for the second IFB is discussed infra.) After review of the record we can find no basis upon which to question the reasonableness of the contracting officer's determination that a mistake was made by Calumet to allow withdrawal of its bid.

The Army's determination to reject Gerstenslager's bid price as unreasonably high is a matter of administrative discretion which our Office does not question unless it is unreasonable or there is a showing of bad faith or fraud. See Schottel of America, Inc., B-190546, March 21, 1978, 78-1 CPD 220; G.S.E. Dynamics, Inc., B-189329, February 15, 1978, 78-1 CPD 127. The determination may be based upon comparison with a Government estimate, past procurement history, current market conditions, or other relevant factors, including any which may have been disclosed by the bidding. See

G.S.E. Dynamics, Inc., supra; Westinghouse Electric Corporation, 54 Comp. Gen. 699, (1975), 75-1 CPD 112; 36 Comp. Gen. 364 (1956).

In the instant case, the determination that the Gerstenslager price was unreasonably high was based upon comparisons with previous purchases of similar items, the withdrawn and alleged intended bid prices of Calumet, and the Government estimate. Prior to ruling that the Gerstenslager bid was unreasonably high, Army reviewed its estimate of \$90,000 for accuracy and further determined that the "maximum permissible price which could be regarded as reasonable" was \$107,596.56. Because the Gerstenslager bid exceeded this figure by more than twenty thousand dollars, Army proceeded to reject the Gerstenslager bid.

With that rejection, the original IFB was canceled pursuant to DAR § 2-404.1(b)(vi) which provides that whenever the contracting officer determines "all otherwise acceptable bids are at unreasonable prices" a compelling reason exists to cancel after bid opening. To a lesser extent the agency report indicates that the cancellation was also based on DAR § 2-404.1(b)(ii) which allows for cancellation if the contracting officer determines the need for specification revision. In this case, the second IFB contained revisions to the technical specification, in particular the air conditioning unit, which, in the opinion of the agency, were necessary to prevent its misinterpretation. Army notes that specification ambiguities in the original IFB contributed to the mistaken bid of Calumet.

In this regard, the principal issue before our Office is whether the contracting officer's determination that Gerstenslager's price was unreasonably high, and that cancellation of the IFB pursuant to the cited regulation was proper, should be disturbed. Contracting officers have broad powers of discretion in deciding whether a solicitation should be canceled, and our Office does not interfere with such determinations absent a lack of reasonableness. General Elevator Company, Inc., B-190605, June 12, 1978, 78-1 CPD 426;

Hercules Demolition Corporation, B-186411, August 18, 1976, 76-2 CPD 173; Support Contractor, Inc., B-181607, March 18, 1975, 75-1 CPD 160; 39 Comp. Gen. 396 (1959).

In view of the difference between the Government estimate and Gerstenslager's bid, and the review and re-verification of the estimate by the Army, we are unable to conclude that the contracting officer's rejection of the Gerstenslager bid as unreasonably high and cancellation of the IFB were abuses of her broad discretion or were done without a cogent or compelling reason. C. J. Coakley Company, Inc., B-181057, July 23, 1974, 74-2 CPD 51. In this connection we have upheld the rejection of bids where the lowest eligible bid exceeded the Government estimate by as little as 7.2 percent. See Building Maintenance Specialists, Inc., B-186441, September 10, 1976, 76-2 CPD 233.

With regard to Calumet's bid and subsequent award under the second IFB, Gerstenslager argues that Calumet was a nonresponsible bidder because it had submitted a mistaken bid on the original IFB and should not have been allowed to bid on the second IFB. We are aware of no legal basis which prohibits a mistaken bidder from re-bidding on a subsequent IFB. In this connection we note that even a contractor which has been terminated for default may bid on any resolicitation of the terminated contract work. See PRB Uniforms, Inc., 56 Comp. Gen. 976 (1977), 77-2 CPD 213.

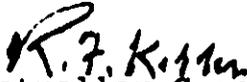
In awarding to Calumet, the Army made an affirmative determination of that firm's responsibility. It is our policy not to review protests concerning affirmative determinations of responsibility, absent, as here, an allegation or demonstration of fraud on the part of the contracting officer or other circumstances not applicable here. E. I. duPont de Nemours and Company, B-191169, June 23, 1978, 78-1 CPD 458 and decisions cited therein.

Regarding Army's decision to make award to Calumet prior to protest resolution, our Bid Protest Procedures at 4 C.F.R. § 20.4 (1978) provide in pertinent part:

"Withholding of Award. When a protest has been filed before award the agency will not make an award prior to resolution of the protest except as provided in the applicable procurement regulations. In the event the agency determines that award is to be made during the pendency of a protest, the agency will notify the Comptroller General."

In the instant procurement the record indicates that the Army properly proceeded to award pending GAO resolution in accordance with DAR §§ 2-407.8(b)(2) and (3)(i) based on the contracting officer's determination of the "urgency of the requirement" and higher level authorization from the Assistant Secretary of the Army. In compliance with the DAK and our Bid Protest Procedures, our Office and the protester were notified by Army of its decision to award during the pendency of the protest.

The protest is denied.


Deputy Comptroller General
of the United States