

DECISION



13037 PL-1
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE B-196295

DATE: March 5, 1980

MATTER OF Stewart-Thomas Industries, Inc.

DLGO 4037

DIGEST:

[Protest Against Solicitation Cancellation]

1. Failure to obtain bid extensions from bidders just prior to cancellation of IFB on basis that bid prices received were unreasonable is mere procedural error, since IFB was validly canceled.
2. Where procurement history indicates that bid prices received are unreasonable and contracting officer determines past prices obtained are still valid, cancellation of IFB is proper.
3. Where procurement history indicates that prices received are unreasonable and contracting officer inquires of past contractor, who did not bid, if past price may still be considered valid, such action does not constitute impermissible auction, and subsequent invitation cancellation for unreasonable prices is proper.

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00385 Issuance of invitation for bids (IFB) No. DLA700-79-B-1503 on May 21, 1979, by the Defense Construction Supply Center for 225 hose box assemblies resulted in the receipt on June 20 of the following seven bids:

<u>Bidder</u>	<u>Unit Price</u>	<u>Total Price</u>
Arbee Corp.	\$ 68.58	\$15,430.50
Stewart-Thomas Industries, Inc.	111.11	24,999.75
Container Service Inc.	127.21	28,622.25
Extrusion Tool Co.	135.00	30,375.00
American Ident. Products Inc.	168.64	37,944.00

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[Bidder ALLEGES MISTAKE IN BID]

<u>Bidder</u>	<u>Unit Price</u>	<u>Total Price</u>
Halprin Supply Co.	275.00	61,875.00
Emerson-Sack-Warner	289.00	65,025.00

The low bidder alleged a mistake in bid of \$6,750, and was permitted to withdraw its bid. This resulted in Stewart-Thomas Industries, Inc. (Stewart-Thomas), being considered the low bidder, and the contracting officer wrote on the abstract of bids "Award is made to * * * Stewart-Thomas, Inc." That bidder was never notified of any award. Subsequently, the procurement history revealed that since July 1978 three purchases of the same item in quantities of 86 to 115 had been made at unit prices of \$69.60, \$65, and \$67.80 from two firms. One of these firms was contacted on August 20 to determine why it had not bid on the instant procurement. No bid had been submitted by that firm due to personal reasons and it was stated that the firm would be willing to submit a unit bid of approximately \$64 on any resolicitation of this procurement. During the period August 21-23, a decision was made to cancel the IFB.

The bases of the Stewart-Thomas protest against the cancellation are threefold. First, it is believed that Defense Acquisition Regulation (DAR) § 2-404.1(c) (1976 ed.) was violated inasmuch as, contrary to this provision, no bid extensions were requested when "administrative difficulties" were encountered in determining whether to make an award under the IFB.

Second, Stewart-Thomas contends that DAR § 2-404.1(a) was violated when the IFB was canceled without the existence of a "compelling reason" for the cancellation. Stewart-Thomas states that based upon the bid prices (and the price range) received on this IFB its bid price is not unreasonable, especially after the Arbee bid price is changed to reflect the mistake in bid. Further, Stewart-Thomas observes that the contracting officer noted on the bid abstract that Stewart-Thomas would receive the award. Stewart-Thomas notes also that the contracting activity did not cancel the IFB on the basis of the past procurement history of the item, notwithstanding its after-the-fact assertion that it would have been justified to have done it solely on

the basis of that history. Rather, the activity, allegedly contrary to law, called a former contractor and canceled only after assurances from that firm that it could offer a lower price. Stewart-Thomas points out that the activity states that if it had not received these assurances from that contractor, the activity would have had to explore further to determine whether a lower price could have been obtained. Stewart-Thomas believes that, because calling nonbidders to inquire as to prices was improper, it was inappropriate to find its bid price to be unreasonable based on information obtained in this manner. As regards the two lowest bid prices obtained on the resolicitation, Stewart-Thomas believes that these must be ignored since the cancellation and the resolicitation were improper, and thus these prices were obtained improperly.

Third, Stewart-Thomas believes that any award to other than itself at its bid price would be improper because the actions of the contracting activity constituted an impermissible auction. After bids were opened and prices disclosed, the activity, in essence, allegedly attempted to find firms which could offer better prices, notwithstanding the fact that 80 firms had already been solicited on the original solicitation and only seven cared to bid. Stewart-Thomas, citing Interscience Systems, Inc., B-194497, October 30, 1979, 59 Comp. Gen. _____, 79-2 CPD 306, states the activity not only improperly permitted a potential bidder to possibly adjust its price knowing the prices offered by other parties, but it also gave a bidder who had not bothered to bid originally a second bite at the procurement. It is stated that to resolicit bids which will respond to prices exposed by bid opening rather than to changed requirements set forth in the procurement is something our Office found improper in 52 Comp. Gen. 285 (1972). Further, Stewart-Thomas notes that in 41 Comp. Gen. 599 (1962) we stated that maintaining the integrity of the bidding system is more important than mere pecuniary savings. Stewart-Thomas believes that to condone the actions taken here would be to allow an activity to use the bids obtained on a procurement as leverage in obtaining a lower price from a nonbidding company or to make improper awards to favorite contractors at prices reached after bid prices have been exposed.

It is the position of the contracting activity that a decision to cancel on the basis of unreasonable prices was proper simply on the basis of the procurement history. It states that the prior contractor was contacted solely to establish that the prices it had previously bid were still realistic; that if they had not been realistic a further study of past prices would have been made; and that if the study had shown the procurement history to be no longer valid an award would have been made to Stewart-Thomas. The notation on the abstract of bids regarding an award to Stewart-Thomas is stated to have been made mistakenly. Further, the contracting activity notes that on the resolicitation two bids with unit prices of \$58.95 and \$65 were received and that an award to the low bidder would result in savings of \$11,736 (less administrative expenses) over an award under the original IFB.

As regards the contention that bid extensions should have been requested of the bidders, we note that the bid price acceptance period expired during the time period when a determination to cancel was being formulated. However, because of our following findings we view the failure to request extensions as merely a procedural error.

Concerning the Stewart-Thomas contention, that the cancellation violated DAR § 2-404.1(a), we note that under DAR § 2-404.1(b)(vi) cancellation of an IFB is authorized where the bids received are determined to be unreasonable in price. Jig Boring Specialists, Inc., B-192878, February 15, 1979, 79-1 CPD 189. The Stewart-Thomas bid price was approximately 61 percent higher than the highest bid price received in past procurements.

The contracting activity's purpose in contacting the prior contractor was not to require a bid from it, but only to ascertain the validity of the former prices in the current market. In the circumstances, we consider the action proper. Although any cancellation for unreasonable prices may result in nonbidders having another chance to bid (and with the knowledge of the prior bid prices), the competition the second time also provides those bidders who bid unreasonable prices the first time another opportunity to bid as well and this time at reasonable prices. Moreover, the fact that

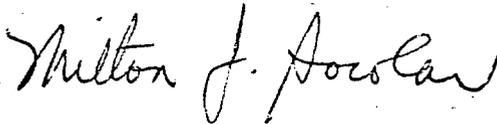
unreasonable prices are known should affect no one detrimentally, since those prices have been determined to be unacceptable and do not serve as a target to be met or slightly underbid. Since any bidder is free to bid whatever price it chooses on recompetition, the agency has no way of knowing in advance that any particular bidder will be successful.

Finally, we do not believe that the contracting officer conducted this procurement in the manner of an impermissible auction. The cases cited by Stewart-Thomas to establish that an impermissible auction was conducted do not establish that fact. In 41 Comp. Gen. 599, supra, we held that, where bidders were permitted to quote their own delivery schedules with no evaluation factor being applied to the bid prices to equalize the effect on prices that different delivery schedules might have, maintenance of the integrity of the bidding system required that the solicitation should be canceled since bidders were not bidding on equal bases. In 52 Comp. Gen. 285, supra, we held that where a specification change was so minor as not to affect price or in reality the item being procured, such a change could not serve as a basis for cancellation of the invitation. To apply the logic of these two cases to this protest would be to reach the illogical conclusion that, contrary to what is permitted in the regulations, unreasonable bid prices could not be rejected since those prices would be exposed and an attempt to get reasonable prices would constitute an impermissible auction.

In Interscience Systems, Inc., supra, the language relied on by Stewart-Thomas was our cited decision in B-173504, September 12, 1972. In that case, the Government advertised for certain items which it could have acquired by the exercise of an option under an existing contract. The contractor on that contract was second low bidder under the advertised procurement and would have been the low bidder had its bid price modification not been received untimely. We held that the subsequent attempt of the contractor to apply its bid price modification to its option price was not permissible since to permit this would be equivalent to permitting an unsuccessful bidder to lower its bid price after bid opening so as to displace the low bid (the price of that low bid was obviously known). In that case, a valid bid

existed. In the present protest, no valid bid existed to protect after its exposure, since all the bid prices were rejected after a valid determination that they were unreasonable.

The protest is denied.

A handwritten signature in cursive script that reads "Milton J. Fowler".

For the Comptroller General
of the United States