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DECISION



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

20915

FILE: B-204582

DATE: March 1, 1982

MATTER OF: Genco Tool and Engineering Co.

DIGEST:

1. A contracting agency may properly cancel a solicitation after bid opening where it determines that sufficient funds are not available for award of the total quantity advertised.
2. Provision of the solicitation which gives the Government the right to make an award for a quantity less than the quantity called for by the solicitation does not require the agency to make an award of a lesser quantity where there are insufficient funds to award the total quantity.
3. Proper cancellation of IFB because sufficient funds are unavailable does not constitute an auction as that term is used in Defense Acquisition Regulation (DAR) § 3-805.3(c), which refers to negotiated procurements.
4. Stipulation in DAR § 2-404.1(a) that an IFB should not be canceled after opening solely because of increased requirements for items being procured does not apply where the agency is unable to award a contract for the stated quantity because of insufficient funds. Rather, the stipulation applies where the stated quantity can be awarded in its entirety and additional quantities can be obtained separately under a new procurement.

Genco Tool and Engineering Company (Genco) protests the cancellation of invitation for bids NO0123-81-B-1124 issued by the Naval Regional Contracting Office, Long Beach, California. The canceled IFB was for the supply of 77 lift-loader adapters with first article testing. The IFB also gave the Government an option for the delivery of an additional 78 units.

The following three bids were received by the Navy:

<u>Bidder</u>	<u>Price for First Article & Production Units</u>	<u>Price for Option Quantity</u>	<u>Evaluated Price</u>
Genco Advance	\$1,511,552	\$1,481,610	\$2,993,162
Machine Corp.	\$1,559,220	\$1,559,220	\$3,118,440
Modern Aire Cyclone Corp.	\$2,251,050	\$2,433,600	\$4,684,650

The Navy procuring activity had budgeted the amount of \$1,248,000 for the 77 unit requirement and the first article testing. Because Genco's bid price of \$1,511,552 was \$263,552 higher than the budgeted amount, the Navy canceled the IFB. Genco protested the cancellation to this Office.

We deny the protest.

Genco contends that the Navy did not have a compelling reason to cancel the IFB after bids were opened. Genco argues it was neither necessary or proper to cancel the IFB where there was adequate funding for at least a portion of it. In support of this argument, Genco cites paragraph 10(c) of the IFB, Solicitation Instructions and Conditions, which stated:

"The Government may accept any item or group of items of any offer, unless the Offeror qualifies his offer by specific limitations. UNLESS OTHERWISE PROVIDED IN THE SCHEDULE, OFFERS MAY BE SUBMITTED FOR ANY QUANTITIES LESS THAN THOSE SPECIFIED; AND THE GOVERNMENT RESERVES THE RIGHT TO MAKE AN AWARD ON ANY ITEM FOR A QUANTITY LESS THAN THE QUANTITY OFFERED AT THE UNIT PRICES OFFERED UNLESS THE OFFEROR SPECIFIES OTHERWISE IN HIS OFFER."

According to Genco, the above-quoted language clearly gave the Navy the right to award a contract for any quantity less than the initial 77 units. Therefore, Genco concludes that unless absolutely no money was available for the award of any quantity of items under

the IFB, the Navy should have awarded a contract to Genco for as many units as there were available funds.

The Navy states that after finding that Genco's bid exceeded the amount budgeted for the procurement, a determination was made that the budgeted funds could be more effectively utilized on other programs. The Navy further states that this determination was influenced by the fact that in fiscal year 1982 there would be a firm requirement for between 200 and 300 lift load adapters. According to the Navy, a competitive procurement for this increased quantity would likely result in a unit price reduction of between \$1,000 and \$1,500.

With respect to Genco's contention that a contract should have been awarded for as many units as there were available funds, the Navy concedes that under paragraph 10(c) of the IFB the Government reserved the right to make an award for a quantity less than the quantity offered and that Genco's bid did not specify any limitations on this right. The Navy asserts, however, that Genco is attempting to convert the Government's right to make award on a lesser quantity to a duty on the Government to do so to the extent that funds are available. The Navy points out we have held that the cancellation of an IFB because of the lack of sufficient funds is a proper exercise of the agency's internal management of its funds. See Somers Construction Company, Inc.--Reconsideration, B-193929, July 24, 1979, 79-2 CPD 54. In the Navy's opinion, any requirement that an award of lesser quantities be made would unduly limit the Government's administrative discretion to cancel a solicitation due to a lack of available funds.

Contracting officers have broad discretion to cancel a solicitation. However, because the cancellation of a solicitation after bid opening and after prices are exposed tends to discourage competition, the Defense Acquisition Regulation (DAR) and our cases require that the contracting officer have a "compelling reason" to reject all bids and cancel a solicitation after bids have been opened. DAR § 2-404.1(a); Bentley, Inc., B-200561, March 2, 1981, 81-1 CPD 156. In this connection, we have taken the position that an agency's

determination that funds are not available for contract obligation is a sufficient reason upon which to cancel a solicitation and that it is not our role to question the unavailability of funds. See Norfolk Dredging Company, B-201295, September 23, 1981, 81-1 CPD 245; McCain Trail Construction Co., B-196856, July 8, 1980, 80-2 CPD 16.

While DAR § 2-404.1(a) stipulates that an invitation for bids should generally not be canceled and readvertised after opening solely because of increased requirements for the items being procured, this admonition applies to situations where the Government determines additional quantities of an item are needed which could be obtained separately under a new procurement. See 39 Comp. Gen. 396 (1959); 36 *id.*, 62 (1956). However, we do not think that this admonition applies here where the contracting agency is unable to award the total quantity set forth in the solicitation because of insufficient funds. Rather, DAR § 2-404.1(a), in our opinion, applies where the stated quantity can be awarded in its entirety.

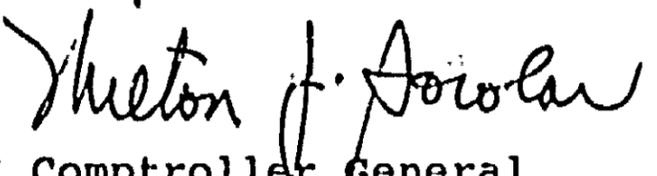
As to Genco's contention that paragraph 10(c) of the IFB required the Navy to award a contract to it for as many units as there were available funds, we do not think that this paragraph was designed to force the agency to make an award of a lesser quantity where there are insufficient funds to award the total quantity. Rather, paragraph 10(c) was intended to permit an award of a lesser quantity where the Government's minimum needs decrease subsequent to bid opening. In our opinion, then, paragraph 10(c) cannot be relied upon to challenge an agency's unquestioned legal right to cancel a solicitation because of a lack of funds because the internal management of an agency's funds generally depends on the agency's judgment concerning which projects and activities should receive greater (or lesser) amounts of funds. Somers Construction Company, Inc.--Reconsideration, supra.

Genco asserts that in stating a procurement in fiscal year 1982 for an increased quantity of lift-loader adapters would result in a \$1,000 to \$1,500 savings per unit, the Navy has created an "auction situation" by disclosing the price that it would like to see in the next procurement. Also, Genco questions whether the Navy in issuing the IFB was not actually trying to

obtain pricing information for the prospective 200 to 300 unit procurements in fiscal year 1982. In this regard, Genco cites DAR § 1-309, which prohibits the solicitation of bids for purely informational purposes, and argues that IFB's cannot be used merely to plan future procurements.

We do not agree that the factual situation presented here constitutes an auction as that term is used in the DAR. While DAR § 3-805.3(c), which pertains to negotiated procurements, prohibits auctions, it prescribes no penalties. Moreover, there is nothing inherently illegal in the conduct of an auction in a negotiated procurement. Engineering Research Inc., B-187814, February 14, 1977, 77-1 CPD 106. This case, moreover, involves a formally advertised procurement and, although this Office does not sanction the disclosure of competitive information with regard to any procurement, we cannot conclude that the increased quantity reason given by the agency in support of the decision to cancel constitutes an auction or an improper disclosure of information. All that the Navy is doing in our opinion is indicating the possibility that the price for each individual lift-load adapter will decrease because of the significant increase in the number of them that will have to be procured in fiscal year 1982.

We deny Genco's protest.

for 
Comptroller General
of the United States