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DECISION

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

FILE: B-197016 DATE: July 1, 1980

MATTER OF: Baker Manufacturing Company, Inc.; Joerns Furniture Company; Carsons of High Point, North Carolina

DIGEST:

1. When agency determines that it has "misinterpreted" order canceling all solicitations pending market analysis and survey of needs, solicitation should be reinstated.

2. Rule that offer, once rejected, cannot subsequently be accepted does not apply when low bidder resubmits bid and extends acceptance period at Government's request.

3. Bids which have expired because solicitation was canceled generally may be revived upon reinstatement. However, when original bids have been returned to bidders, propriety of revival depends on whether, under facts of particular case, integrity of competitive system has been compromised.

Three furniture manufacturers, Baker Manufacturing Company, Joerns Furniture Co., and Carsons of High Point, North Carolina, protest the award of indefinite quantity, Federal Supply Schedule contracts for household furniture by the General Services Administration (GSA). Since each firm alleges that the same action by GSA--reviving and accepting bids after returning them to bidders during a moratorium on furniture purchases--compromised the integrity of the competitive bidding system, we are issuing a single decision on the matter.

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[Protest ALLEGATIONS CONCERNING the ~~Compromise~~ INTEGRITY of Competitive Bidding System]

We find that the record supports GSA's determination that, in this particular case, the abstract of bids, together with the resubmitted original bids, provided an adequate basis for award. We therefore are denying the protests; a detailed analysis follows.

The solicitation in question, No. FCFH-P2-5198-A, was issued August 22, 1979, with an amended closing date of September 28, 1979. The items sought (beds, dressers, mirrors, desks, bookcases, tables and chairs, sofas, and wardrobes) were divided into five groups, with awards to be made in the aggregate by group for each of three geographic areas.

On October 9, 1979--after opening but before award--the Administrator of General Services ordered that all current solicitations for all classes of furniture be canceled, stating that proper inventory management required that GSA analyze the market to determine both agency needs and the alternatives available to meet those needs. He directed the Federal Supply Service to go back to all customer agencies and require them to revalidate their needs "in the context of what is available nationwide through the Government's excess channels."

Responding to this order, on October 25, 1979, GSA informed all offerors that no awards would be made under the solicitation in question pending a market analysis and a review of current and future needs. GSA's letter stated:

> " * * * We cannot predict the effect of these actions on the Government's requirements. However, you will be afforded an opportunity to resubmit your offer should the procurement be deemed essential to the Government. Accordingly, your offer is rejected pursuant to Federal Procurement Regulations (FPR) § 1-2.404-1(a) and is being returned."

Subsequent to this, GSA determined that it had "misinterpreted" the order of October 9, 1979. In a series of internal memorandums, it reinterpreted

the order as not preventing processing of advertised schedule solicitations such as this one. GSA's rationale was that since procuring agencies placed orders directly with schedule contractors and paid directly for items ordered, agency heads would, in effect, be revalidating their underlying needs before doing so.

GSA therefore reinstated the canceled solicitation and, on November 30, 1979, asked nine bidders who were in line for awards to resubmit the originals and duplicates of their bids. Eight firms, including Baker and Joerns, returned their bids and agreed to extend acceptance periods. At the same time, Baker, which had bid on two groups of furniture, sought to reduce its prices for several items in the group on which it was not the apparent low bidder. Joerns, the incumbent contractor for one group, offered to reduce bid prices by 6 percent across the board.

Both firms appear to have protested to our Office when it became clear that GSA would not accept any modifications of original bid prices under the reinstated solicitation. (Baker also sought to increase its prices on a different reinstated solicitation, not at issue here.)

In February 1980, Baker sought but was denied a temporary restraining order by the U.S. District Court for the District of Columbia in Civil Action No. 80-0403. This would have prevented GSA from authorizing work or expending funds under the protested contracts, which had been awarded on February 11, 1980. Before the time set for a hearing on its motion for a preliminary injunction, however, Baker withdrew and requested our opinion.

The main thrust of Baker's protest is that GSA has compromised the integrity of the competitive system. Joerns and Carsons (not an apparent low bidder but one which argues that it may have been eligible for award due to "qualification problems" with other bidders) have stated essentially the same grounds for

protest. Since Baker's submission is most detailed, we will respond to it; our decision also applies to the protests of Joerns and Carsons.

Baker argues that because GSA's original cancellation was proper, the solicitation could not have been reinstated. Such action, Baker maintains, is possible only when (1) the original cancellation was improper, and (2) the contracting officer abused his or her discretion (emphasis original). In addition, Baker argues, GSA is required to show that reinstatement of the canceled solicitation would promote the integrity of the competitive system and would not prejudice other bidders. None of the above criteria is met, Baker concludes, and the possibility of tampering is so great that GSA should be directed to terminate the contracts and either readvertise or negotiate with all original bidders.

Baker further argues that GSA's return of the bids effectively nullified them, and that the request for resubmission was a negotiation, in which all qualified bidders were entitled to participate. Restricting submissions to those "thought to be low on the basis of second-hand evidence," Baker maintains, was illegal and unfair.

In this regard, Baker alleges that bids were not read aloud at opening, that the originals were not available for inspection at that time, and that copies were left in the bid room with "access to all." Baker also alleges that prices were recorded "some days" after opening, under conditions which made it impossible to establish their accuracy, and that for 30 days thereafter, the original bids were in the possession of bidders, each of whom was in a position "to make any self-serving adjustments he chose and to see that such adjustments appeared on both copies."

For these reasons, Baker concludes, GSA's abstract of bids was not an adequate basis for award. Moreover, according to Baker, the abstract did not reflect volume discounts which several bidders offered, may have contained errors in prices, and did not indicate whether

the original bid was signed or whether an amendment was acknowledged, both elements of responsiveness.

GSA, on the other hand, argues that revival of the bids was proper, and that conditions for resubmission were carefully controlled. In addition, GSA states, the abstract of bids was prepared according to regulations, contained all information necessary to determine the low, eligible bidders, and remained in the custody and control of the agency from the time original bids were returned to bidders until they were resubmitted. Thus, GSA concludes, the abstract provided an adequate basis for evaluation and award under the original solicitation.

The initial question for our Office is whether the canceled solicitation can be reinstated. In Spickard Enterprises, Inc., 54 Comp. Gen. 145 (1974), 74-2 CPD 121, we reviewed an "erroneous, albeit honest" decision to cancel which had been made because none of the bidders eligible for award had submitted bids within the funding limitations for the project. At the time of the cancellation, the contracting officer was not aware that the head of the agency could obtain additional funds by requesting their transfer from other projects. We recommended reinstatement when the agency, after readvertising, determined that enough money could be transferred under existing authority to permit award to the original low, eligible bidder.

We stated in Spickard that rejection of all bids after they had been opened tended to discourage competition, and that cancellation was inappropriate when an otherwise proper award under the original solicitation would serve the actual needs of the Government. It was our view that no "cogent and compelling reason" existed after the additional funds became available "to allow the cancellation to stand." See also Berlitz School of Languages, B-184296, November 28, 1975, 75-2 CPD 350.

We believe that the instant case is analogous, since the cancellation was based on a "misinterpretation" of

the GSA Administrator's order, i.e., it was an "erroneous, albeit honest" decision at the time the cancellation was made. Thus, we believe reinstatement was appropriate.

Baker also argues that an offer, once rejected, cannot subsequently be accepted, citing Minneapolis & St. Louis Railway Company v. Columbus Rolling Mill, 119 U.S. 149 (1886). We believe Minneapolis is inapposite. In that case, the party rejecting the bid thereafter sought to accept the rejected offer without the consent of the offeror. Here the low bidders have consented to the revival of the original bids, and in our view they may be accepted. See 19 Comp. Gen. 356 (1939). Thus, as a general rule, bids which have expired because a solicitation was canceled may properly be revived and accepted upon the solicitation's reinstatement. Suburban Industrial Maintenance Company, B-188179, June 28, 1977, 77-1 CPD 459, modified on other grounds, November 29, 1977, 77-2 CPD 418.

Whether bids which have been returned to the original bidders can be revived, however, is a different question, and one of first impression with our Office. There are no applicable statutes or regulations, and we are not aware of any case law on this subject. Its resolution, we believe, depends upon whether, as Baker asserts, the integrity of the competitive bidding system has been compromised.

For the most part, Baker's allegations provide no basis to challenge award to the low bidders under the original solicitation. The Federal Procurement Regulations (FPR) § 1-2.402(a)(1964 ed.) provides that all bids shall be:

> " * * * publicly opened and, when practicable, read aloud to the persons present, and be recorded. If it is impracticable to read the entire bid, as where many items are involved, the total amount bid shall be read, if feasible. * * * "

In a procurement such as this one, with five groups under which different items were to be delivered to different areas, reading all bids aloud may very well have been impracticable.

FPR § 1-2.402(c) further provides that if duplicate copies are not available for public inspection, original bids may be examined, but only under the immediate supervision of a Government official. Thus, the unavailability of originals for inspection, and the leaving of duplicates in the bid room for this purpose, appear to have been in accord with, rather than contrary to, regulation.

We have no reason to believe that the abstract did not accurately reflect prices bid. The GSA procurement agent who prepared it has submitted an affidavit stating that the abstract of bids was retained by GSA and not released to the public at any time, and concludes:

> "When bids were returned, I compared the original copies to the original abstract. With respect to any group for which any returned bid was apparent-low, no changes whatsoever had been made or proposed."

The abstract does show volume discounts; however, the solicitation specifically states that these were not to be evaluated for purposes of award. Baker has not pointed out any errors in recording of prices or any discrepancies between an abstract prepared by a commercial recording company at bid opening, which Baker offered in evidence to the court and our Office, and the official one, prepared by GSA after opening.

With regard to the question of responsiveness, it is true, as Baker alleges, that the abstract of bids does not reflect such essential information as whether a bid was signed. This is a question of fact, and after the original bids were returned to bidders, the only means of proving it would have been for Baker to continue its court suit and to question bidders under oath. Since the complaint was withdrawn, however, we are forced to decide the issue without benefit of such testimony.

We therefore view the bid abstract as the best evidence available at this time upon which to base a judgment as to the responsiveness of the low bidders.

We note that the abstract of bids includes exceptions and conditions imposed by bidders. Joerns, for example, submitted bid prices for three zones in Group I, but stated that it would not accept award of Zone 2 or 3 alone. Carsons, bidding on Group III, stated that if it was not low in the aggregate for Zone I, its prices for certain items in that zone should be reduced by $2 each, and if it was not low in the aggregate following this first reduction, the same items should be reduced by an additional $2. Baker offered similar reductions for aggregate Group IV which were clearly noted on the abstract.

In our opinion, it is unlikely that the contracting officer, preparing the abstract noting how bidders had qualified their bids, would have overlooked material omissions such as an unsigned bid. We also emphasize that under the provisions of FPR § 1-2.402(c), supra, copies of the bids were available for public inspection after bid opening, and no contemporaneous allegations of the nonresponsiveness of any of the bids were made either to this Office or the agency. Thus, while the possibility exists that one or more of the low bidders may have omitted material requirements from their bids, we consider the probability of that having occurred under the circumstances as being very remote. Compare L.V. Anderson and Sons, Inc., B-189835, September 30, 1977, 77-2 CPD 249, in which we held that a hand-delivered bid, received late due to government mishandling, could not be accepted after having been opened, then returned to the protester, because no record of the contents of the bid had been made prior to its return.

Finally, failure to acknowledge the single amendment to the solicitation, which Baker also argues was not shown by the abstract, could be waived, since it (1) extended the opening date, (2) set aside a second group of furniture for award to small businesses, and

(3) corrected one obvious typographical error; awareness of these changes would have been apparent from the bids themselves. See Arrowhead Linen Service, B-194496, January 17, 1980, 80-1 CPD 54; Che Il Commercial Company, B-195017, October 15, 1979, 79-2 CPD 254.

We therefore conclude that under the specific facts of this case, no adequate basis exists to disturb the awards.

The protests are denied.

Milton J. Socolar

Acting Comptroller General
of the United States