13815 PC-1

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

[Protest of Solicitation Cancellation]

FILE: B-198316 **DATE:** May 27, 1980

MATTER OF: M. Bennett Ltd.
4696

DIGEST:

1. If prices in negotiated procurement have been improperly disclosed to all offerors, it is desirable to make award on basis of initial proposals, if possible, because conduct of negotiations and submission of final offers may constitute proscribed auction.

2. To extent award cannot be made on basis of initial proposals where all offered prices have been improperly disclosed to all offerors, discussions should be held with offerors, notwithstanding possible auction, since resulting award would not be improper or illegal. Moreover, possibility of damage to competitive system resulting from resolicitation more than offsets harm resulting from auction in peculiar circumstances.

Request for proposals No. JB/80081 was issued on February 25, 1980, to minority business firms for the procurement of medical supplies by the
2956 District of Columbia General Hospital (Hospital), District of Columbia Government. Because offerors' prices for the procurement were thereafter improperly revealed at a public opening of proposals, the solicitation was canceled on the theory that to continue the procurement would constitute an illegal auction.

M. Bennett Ltd., an offeror on the procurement, protests the cancellation on the basis that award(s) at the disclosed prices would not be prejudicial to any of the offerors. Based on our review, we are requesting the Hospital to reconsider the cancellation.

To cancel a negotiated solicitation, the reasons for canceling must not be arbitrary. Kentron International, Inc., B-195789, March 7, 1980, 80-1 CPD 180. The principles for assessing the reasonableness

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of the contracting officer's decision to cancel were set forth in WESTPAC Products Company, B-186671, November 23, 1976, 76-2 CPD 444, when we said:

> "* * * Normally, where an offeror's pricing or technical information is improperly disclosed, the contracting agency should make an award on the basis of initial proposals, see RCA Corporation, 53 Comp. Gen. 780 (1974), 74-1 CPD 197, or refuse to entertain further modifications to the proposal of the offeror which received the information [to avoid an auction]. See 50 Comp. Gen. 222 (1970). In a recent case, however, we did not object to a contracting agency's decision to continue to hold discussions with two offerors after one had been erroneously advised of the other's prices where the agency believed it could not award the contract at the prices contained in the initial proposals (which were considered to be unreasonable) and could not drop the firm which had received the information from further competition because such action would leave only one firm in contention for the award. TM Systems, Inc., 55 Comp. Gen. 1066 (1976), 76-1 CPD 299. In that case the agency continued discussions after disclosing each offeror's initial price in order to equalize the competitive positions of both offerors. * * *"

There is nothing in the present record to indicate why the contracting officer decided he could not make award(s) on an initial proposal basis--an award method which the Hospital expressly reserved to itself under paragraph 10(g) of standard form 33A in the solicitation. Moreover, there is no indication that the contracting officer was aware of the TM Systems, Inc., decision cited above. That case rejected the argument that the conducting of further discussions under similar circumstances (an improper price disclosure) would result in an improper or illegal award, so long as all offerors were placed in the competitive positions they should have occupied prior to the improper disclosure. As we said in the TM Systems, Inc., decision:

> "We note that while * * * [the regulation] prohibits auctions, it does not describe any legal penalties or consequences attaching to an award resulting from an auction. While our Office does not sanction the disclosure of information which would give any offeror an unfair competitive advantage, we have also stated that we see nothing inherently illegal in the conduct of an auction in a negotiated procurement. See 48 Comp. Gen. 536, 541 (1969). See, also, 53 Comp. Gen. 253 [1973], where we declined to hold that an award resulting from an auction was either improper or illegal. We see no merit in TM's argument. We believe that an award following * * * [the equalizing of competition by further disclosure] will be legal and proper."

Our approach in this area has been prompted by recognition that the known prices of competitors often tend to influence prices received under a reprocurement. When prices are so influenced, the integrity of the competitive procurement system has, to some extent, been affected, thereby causing more damage to the system than that following the results of an auction in these peculiar circumstances.

In the present case, all contending offerors have apparently been placed in the same competitive position by the public opening of proposals; therefore, based on the present record, we see no need for any further pricing disclosures of the kind recommended in TM Systems Inc., in order to equalize the competition.

We therefore are recommending to the Hospital that it reconsider the cancellation in light of the TM Systems, Inc., and WESTPAC Products Company decisions and that award(s) be made under the RFP on an initial proposal basis if appropriate. If prices are considered unreasonable, or other valid reasons exist for not making initial proposal awards, we are further recommending that negotiations be conducted with the offerors for all items on which at least two offers were received.

Milton J. Socolar

For the Comptroller General
of the United States