

116244
DECISION



19810
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-199013

DATE: September 1, 1981

MATTER OF: McQuiston Associates

DIGEST:

1. Failure to synopsise procurement in Commerce Business Daily does not constitute compelling reason to cancel contract and resolicit since competition and reasonable price was obtained and it does not appear that contracting officer intended to exclude protester from bidding by failing to publish synopsis in Commerce Business Daily.
2. Failure of contracting officer to follow procedural requirements regarding award prior to resolution of protest does not affect legality of award.
3. Where contracting officer determined, in effect, that there was only one concern that could meet its needs, there would have been no purpose in soliciting another for the procurement.
4. Alleged anti-trust violations are for consideration by the Attorney General, not GAO.
5. Protest against September 1979 and January 1980 cancellations of RFPs on May 26, 1980, and award of order which protester learned about on May 1, 1980, but did not protest until May 19, 1980, is untimely under the Bid Protest Procedures.

McQuiston Associates (McQuiston), whose contract DAAH01-79-C-0179 to supply pulse forming networks to the United States Army Missile Command (Command), Redstone Arsenal, was partially terminated for default, protests the Command's failure to invite it to bid under invitation for bids (IFB) DAAH01-80-B-0556 covering the repurchase of the terminated portion. Additionally, McQuiston protests the series of canceled solicitations that allegedly led to the award of orders 44 and 145 to Western Electric Company under basic ordering agreement DAAH01-78-G-0018.

We have decided that the protest is without merit in part and untimely in part.

The contracting officer has advised that he did not send McQuiston the IFB for the reprocurment of the terminated portion of contract DAAH01-79-C-0179 because our decisions have indicated that defaulted contractors are limited to bidding no more than the price in the defaulted contract and he thought McQuiston would be unable to meet or beat the original contract price. Further, the contracting officer has indicated that he sent a procurement synopsis to the Commerce Business Daily for publication and thought that the publication would put McQuiston on notice of the procurement if it wished to bid. The contracting officer states that he learned that the synopsis was never published only after the bidding occurred.

We have held that, even though the contracting officer fails to solicit the defaulted contractor for the reprocurment, the defaulted contractor is on notice of the repurchase when it is duly synopsisized in the Commerce Business Daily. PRE Uniforms, Inc., 56 Comp. Gen. 976 (1977), 77-2 CPD 213. Failure to synopsisize the procurement in the Commerce Business Daily does not constitute a compelling reason to cancel the contract for the procurement and resolicit if competition was generated, the price was reasonable and there is no evidence that the omission was the result of a deliberate attempt by the agency to preclude the protester from competing. Military Services Inc., of Georgia, B-199976, November 19, 1980, 80-2 CPD 384.

In this case, the contracting officer reportedly sent the procurement synopsis to the Commerce Business Daily. Thus, it does not appear that the contracting officer intended to exclude McQuiston from the procurement by failing to publish the synopsis in the Commerce Business Daily. While McQuiston contends that publication in the Commerce Business Daily would not have put it on notice of the procurement because it does not subscribe to the publication and the contracting officer knew that, McQuiston has not provided any evidence to establish the contracting officer had that knowledge.

Two bids were received on the reprocurement. The act of making an award to the low bidder indicates that the contracting officer considered the low bid to be reasonable. The determination of price reasonableness is a matter of business judgment requiring the exercise of broad discretion by the contracting officer. Falcon Rule Company, Aakron Rule Corporation, B-187024, November 16, 1976, 76-2 CPD 418. It may be that McQuiston would have bid a lower price than the successful bidder, but on the present record we have no basis to conclude that the low bid was unreasonable. Thus it appears that competition and a reasonable price were obtained.

McQuiston questions whether its bid on the reprocurement would properly have been for rejection, as the contracting officer contends, if it was more than the price in the defaulted contract. Since McQuiston did not bid on the reprocurement, the question is academic and an answer is not necessary for the resolution of the protest. However, we note in passing that in PRB Uniforms, Inc., supra, we affirmed that a reprocurement contract may not be awarded to a defaulted contractor at a price greater than the terminated contract price notwithstanding the provision in the defaulted contract giving the Government the right to excess reprocurement costs.

Further, McQuiston has questioned the propriety of the award on the reprocurement since it was made while the protest was pending. However, if the applicable procedural requirements regarding an award prior to resolution of the protest were not followed,

the legality of the award would not be affected. SAI Comsystems Corporation, B-196163, February 6, 1980, 80-1 CPD 100.

McQuiston protests that IFB DAAH01-78-B-0837 for a Nike Hercules control part on which it was the low bidder was canceled and award was made instead to Western Electric by order 44 under contract DAAH01-78-G-0018. However, the record shows that order 44 placed on March 16, 1979, preceded the cancellation of the IFB of May 8, 1979, and that the order was to fill different requirements than those in the IFB. Thus, the cancellation of the IFB because the "supplies being procured are no longer required" had nothing to do with the placement of the order.

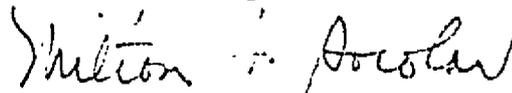
Moreover, while McQuiston contends that the award of order 44 was improper because it was a cost-plus-fixed-fee order, the order on its face states that it is to be finalized "as a Firm-Fixed-Price type contract." McQuiston also contends that the order was improper because it allegedly was in derogation of the Defense Production Act, 50 U.S.C. App. 2071, since McQuiston as a former supplier of the part was not provided an opportunity to submit an offer for the procurement, and it failed to provide the McQuiston small business concern an opportunity to compete. While McQuiston may be a former supplier of the part and a small business concern as well, we note that the contracting officer decided that the procurement should be restricted to the only source, Western Electric, for whom first article could be waived because of the urgency of the procurement. The determination whether to waive first article testing is a matter of administrative discretion which will not be disturbed where there is a reasonable basis for the decision. See Wilson & Hayes, Inc., B-196089, March 17, 1980, 80-1 CPD 204. Since the contracting officer determined, in effect, that Western Electric was the only concern that could meet the agency's needs, there would have been no purpose in soliciting McQuiston for the procurement.

McQuiston suggests that the contracting agency's dealings with Western Electric amount to restraint

of trade and monopolistic practice in violation of the anti-trust laws. Alleged anti-trust violations are for consideration by the Attorney General, not our Office. Swiss-Tex Incorporated, B-200809, B-200810, October 31, 1980, 80-2 CPD 333.

The award of order 145 to Western Electric for pulse forming networks was preceded by three requests for proposals (RFP) each of which was canceled for reasons set forth in the final amendment issued under each of the RFPs. Two of the amendments canceling the RFPs were issued in September 1979 and one in January 1980. McQuiston did not complain about these cancellations until May 26, 1980. Moreover, it appears that McQuiston learned of the award of order 145 in a procurement history obtained from the contracting agency on May 3, 1980, but did not protest that order until its letter of May 19, 1980. McQuiston's protest against order 145 and the three prior cancellations of the RFPs which led to that order is untimely, since under section 21.2(b)(2) of our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(2) (1981), the protest was required to be filed not later than 10 working days after the basis for protest was known or should have been known, whichever is earlier.

Accordingly, the protests of McQuiston are denied in part and dismissed in part.


Acting Comptroller General
of the United States